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

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Application of ROBERT T. GIAIMO, as Co-Executor of the Will of Edward P. Giaimo, Jr., Deceased for the Judicial Dissolution of FIRST AVENUE VILLAGE CORP.,

Index No., 100445/2007

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Application of ROBERT T. GIAIMO, as Co-Executor of the Will of Edward P. Giaimo, Jr., Deceased for the Judicial Dissolution of EGA ASSOCIATES, INC.,

SPECIAL REFEREE REPORT & RECOMMENDATION

Index No., 100474/2007

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THE SUPREME COURT : NEW YORK COUNTY IAS PART 85R

A P P E A R A N C E S

For Petitioner Robert T. Giaimo
Philip H. Kalban, Esq.
Putney Twombly, Hall & Hirson
521 Fifth Avenue
New York, NY 10175
pkalban@putneylaw.com

For Respondent Janet Giaimo Vitale
Mitchell J. Geller, Esq.
Robert J. Burns, Esq.,
Holland + Knight
31 West 52nd Street
New York, NY 10019
Mitchell.geller@hklaw.com
Robert.burns@hklaw.com

By decision and order of the Hon., Marcy Friedman, dated December 20, 2007, the issue of the "fair value" of shares of the corporations First Avenue Village Corp., ("FAV") and EGA Associates, Inc., ("EGA") was referred to the Special Referee to hear and report. Both proceedings were referred on September 15, 2008, at which time the issues conference and the proceedings adjourned for a hearing. Following subsequent conferences on limited discovery the parties were directed to appear on January 5, 2009, for a hearing on the referred issue. These two proceedings were consolidated for hearing.

The hearing commenced on January 5, 2009, and continued on January 6-7, 9, 12, 14-16, 20-23, 28-29; February 4-5, 18, and concluded on March 3, 2009. Following more 17-days of trial the attorneys requesting time to submit post-hearing memos of law. The submission date was extended at the request of counsel and final submission of post-hearing memos of law was made on or about October 15, 2009.

While this matter was *sub judice*, the Appellate Division, First Department issued an opinion on December 15, 2009, with respect to the transfer of one (1) share of stock from both FAV and EGA from the decedent Edward P. Giaimo Jr., to his sister, Janet Giaimo Vitale, which was an issue raised in this hearing (see, T1, pp 11-14). The Appellate court revoked the transfer of the share interest to Ms. Vitale (see, *Giaimo v EGA Associates Inc.*, 68 AD3d 523 [President and equal shareholder of a closely-held corporation lacked power to act unilaterally against interest of his brother, who was also equal shareholder, precluding purported transfer of share to their sister, who was also equal shareholder; transfer restrictions printed on back of share certificates, which prohibited transfer of shares without granting corporation 30 days' written notice and first option to purchase shares, should have been enforced]). The result is that both Ms. Vitale and petitioner herein, Robert T. Giaimo are equal shareholders of both FAV and EGA. The Appellate Division determined that the decedent-brother lacked the power to convey his interest under the particular circumstances.

In view of the same, on or about December 21, 2009, a follow-up conference was held with the attorneys to discuss whether the Appellate Division decision had any substantive impact on their respective legal arguments. Both sides conferred with the Special Referee and represented that their legal arguments did not change on the issues referred to the Special Referee. The 2,300-pages of transcript of the hearing was ordered. Exhibits submitted and marked in evidence are noted herein. The hearing consisting of two phases: (1) the valuation of the subject properties consisting of, among others, 4 and 5-story walk-up tenements; and (2) the valuation of shares of the two corporate entities.

The transcript and parties' post-trial memoranda will be filed with the County Clerk, but the voluminous exhibits (consisting of more than five banker boxes) will be returned to the parties. The exhibits are indexed at the end of this report. Designations from the transcript are noted as "T" followed by page number. It goes without saying that the review of the 2,300 pages of transcript was exhausting and took several months, coupled with the Special Referee's calendar of other hearings, conferences, supervising discovery, and weekly uncontested matrimony calendars, etc. But no good deed goes unpunished.

Based on my review of the testimony, evidence and consideration of the parties' legal arguments, I make the following findings and conclusions.

<u>FINDINGS OF FACT</u>

<u>*PART ONE: VALUATION OF SUBJECT PROPERTIES*</u>

<u>*Respondent's Accountant, Architect, and Expert -Valuation of Real Properties*</u>

1. At the commencement of the hearing, the attorneys examined one, Alan Yates ("Yates") an accountant and partner of Nussbaum, Yates, Berg, Klein & Wolpow. He testified to his duties performed in filing certain tax filings and/or compiling of the same, specifically with regard to a gift tax he attributed to the sell of stock from decedent Edward P. Giaimo to his sister, Ms. Vitale (<u>discussed</u>, *supra*; Rx 1 [United State Estate Tax Return re: Edward P. Giaimo Estate]). The weight of Gates' testimony is *di minimus* in view of the Appellate Division disposition (<u>see</u>, *Giaimo v EGA Associates Inc.*, 68 AD3d 523) (T, 4-18).

2. Respondent called her expert Karen Esposito ("Esposito"), a principal of All Island Valuation Services, LLC, who testified to her valuation of the subject properties in issue. After graduating from high school, Esposito became employed in real estate appraisals of residential properties. She is a New York State Certified General Appraiser and a member

of the American Society of Appraisers, a multi-discipline organization. She is also a member of the Appraisal Institute; she holds no designation from that organization (T, 153-155). Her qualifications in valuations/appraising are set out in her Curriculum Vitae (, Rx 2) (T, 21-31). She has 20-years of work experience in appraising residential properties in New York State, and 15/20% of her work is residential and mix-used apartment appraisals. The majority of them Manhattan residential walk-ups. She identified a partial list of client services by All Island Valuation Services, LLC (Rx 3; T, 158-163).

3. Esposito appraised the subject properties (Rx 4 [Appraised Properties of FAV and EGA]) as of the date, July 31, 2007. The appraisals are divided in two groups, FAV and EGA (T, 32-36).

4. Esposito identified the nineteen (19) appraisals: (1) 43-49 First Avenue (Rx 5); (2) 6 Spring Street (Rx 6); (3) 8 Spring Street (Rx 7); (4) 1057 First Avenue (Rx 8); (5) 1063 First Avenue (Rx 9[1]); (6) 278 Mott Street (Rx 10); (7) 356 East 57 Street (Rx 11); (8) 440 East 58 Street (Rx 12); (9) 209 East 59 Street (Rx 13); (10) 314 East 62 Street (Rx 14); (11) 1144 First Avenue (Rx 15); (12) 324-326 East 66 Street (Rx 16); (13) 328-330 East 66 Street (Rx 17); (14) 341 East 76 Street (Rx 18); (15) 223 East 96 Street (Rx 19); (16) 155 East 99 Street (Rx 20); (17) 157 East 99 Street (Rx 21); (18) 159 East 99 Street (Rx 22); (19) 161 East 99 Street (Rx 23) (hereinafter "the subject properties"). Her opinions and conclusions are set out in the reports and reflect and describe all facts on which she relied in reaching her opinion on the market value of each property (T, 41-43).

5. Esposito identified the Scope of Work Rule; she maintains the scope of work conforms with the Uniform Standards of Professional Appraisal Practices ("USPAP") (Rx 24 [Id., Only,

[1] Also known as 350 East 58 Street.

see, T, 601-602), and provides the "retrospective market value" as of July 31, 2007. She pines the market value reflects the "highest and best use" for each property. She considers the "concept of substitution" on which "the sales comparison approach is predicted" (id., pp 7-11, 70-71). She arrives at the market value by performing a sales-comparison approach to value and an income approach to value (T, 44-48).

6. Her valuations were made after she and/or her husband (also a licensed appraiser) completed inspections of the interiors of the comparables properties and the subject properties. Esposito collected forty (40) comparables and weighed the information gleaned to arrive at a valuation. She conceded certain information was not obtained from the comparables, such as, access to rent rolls or expenses for these buildings, to measure whether the rent rolls and expenses were similar or different from the subject property. As to those comparables that had retail space, she testified she visited them (T, 402).

7. She inspected the exteriors of the subject buildings, all are walk-ups with exception to one elevator-building. They were five to six floors as tenement buildings, some with retail space. All appeared to be prewar construction. She found the properties to be below average of adequately maintained buildings in New York City Esposito signed all of reports as the "preparer," but conceded she could have reviewed the reports done by another and confirmed upon review the data used in the report as a "reviewer" (T, 49-52).

8. Esposito testified to using three approaches: sales-comparison; income approach; and cost approach. She used the first two as a check against the other. She also used the sales-approach to weigh the concept of substitution. She testified the comparables were selected as close as possible to the subject properties. Location was important and the neighborhood of the actual property was a material factor. She measured "close in size as possible,"

especially in weighing the concept of substitution. She considered the unit mix of comparables and the subject properties; retail units that draw a different level of income; zoning for subject properties and comparables, vacant and development lots; frontage and street or avenue location of properties where retail is an issue, and "gross building area" ("GBA"). She considered "unobstructed views" of the Hudson River and "air rights"of the subject or comparable properties . Where Esposito found imbalance, she made "adjustments." Each of her reports contains a "grid" that identified what adjustment was made to a comparable or vice-versa in the sales-comparison approach. She measured the adjustments by percentage and not dollars, though the latter approach can also be made. She testified all of the adjustments in her reports were directed toward the comparable property, not the subject property (T, 52-60).

9. Adjustment to a comparable could either be positive or negative. A positive adjustment is made to the comparable over the subject property because the former is viewed inferior, for whatever category (size, location, liens, air rights, etc.,), compared to the subject property. A negative adjustment is made to the comparable over the subject property where the former property is superior in whatever category to the subject property (T, 60-61).

10. Esposito also valued the properties by considering the direct income capitalization approach, employed by appraisers to estimate the value of income of residential rental properties. This approach is based on the expectation of future of benefits (rents) and relates value to both market rent that a property can be expected to earn and the reversion, i.e., resale, when a property is sold. Esposito amplified that the relationship between the capitalization rate and value of the subject property is basically the following: the lower the capitalization rate to net operating income the higher the value of that property or the higher

the subject rate the lower the value (Rx 25 [example of equation of income cap., rates]). She noted the net income of a property is impacted by the actual expenses of a property, e.g., higher the expenses, lower net income and the lower value (or vice-versa) (T, 61-64).

11. Esposito estimated expenses that she attributed to the properties. She applied a higher capitalization rate for these buildings and, hence, a lower valuation. For example, Esposito opined that applying a contemporary superintendent salary of $46,000.00 as opposed to $5,200.00 a year (attributed by petitioner) for the property at 43-49 First Avenue, results in a lower net income, higher capitalization, and lower valuation of more than $816,000.00. Esposito opines in this instance that the subject property would be "over valued" by $816,000.00 if one would have stayed with the lower superintendent salary of $5,200.00.

12. Esposito testified her valuations were much lower than the valuations pressed by the petitioner. Her market value for 43-49 First Avenue (Rx 5) is $13,430,000.00, applying both the sales-comparison and income approach to value, but relying on the final value under the income approach because she opined that as all of the properties were "leased-fee property" she relies on the income approach to finally value such properties. But, she also opined the sales comparison values validated her income approach as both values were close in comparison, e.g., the sales values for the subject property were $13,570,000.00, versus income value of $13,430,000.00 (Rx 5, p 111). She provides the income and expenses for each of the subject properties in her reports (T, 64-68).

13. Her reports contain an examination of the rent roll for each property (e.g., Rx 5, 43-49 First Avenue, p 74). But, certain instances Esposito plugged in a rent, such as, for an apartment at 43-49 First Avenue of $1,500.00, although the rent roll provided to her listed the apartment vacant as of July 31, 2007 (valuation date). She added the rent after learning it

was rented in September 2007 at $1,500.00 (after the valuation date). She used that rent for income purposes. As for retail rental space of the subject properties, Esposito used a retail rent comparable to see whether there was upside potential of income from existing retail leases on the properties (T, 69-73).

14. Esposito testified 43-49 First Avenue contained 78-units of which 7 (seven) were retail units. She noted the subject property is one building, but contains four (4) fire walls (T, 83-84). Esposito views the property "technically as four buildings (T, 88), but she is not an engineer.

15. Esposito then testified to her capitalization rate and analysis, the rate that is applied to net operating income will result in the market value for the subject property. As an example, the 43-49 First Avenue property had a "cap rate" of five percent (5.0). Esposito opines that cap rate was derived after weighing several factors, such as, holding period (projection period) of ten years (10), capping the rate at 10 years; the value change over those years (increase or decrease of value of the building); the equity yield (return that investors expect on money); build-up of the overall rate; mortgage term (estimated of 10 years); mortgage ratio (lender puts up 75% of costs, the investor pays 25% of cost), in arriving at the 5.0 cap rate (e.g., see, Rx 5 [43-49 First Avenue, pp 94-95) (T,74-78).

16. Each of her reports note the exposure time period (a period of months before the property is put up for sale to third party buyer, but before the valuation date - to feel the market up to the time of the valuation date) and marketing period (a period of months that follow up to the time the property is put up for sale and subsequently sold)(Rx 5, p 11). Esposito opined that these time periods are considered in estimating the appropriate capitalization rate. She testified that not all properties had the same exposure and market period and

depending on location, the periods were either longer or shorter (T, 170-171). She arrived at the time periods (months calculation) from data she obtained, but did not include the source in her reports (e.g, see, Rx 10 [278 Mott Street Appraisal, pp 11-12]; T, 164-175).

17. She then analyzed the income and expense of each subject property (e.g., see, Rx 5 [43-49 First Avenue, pp 96-100), assembling income and expense to arrive at a net operating income for each property and then applied her cap rate. Esposito lists estimations of income and expenses for each property, her sources are books and records available and/or given to her for the each building, such as, reported annual expenses. She also relied on DHCR or the Rent Guideline Boards published "RPIEs"(Real Property Income and Expense Statements) that provide operating and income expense reports of rent-stabilized buildings for similar sized buildings. But, Esposito noted that RPIEs for the subject property were filed and available to her. She did not rely on them nor use them as expense comparables (T, 447-449).

18. Using some of the above sources, Esposito did a comparison to determine the expense for each category and then normalized or stabilized the expenses for each building, e.g., one building may have listed legal expenses (evictions, etc.,) at $100,000.00, but she would not capture the entire $100,000.00 as a normal expense. She allocated a "contingent expense" of the legal fees and opined the lower expense was normalized for purposes of appraising the property. As to the subject property (43-49 First Avenue), Esposito applied $46,000.00 as superintendent expense and another $24,200.00 for ancillary labor (in addition to a free apartment and telephone) using her "common sense" and published data from several sources noted in her reports. She applied the same methodology for all of the properties. She did not use the lower expense of $5,200.00 for the superintendent, noting her appraisal

assumes prudent management of the property and \$5,200.00 as an annual expense was too suspect, averaging \$70.00 (after taxes) a month (T,78-86).

19. Esposito's considered the legal and accounting costs for the specific property (\$40,000.00), and in each of the other properties depending on the physical size. She allocated similar expenses to cover landlord-tenant litigation, preparation of property RPIEs. She applied a 5% management fee then arrived at an estimate of income expenses and net operating income and divided them by the cap rate. She factored rent loss where she found applicable, e.g., retail rental on a lease that she opined was below market and where the lease was in effect during the valuation period, increasing the value of such a lease by \$20.00 a square foot (700 square feet) for a ten-year period, noting this methodology of higher rent added value. She arrived at an income approach valuation for 43-49 First Avenue of \$13,430,000.00 (T, 88-95, 439-441).

20. Her management fee of 5% and legal /accounting generally applied to all of the properties, but there were differences depending on size. She conceded some properties had apartments with low turnover and, thus, new leases were minimal. She found it reasonable to assess a 5% management fee for each building, as well as, include expenses for the owner's own office space." She rejected the notion that bookkeeper and attorney services as to tenant matters were also covered under the managing fee. Esposito included "replacement reserves" (e.g., roof, plumbing, elevator) for all buildings, though she conceded most owners in this area of real estate do not have replacement reserves for their buildings, including her client (T, 441-447). She believes replacement reserve - regardless that building owners do not do so - is prudent management (T, 512-514).

21. Esposito then did a sales comparison valuation to see whether it mirrored her income

approach. That branch of her appraisals is set out in each report (e.g., Rx 5 [43-49 First Avenue, pp 100-109). As to this particular property, Esposito selected approximately four comparables in the vicinity of 43-49 First Avenue property, similar properties that were close to size (some either small or larger) and with retail space. She considered the physical upkeep and/or condition and location of the comparable(s) to the subject property. Adjustments made to the comparables were either negative (when they are superior in certain categories) or positive (when inferior to the subject property). For example, in her reports (Rx 19, p 62), Esposito stated "location" adjustments attempted to equate differences among the comparables and the subject property, such as, quality of surrounding properties, traffic conditions, access, reputation (T, 387-388).

22. Each report contains a grid of the comparables and adjustment made. Each adjustment was assigned a percentage ranging 5%, 10%, 20% and as much as 30%, either positive or negative based on the adjustment. Depending on positive and negative adjustments, there could be a net 0% adjustment or more (e.g., 10% positive and a 10% negative would cancel out and end up with a 0% adjustment). For 43-49 First Avenue, she valued it under the sales comparable approach at $13,570,000.00, noting that her latter approach confirmed her income approach valuation as not excessive ($13,430,000.00) (T, 95-104).

23. Esposito conceded that she looked at the 19-subject properties on or about June 10, 2008, but had also appraised the 19-properties for the Estate of Edward Giaimo. Those inspections took place another time (T, 198-199).

24. She testified the inspections of the19-subject properties were done by her husband in one day, from roof to basement. She relied on only his inspection of these properties, other than the memoranda generated for the upper eastside property at 223 East 96th Street (Rx 19 [see,

John Nakrosis memo attached thereto]). But, she generated reports for this hearing as well as reports for the Estate and that some portions of the latter reports are repeated verbatim in the instant reports, e.g., 278 Mott Street (Rx 10 [278 Mott Street Appraisal]; Px A [278 Mott Street Appraisal for Estate]) and 356 East 57 Street (Rx 11 [356 East 57 Street Appraisal]; Px B [356 East 57 Street Appraisal for Estate]). Her newest reports suggest the properties are in need of repair and upgrade and not adequately maintained by the owner. But, here earlier reports for the Estate indicated no need for repair or upgrade and the properties well maintained. Esposito testified that her early reports for the Estate (Px A) were incorrect and/or contained misprints-but also testified that the conditions of the properties had no impact on value (T, 200-227).

25. Asked to compare her reports for 6 Spring Street (Rx 6 [6 Spring Street Appraisal]) and 278 Mott Street (Rx 10), and her treatment of Estimate of Income and Expenses and the calculation of the cap rate for the two properties (id., pp 81-87; pp 77), Esposito testified that the "conditions" of the properties (as well as engineer reports from Braxton Engineering) were considered by her with respect to the "appreciation" of the buildings during the holding period (10 years) that an investor would retain the buildings after a hypothetic purchase on the valuation date.

26. During cross examination, Esposito was asked whether she was inconsistent with her prior testimony that condition had no impact on valuation when she testified that the engineer reports (Braxton Engineer) did not "accurately reflect the retrospective condition" of the properties. Her testimony was confusing as to what she really understood, what she relied on, what she inspected, what her husband inspected, and whether she agreed with the reports, etc., (T, 281-292).

27. But, when asked about the difference in cap rates, the higher 5.75 for March 2007 (Estate reports) to the lower , 5.50 in July 2007 (instant reports) for 278 Mott Street, Esposito could only explain that there was a computer error in her formula calculation. She opined the 5.50 cap rate was the correct rate (T, 227-241).

28. Esposito also did not believe an owner could recover costs from tenants in rents for replacing the roof; she did not understand that to be a major capital improvement (T, 257).

29. Finally, after some re-direct, Esposito made it plan her reduction in valuations of the subject properties from March to July 2007 appraisals had nothing to do with the Braxton reports, that is, she did not reduce the market value of any of the properties by reason of the Braxton reports (T, 475).

30. Esposito acknowledges similar tenement buildings appreciated in value more than 100% in the prior ten-year period 1997-2007, but she did not weigh that percentage appreciation in her valuation of the subject buildings (T, 242-258).

31. Esposito's "equity requirement" of 25% and interest rates of 5.75% and 5.50% were based on data she obtained and also conversations she had with a bank professional based in Uniondale, Long Island in March 2007, which she did not update for her July 2007-appraisals, based on conversations with the same bank executive (Px A, p 63; Rx 10).

32. This testimony was with regard to Esposito's valuation of all of the properties other than the 223 East 96th Street property, which she valued as a development site. She concedes that were interests rates to fall to 5.25 this would impact the cap rates (T, 268-275).

33. Esposito's valuation opinion as to the other subject properties, coupled with her reports (6 Spring Street; 8 Spring Street; 1057 First Avenue; 1063 First Avenue; 278 Mott Street; 356 East 57 Street; 440 East 58 Street; 209 East 59 Street; 314 East 62 Street; 1144 First

Avenue; 324-326 East 66 Street), mirrors the analyses she employed in valuating 43-49 First Avenue. She made two corrections to her reports relating to certain comparables, e.g., larger size or air rights sold (Rx 6 and Rx 7), or sale of double building. She would exclude those comparables. But, opines her valuation is not impacted by the corrections or changes (T, 146-150).

34. One property is an exception; the 222 East 96 Street property is structurally damaged and has one resident in occupancy. The attorneys stipulated that property will be as a development site. Esposito opines the value of that property is $3,620,000.00 after applying both income approach and sales comparison approach, and adopting the latter method for valuation. She used the income approach to cross-check her sales comparison approach. She hypothetically "built out" the building for full rental, weighed the estimated cost of operation, including expenses, coupled with market rents. She deducting the cost of building and used a multiple for square feet totaling 19,360 square feet. Her capitalization rate was applied against income, etc. Her value came close to the sales comparison approach value (T, 105- 108; Rx 19 [223 East 96 Street Appraisal]).

35. In her sales comparison, Esposito amplified her findings in a grid (Rx 19, pp 61-64), noting market conditions, scarcity of development sites, narrow lots, zoning requirements, etc. She opined the location was bordered by East Harlem. Her looked for comparables in the vicinity. She considered the configuration of the lot, which had a small frontage (30 ft) and a 100-feet length. She weighed air rights and "plottage" (developers buy up adjoining lots to increase mass build up). She considered retail space, retail rents and zoning permitted for the subject site. She reviewed six comparables (recent sales of developed sites) and made adjustments either due to size, location, square footage of apartments, retail space,

zoning, configuration. These adjustments are amplified in her report (Rx 19).

36. Esposito then arrived at a square foot value (relying on her opinion as to the most square footage available to build on the subject site, i.e., the FAR, "floor area ratio"). For the comparables, Esposito took the full price of the site, e.g., $13,144,085.00 (T, 123), divided by the square footage, e.g., 60,960 sq., ft., and arrived at the multiple. She then adjusted for time, location, plot, configuration, zoning, etc., and arrived at $211.00 per square foot of FAR. She multiplied that toward the square footage she understood the subject lot would yield, 19,360 square feet, and arrived at a value of $4,084,960.00 (T, 109-129).

37. Her calculation of 19,360 square feet is derived from an architect memorandum, dated June 2, 2008, that she annexed to her report (Rx 19, p 89 [John Nakrosis]) (T, 131-134). She adjusted downward the value by factoring in demolition cost and removal of asbestos. She calculated the costs to be $472,260.00. She opined the sales comparison valuation was $3,620,000.00. She sought to mirror the value by way of the income approach (Rx 19, p 74-84).

38. She identified two buildings in the vicinity of the "developed site": 225 East 95 Street and 215 East 96 Street, which she viewed as similar in size to the hypothetic build-out building. She calculated the square footage rental, after making adjustment for amenities, location, size in comparison to the subject site. She factored costs, expenses, etc., against rental income and then able to arrive at her cap rate. She then adjusted for demolition, removal, etc. She testified the value result mirrored her sales comparison value (T, 130-145).

39. Esposito understands her mirror analysis is appropriate and rejects the notion that an appraiser should only use the land-residual approach when there are insufficient sales data available. She rejects the opinion that the land-residual approach can be easily manipulated

or that it is viewed less favorable in terms of valuing vacant land. She concedes that if there is a change in her assumptions on market rent, operating expenses, construction costs, etc., there will also be a change in the appraisal value (T, 301-304).

40. During her cross examination, Esposito identified a summary appraisal of the same property conducted by her offices with the valuation date of March 26, 2007, done on behalf of the Edward P. Giaimo Estate (Px C [223 East 96 Street Appraisal for Edward P. Giaimo Estate]) and the value more than her value as of July 31, 2007 (T, 297-301).

41. Esposito testified the highest and best use for the subject property was residential with no retail space. The value is less where there is no retail space. She Esposito opined the property was solely residential because there was limited floor space in comparison to adjacent buildings, competition in adjacent properties that had luxury floor space on the lower floors, and higher floors with river views. She found the subject property's rents would be less than the adjacent property. found the full FAR was 28,090 square feet; she rejected the notion all of it could be fully used because the adjoining building's wall was not "fully adjoined" to the property's wall. A "sliver" building could not be erected as high as the building next to it. Only a building no more than 100 feet could be built (T, 305 - 308).

42. The Nakrosis report (Rx 19, p 89 [John Nakrosis]), for the property reflects a new building at the height of the taller building where the street wall abuts the fully attached taller wall could be built at the site. Esposito concedes she is not an expert in zoning, but understands Nakrosis report limits the height of a building to no more than 100 feet. The height limit impacts downward the valuation of the development site. Upon further examination, she agreed a one-bedroom apartment for each floor was obtainable and that an apartment on

each floor could measure at 907 square feet, large enough for one bedroom. She also understood that condominiums would sell as rentals. But, without amenities, such as a gym, parking garage, observatory (like the adjacent building "Carnegie Hill), the square feet obtainable was less than $600.00, rejecting the notion that a private apartment on each floor was a comparable amenity to Carnegie Hill. Esposito did not do a survey of the condominium square foot values other than her awareness two luxury condominium projects (Carnegie Hall and The Observatory) which command between $600.00 and $1,000.00 a square foot (T, 309-327).

43. Esposito was asked if she weighed or "credited" the "value" of the subject site's maximum FAR (28,090 square feet) although there may be restrictions. She saw no other value e.g., developing air rights. She gave no consideration to the difference in buildable square feet between the 19,360 and the full FAR of 28,090 square feet. She valued the square feet at $211.00 based on build out on the 19,360 square feet. She disregarded the balance of the 8,640 square feet. Had she included the 8,640 feet at $211.00 it would have added value to the site of approximately $1,823,000.00. But, she opined had she considered the 28,090 square feet her value would have been $200.00 because of the larger size. Her value would have been $5,630,641.00, but deducting costs of construction, demolition, clean up, etc., the reconciled value would have been $5,160,000.00 (T, 330-339).

44. Asked about the comparables for the 223 East 96 Street property (Rx 19, p 64) for her July 31, 2007 appraisal, compared to the comparables she used for the Estate value (Px C) in March 2007 (id., p 52), Esposito conceded some of the comparables for the July 2007-valuation were new. She explained she used different comparables because they were closer in time to the July 2007-valuation date, and she was not bound by her reasoning in the

earlier valuation. She explained that she "discovered" comparables for the July 2007-valuation that she had not known existed before March 2007 and that her March 2007-appraisals were done in haste (T, 339-341).

45. She also made adjustments to the comparables for the East 96 Street site. She adjusted in increments of 5%, but did not know if her adjustments by a multiple of 5% was the industry norm. It was her practice. She conceded another error in her analysis of the comparables and the FAR allocation of square feet used in two valuations (March 2007 v July 2007), which "ironically" or by "coincidence" resulted in lower square feet allocation of the comparables used in the July 2007-valuation. The lower square feet allocation for FAR, was weighed by Esposito when she arrived at a lower valuation in the July 2007-valuation. She conceded to another "adjustment" for location in her July 2007-valuation compared to her March 2007-appraisals, which "ironically" resulted in a lower valuation (T, 343-346).

46. Esposito was not aware whether her comparable at or about 2023 First Avenue was located near a New York City Housing Authority ("NYCHA") project. But, testified it was in a similar location as the East 96 Street property (T, 346-348, 363).

47. Esposito was provided a Google rendition of the address of 2023 First Avenue (Px E), (Rx 19, p 68), at first she maintained the property was not located on 104 Street. Her recollection was that the comparable was located at 101 Street. On re-direct, Esposito clarified her error, conceding the location was indeed at 104 Street (T, 484). But, had no recollection of a public housing project located across from the comparable. She was asked whether she was aware that one of the comparables had tenants in occupancy and may require costs in removing them. But, she had no personal knowledge, did not contact the seller or buyer or broker for that comparable. But, she noted such a fact would have to be

considered and weighed in reaching a valuation of the subject property (T, 384-400).

48. Esposito treated the comparables used in the March 2007-appraisals differently in her July 2007-valuation on adjustments, zoning, and location. The adjustments for July 2007 "ironically" decreased the square feet value for development compared from the March 2007-appraisals (Rx 19, pp 65-69; T, 355-363).

49. On re-direct, Esposito testified that though her treatment of comparables may have been different, there was no difference in procedures. She used the same procedures but with different outcomes. However, she noted that some of her valuations for July 2007 were actually higher than her Estate valuations of March 2007 (T, 475-477, 485-492 [278 Mott Street; 223 East 96th Street; 356 East 57th Street]).

50. As to other comparables used for the properties, such as, 314 East 62nd Street (Rx 14 [314 East 62 Street Appraisal]), Esposito confirmed she did not have access to rent rolls or expenses for those comparables. In none of her comparables did she ascertain rent rolls or expenses before selecting them. Nor did she visit or inspect retail spaces of the comparables to compare retail space of the subject properties. None of her comparables had the same size store frontage on corners; no adjustment was made by her to those comparables with respect to one of the subject properties that had retail frontage- space on a corner. For the property located at 356 East 57 Street, Esposito changed comparables from March 2007, opining the change was made in view of her assessment that the credit market had tighten after March and up to July 2007. She changed her calculation of expenses for the property at 356 East 57 Street from March compared to July 2007. And for every appraisal where Esposito states "fuel-residential only," she did not deduct the square footage of the subject properties that had retail space from her "fuel use" calculation (in determining 'net

operating income') (Rx 10, p 86 [278 Mott Street Appraisal]; Rx 5 [43-49 First Avenue Appraisal]; Rx 11, 86 [356 East 57 Street Appraisal]; Px B [356 East 57 Street Appraisal for Edward P. Giaimo Estate]; Rx 13 [209 East 59 Street Appraisal]; Rx 15 [1144 First Avenue Appraisal]; Rx 16 [324-326 East 66 Street Appraisal]; Rx 18 [341 East 76 Street Appraisal]; Rx 9 [1063 First Avenue Appraisal]; Rx 7 [8 Spring Street Appraisal];Rx 6 [6 Spring Street Appraisal]; Rx 8 [1057 First Avenue Appraisal]). She opined the "fuel charged" was extrapolated from source data she understood incorporated fuel expenses for the residential portion of those properties (T, 402-430).

51. Esposito reviewed labor costs allocation as to four properties located adjacent to each other on East 99th Street (Rx 20 [155 East 99 Street Appraisal]; Rx 21 [157 East 99 Street Appraisal]; Rx 22 [159 East 99 Street Appraisal]; Rx 23 [161 East 99 Street Appraisal]).

52. She allocated the expense of part-time superintendent at $20,000.00 for each building. She found it irrelevant that one superintendent had maintained all four properties in the past. In her appraisal she allocates $20,000.00 for four different superintendents. She would allocate $80,000.00 for one superintendent if all four buildings consisting of 80-units were sold to one owner. Esposito did not know how much her client was paying a superintendent to care for the building, she did not expense the same, finding it irrelevant. But, Esposito did know that the expense for a superintendent as reported by the client was $1,200.00 for each building (T, 444-445 [Rx 20, p 73]).

53. She did not use the actual amount, opining an appraiser presumes prudent management and the $1,200.00 per building in her opinion was not prudent (T, 504-506). Moreover, she allocates $20,000.00 as expense for each building for a part-time superintendent and includes for some of the properties a rent-free apartment (Rx 18 [341 East 76 Street]). But,

she does not include the value of the rent-free apartment as part of the compensation (T, 438-439). Apparently, Esposito believes excluding rent-free apartment value as part of expense for management is "prudent management."

54. Asked about her use of different comparables for 1057 First Avenue (Rx 8, p 88) and 1063 First Avenue (Rx 9, p 90), the two properties on opposite corners of the same block, Esposito maintains these two properties were economically different as to rent levels and income. Thus, she decided to use different comparables that match similar income and expenses. She conceded she had no income or expenses from the comparables selected, but that she selected these comparables based on her "sensitivity studies" with the subject property. She applied a "typical cap rate in the area utilizing a wide enough range that" gave her the "probable rent" for the comparable. However, she had no actual information of the comparables' rents and expenses and conceded actual income and expenses of a sale are the best indications of what the cap rate would be for a particular property (T, 448-456).

55. Reviewing her vacancy rates of the properties, she noted a 2% and 4% vacancy rate for the properties, e.g., 6 and 8 Spring Street properties, respectively (Rx 6 [6 Spring Street Appraisal]; Rx 7 [8 Spring Street Appraisal]). She applied the rates based on the number of rent-controlled/rent stabilized apartments on the properties and the low vacancies (T, 457-458).

56. She applied different rates for different properties, depending on the number of rent-controlled apartments, rent stabilized apartments and market-rent apartments of each property (T, 510-511).

57. Based on her analysis of data, the comparables, and the subject properties, she valued the following properties as of July 31, 2007:

43-49 First Avenue	$13,430,000.00	6 Spring Street	$1,580,000.00
8 Spring Street	$2,145,000.00	1057 First Avenue	$1,912,500.00
1063 First Avenue	$4,050,000.00	278 Mott Street	$4,170,000.00
356 East 57 Street	$2,910,000.00	328 East 66 Street	$4,640,000.00
324 East 66 Street	$4,650,000.00	314 East 62 Street	$3,390,000.00
1144 First Avenue	$4,550,000.00	209 East 59 Street	$2,850,000.00
440 East 58 Street	$1,640,000.00	341 East 76 Street	$4,125,000.00
155 East 99 Street	$2,330,000.00	157 East 99 Street	$2,470,000.00
159 East 99 Street	$1,920,000.00	161 East 99 Street	$1,900,000.00

223 East 96 Street (Development Site) $3,620,000.00

The total value for FAV and EGA properties is **$68,282,500.00.**

58. John D. Nakrosis ("Nakrosis") testified as to his report on 223 East 96 Street (Rx 19, p 89). He is a licensed New York architecture and holds a degree in civil engineering (Rx 26 [Nakrosis]). He is knowledgeable of the New York City zoning and buildings classification. A principal of John Daniel Nakrosis Jr. Building Design, he testified to his familiarity with 223 East 96 Street property (Rx 19) and the area where it is located. He reviewed the survey of the subject property and filings of documents and drawings for the proposed adjacent building at 217 East 96th Street and New York City Building Departments filings and documents for a second adjacent property at 225 East 96th Street. Nakrosis identified his memoranda attached Esposito's appraisal for the 96 Street property (Rx 19, p 89 [John Nakrosis]), dated June 2, 2008 (T, 534-539).

59. Nakrosis generated the memorandum for Janet Vitale. He confirmed the maximum FAR for the lot is 28,090 square feet (2,809 x 10), and zoned in the least restrictive residential

zone area. Nakrosis testified that the maximum floor area of the lot cannot be used for a building; the maximum one can use is about 70% of the 28,090 square feet because the frontage of the parcel in issue is only 27 feet and thus the zoning limits the height of a building on a lot less than 45 feet frontage to either 100 feet or the width of the street it fronts, whichever is less. There was also a 100-feet height limit. He rejected the notion of an exception for the lot. He testified the owner of 223 East 96 Street property cannot take advantage of an exception. Nakrosis noted the west property line of 223 East 96 Street property adjoined 217 East 96 Street. The tallest wall of 217 East 96 Street property was 40-feet tall and the higher 30-story portion of the same building was set back 14-feet from the west property line. He testified no building over 100-feet on the lot, if built, would be 'contiguous' with and fully abut the 30-story building wall. His position on the issue is contained in his memorandum (Rx 19 [John Nakrosis Memorandum, pp 1-2; T, 540-545).

60. He also testified in addition to construction of a building, there was a need to abate asbestos that would cost at the minimum$300,000.00 (T, 547).

61. As to the 70% limitation of the lot, Nakrosis concluded the zoning requires that 30-feet of rear yard for the lot. Thus, he opines that approximately 19,360 square feet is available for physical construction of a building. He identified a graph (Rx 27 [Graphic Presentation of June 2 Memo]), generated to depict his analysis (Rx 19, p 89 [John Nakrosis]), but with a slight change. At the hearing, Nakrosis conceded an error in his memoranda as to the possibility of erecting a "sliver" building. He testified that upon review of the drawings he found an exception for a 'sliver' building would not apply because of the lot being too narrow (T, 558-561).

62. Nakrosis' testimony is that a ten-floor structure can be erected on the site, with the first nine

(9) floors at 1,914.8 square feet each of which 1,427.2 square feet being the rentable apartment space. The 10th floor apartment would be 1,509 square feet of floor space (T, 546-553).

Petitioner Rebuttal Expert re: Esposito Testimony & Expert Valuation of Subject Property

63. James Levy ("Levy") a real estate appraiser, consultant and broker of more than 40-years testified on rebuttal as to Esposito's valuation method. He is a member of the American Society Appraisers and is MAI designated from the America Appraisal Institute (Px AN [James Levy]). He has done thousands of appraisals for businesses, individuals, and estates. He has testified hundreds of times in various judicial and quasi-judicial settings (T, 1272-1279).

64. Levy testified to the methodologies employed by Esposito, her adjustments to the eighteen (18) properties and her cap rates and reliance on estimated square feet. He also testified to her use of expenses and income, including legal and labor expenses. Levy recalled Esposito's testimony of reliance on data published by the Institute of Real Estate Management to estimate expenses for the subject properties and comparables. But, noted the absence of a reference of those numbers in Esposito's export report ((T, 1280-1282, 2424-2425).

65. Levy opined Esposito's expenses for legal and payrolls were inordinately high; he opined there were errors in the sales comparison approach and her adjustments. He also found error in Esposito's analysis. He found lower cap rates for the same properties than testified by Esposito. He questions Esposito's reliance on other sources of income and expenses (operating income), rather than actual income/operating expenses as the best evidence of cap rate, which he testified are the actual costs/expenses that are readily available for some

of the properties, e.g., March 15-filings for tax certiorari/tax appeal reports (T, 1280-1282).

66. Levy agrees with the trending of rent rolls to come up with the income of property. But, also that one should do the same as to expenses for the same period (T, 1283-1984; see also, T, 843-847, 1193-1195, [such as Leitner's method of trending]).

67. Levy testified Esposito's adjustments were very subjective, most of the adjustments supported the other and in his opinion based on 40-years of experience, that rarely happens. He found it suspect to have Esposito's sales approach and income approach valuations mirror each other. He concedes two or three properties could mirror, but not all eighteen (not included 223 East 96 Street property). He concludes that for Esposito to have all valuations mirror each other she had to have used wrong judgment and many omissions in her appraisals (T, 2376-2381).

68. For example, reviewing the Esposito appraisal for 440 East 58 Street (Rx12, p 74), Levy opined the use of expenses as a guide without verifying them was not appropriate (T, 1285-1288).

69. Referring to the appraisal of 440 East 58 Street (Rx 12), Levy criticized Esposito for adopting the actual rent, but not trending for "rooms." Levy could not deduce from the material where Esposito obtained the $3,500.00 a month for the garden apartment - although he reviewed her comparable rents. He opines the market rent for the garden apartment is twice that amount. He found Esposito's $27,000.00 allocation of income (presumed to be from the basement apartment), did not include expense/income for the subject property. He opined the $3,500.00 rent for the garden apartment was not realistic (T, 1290-1293).

70. He reviewed some sales comparables Esposito used for 440 East 58 Street. He disagreed with Esposito's size adjustment for the comparable at 206 East 60 Street (Rx 12, p 78),

based upon the number of units of the comparable relative to the units of subject property. He found it was a misleading method because one building could have 20 studio units and the other 10 one-bedroom units, and adjusting for "size" would be misleading.

71. The better method was to adjust based on square feet. Levy would have also made a larger size adjustment (Esposito made a 10%) because the subject property was larger per unit via square feet (T, 1293-1294). Levy also question a second comparable (360 East 61 Street) (Rx 12, p 63), as no such address existed (T, 1383).

72. He also cross checked Esposito's square feet with New York City building records and revealed the size of the buildings/comparables in residential square feet were at odds with Esposito's figures. Levy also reviewed records from his "Genesis," program, a subscription (Genpid), that contains document information from the New York City Buildings Department that provides square footage of property. He used ACRIS to look up documents, but is not aware that it provides square feet information (T, 2412-2414).

73. He testified it was not appropriate to use estimations of square feet in appraisals if actual numbers are available and testified actual square feet was available for <u>440 East 58 Street</u>. Hence, using more feet in an estimation (6,800 square feet) than actual square feet (6,390), results in a lower net operating income because it inflates the operating expenses when valuating under the income approach. Moreover, higher estimation of square feet decrease value because the cap rate is applied to a lower net operating income (T, 1296- 1299).

74. Levy commented on Esposito's adjustment for location of the <u>440 East 58 Street</u> property. He opined it was located in the neighborhood of Sutton Place, which is known in the industry to be a better neighborhood (Upper East Side as well). He would have made adjustments to the comparables as they were inferior to the subject property (T, 1299-1302).

75. He takes issue with Esposito's "condition" adjustment, as it was not possible to reach that conclusion when one simply looks at the exterior of a building. One cannot conclude a building has deferred maintenance without physically inspecting it. He opined the comparable at 480 East 74 Street had updated work as revealed in New York City building records (1302-1303).

76. Levy agreed time adjustments were proper, but he employs a 1% a month based on his experience and knowledge in the field and the credit market at the relevant time. He disagrees with the low 5% adjustment employed by Esposito. He would have used a higher number (T, 1303-1305).

77. Levy was referring to a general period and not a one-day period of July 1 to August 1, 2007. He was referencing the time frame which the sales were compared to the day of valuation, e.g., the sales comparables with sales that took place in mid-2006 to mid-2007. He would not make a sales adjustment for sales that took place July 1, 2007 or after as the sale market changed by July 1, 2007. However, from January 2007 to June 31, 2007, he would apply a 1% time adjustment for each month (T, 2370-2372).

78. As to the cap rate for the subject property, Levy noted to Esposito's referencing of a Massey Knakal Real Estate Services Report and the average cap rates for Manhattan properties below 96 Street property for walk-up buildings (T, 1309-1310).

79. With respect to the subject property at 43-49 First Avenue, Levy had several comments on the appraisal (Rx 5). He addresses the cap rate (id., p 53), noting that the gross building area (GBA) of 38,764 square feet was smaller in New York City buildings records, revealing 33,275 square feet. Levy disagreed that a zoning adjustment is the equivalent of a "utility adjustment" (T, 2365–2367) and reference Esposito's zoning classification code,

finding that the actual zoning for the property was 3.44 FAR, not the 6.0 cited by Esposito. He found insurance cost for the subject property was too high (Rx 5, pp 100-112). He questioned her credibility on her appraisal methods (T, 1311-1312).

80. Levy noted to a comparable used by Esposito that was a double sale. She notes it as a single sale, but Levy testified an appraiser should not separate buildings sold together even if separated by blocks. An appraiser cannot attribute value to one property over the other unless there is a solid record of the sale. The appraisal should value both buildings. Thus, he commented on Esposito's treatment of a comparable (20-22 Prince Street) which was sold with a second building (232-234 Elizabeth Street), but that sale is ignored in Esposito's appraisal (T, 1315-1319).

81. Levy identified two New York City ACRIS documents that demonstrate the two sales (Rx 78 [20-22 Prince Street] and Rx 79 [232-234 Elizabeth Street]). They were sold the same day from the same person and simply because a price is allocated to one does not deem the same separate sales. In his opinion, when using this sale, the appraiser should use both comparables (T, 2381-2384).

82. He testified that with a degree of certainty the parties to that sale were involved in both transactions; he would not use one of the sales and ignore the other because the appraiser does not know the motivation of the seller or buyer as to how they might have arrived and allocated the purchase prices (T, 2449-2450).

83. He rejects Esposito's negative adjustment to the comparable at 380-386 Broome Street because he found there was deferred maintenance for that comparable and anticipated repair work of $500,000.00. He makes a positive adjustment. He also viewed that comparable

superior to the First Avenue property and would make a positive adjustment. He noted this comparable had a cap rate of 1.44 as revealed in from Genesis (Rx 86 [Levy Notes re: Broome Street]). This Broome Street comparable sold in November 2006 (Rx 5, p 108; T, 1318-1320; 2403-2406).

84. With respect to time adjustment, Levy opined that a third comparable (413 East 12 Street) should have a substantial time adjustment of 30% because it was sold in 2004 with a second parcel (T, 1321-1322).

85. He understood the two were sold by the same owner under one contract, noting 520 East 14 Street sold along with 413 East 12 Street in 2004, but the sale did not close until 2007. He obtained the sale information from a market source, Costar. Levy identified the ACRIS reports for these two parcels (Rx 80 [413 East 12 Street] and Rx 81 [520 East 14 Street]; Rx 82 [ACRIS report re: 413 East 12 Street and 520 East 14 Street properties]) and they provide similar information.

86. Levy was not aware the subject properties were to be appraised within 60-days of closing and that he was a recommended listed appraiser. Levy testified he had not appraised the properties and was not aware that he was a possible appraiser. His testimony is that his 30% adjustment has nothing to do with the date of closing (2007), and more to do with the date of the contract's execution (2004), revealing there was a meeting of the minds on an agreed price. All things being equal, the contract was sufficient for Levy to make a time adjustment -short of a new appraisal by the owner and seller that revealed its value higher than the price agreed (T, 2384-2393). He still would have included both parcel sales as one comparable and not two for the same reasons he testified as to 232-234 Elizabeth Street (T,

2451-2452).

87. As to the subject property 1063 First Avenue (also known as 358 58 Street), Levy opined the legal and payroll expenses were "far out of line" (Rx 9). Rejecting Esposito's reliance on estimated income and expenses as suspect for the reasons he noted earlier (T, 1321-1326).

88. He disagreed with Esposito's time adjustment for 1063 First Avenue (Rx 9, p 71) because sales were fairly close in time. Moreover, Levy opined the comparable was in an inferior location to the subject property. He opined the cap rate of 5.5 was "unrealistic" for the market and found it too high (T, 1327).

89. Levy questioned the appreciation rates in Esposito's reports; she opined the suggested rates of 1.5% to 2% per year based on a 10-year hold period was not market nor historical of the period 2004 to 2007. He opined Esposito's build-up of overall rate was skewed because she assumed an appreciation rate of 15% over a 10-year hold period. It was his opinion that the appreciation rate was 30% and, thus, the cap rate would go down from 5.5 to 4.5 (T, 1328-1331).

90. Levy commented on Esposito's appraisal of 1144 First Avenue (Rx 15), finding her "wages" allocation was too high. It was his experience that the size of the subject property would require part-time superintendents paid $100.00 a week for services, which he opined "was not out of line." He found Esposito's allocation of $15,000.00 too high. He testified superintendents do not do repair work; they simply clean the hallways and throw out the garbage, etc. But, conceded this is not the case for all tenement buildings, for example, he would not allocate $100.00 a week to a superintendent of a building that had 35-unites and

two retail spaces (T, 1333-1336, 2425).

91. He also commented on the cap rate for comparable 412 East 64 Street, which Esposito calculated at 5.5%. He opined it was too high based on the appreciation rate he applied and based on that he would reduce the cap rate by one point (T, 1336-1339).

92. Levy testified about Esposito's 1057 First Avenue appraisal (Rx 8), and the comparables she used were the same comparables she used for the property at 1144 First Avenue (Rx 15), but not the same comparables used for appraising 1063 First Avenue. But, he believed they should have been as he opined both of those properties were very similar, though one was a corner building, one had a commercial tenant and the other had a vacant commercial space (T, 2428).

93. He noted Esposito's vacancy rate for 1057 First Avenue appraisal was too high as the rents were below market and that space would rent easily, not 5% as allocated. He assigned a 2% allocation. He agrees with her 5% vacancy for the retail space on the properties. He would not blend vacancy rates with collection losses. He also opined it is improper practice as far as he is concerned because of the different risks to the different types of tenancies (T, 2429). He takes issue with the high payroll assigned to the subject property and opined the legal expense was inflated. He rejects Esposito's 15% appreciation rate over the 10-year hold period opining it was too low (T, 1342-1345).

94. Levy found that the second and fourth comparables (1604 and 1606 First Avenue) was one sale, not two. Levy takes issue with Esposito's practice of separating the comparables although they were sold as one transaction. Thus, he treats this as one comparable, not divide them as Esposito did for her appraisal. He rejects Esposito's treatment of two sales

as that impacts the determination of the cap rate she uses (T, 1345-1350). His testimony was similar at to another two comparables used by Esposito (Rx 83 [ACRIS report re: 147 East 90 Street]; Rx 84 [ACRIS report re: 130 East 93 Street]) (T, 2393-2394).

95. Levy commented on <u>314 East 62 Street</u> (Rx 14) property, finding the payroll of $20,000.00 was overkill and the $10,000.00 in legal expenses excessive. He agreed the management fee of 5% was reasonable if it covered managing and servicing the property, including accounting. He would not allocate space and expenses for the owner's office in view of a management company. The low rents for the units in the subject property did not justify the 4% vacancy rates, they would lease fast. He rejects the cap rate of 5.25 since he rejects Esposito's low appreciation rate of 15% for the 10-year period. Levy applies a 30% "conservative" appreciation rate and thus takes off a point from the cap rate (T, 1350-1354).

96. As to the <u>356 East 57 Street</u> (Rx 11) property, unlike Esposito, Levy would not use a "debt coverage ratio" of 0.9%. He testified to never seeing the ratio used that way to support a cap rate. The best method is to use rates from the market place or built-up cap rates where one uses the right criteria. He rejects Esposito's 15% appreciation rate (as noted by him for the other subject properties). He uses a 30% appreciation rate. He commented on the replacement reserve by Esposito (Rx 11, p 86), but does not understand how she arrived at $484.00 per unit. He opined Esposito method for calculating reserve is not consistent, rather than having a recurring sum for each unit, <u>e.g.</u>, $200.00. He amplified that replacement reserve do not take into account condition of the property, but used for short-term items of replacement (T, 2431). He takes issue with her negative adjustment for location(Rx 11, pp 88-89); he would have made a positive adjustment (T, 1354-1359).

97. As to <u>209 East 59 Street</u> (Rx 13), Levy takes issue with the replacement reserve of $444.00, which he noted should not vary property to property and finds her vacancy rate high (5%), concluding the apartments would rent fast. He would use a rate of 2% for the apartments. But, he agrees with Esposito's retail vacancy rate. He would use at the least a 30% appreciation rate. He rejects Esposito's rate of 15% (T, 1360-1363).

98. As to <u>324-326 East 66 Street</u> and <u>328-330 East 66 Street</u> properties (Rx 16 and Rx 17), Levy makes similar findings. He finds a substantial difference in square footage of Esposito's reports (21,672 and 17,226) and New York City records (17,878 and 17,226). The larger footage impacts income and he finds that significant. He rejects the 5% vacancy rate (Rx 17, p 79) and rejects the inconsistency in replacement reserves between $293.00 and $444.00 for each comparable. He rejects the labor cost allocation of $25,000.00 and $20,000.00 for the properties, finding them as uncalled expenses.

99. Here, too, the appreciation rates of 20% are found too law; he would apply at least 30% for the 10-year period. His revisions increase the value of the properties (T,1363-1377). Moreover, would have limited his review of comparable properties to side streets sales and not avenue sales (T, 2411-2412).

100. As to <u>341 East 76 Street</u> (Rx 18), Levy finds a difference in Esposito's square footage (10,570). His review of New York City records reveal 9,550 square feet. He takes issue with the cap rate as he finds the appreciation of 15% too low. Applying a 30% appreciation would takes a point off the cap rate (1.0%). He opines Esposito's allocation of $20,000.00 for labor and $10,00000 for legal expenses is too high and critiques Esposito's decision to add electric expenses on top of the actual expenses for this property, finding it improper (T,

1380-1388).

101. As to 155, 157,159 and 161 East 99 Street (Rx 20 through Rx 23), Levy notes his prior comments are applicable to these four properties. He recalled they are all the same size, but Esposito allocated a payroll of $20,000.000 and legal expenses of $10,000.00, which Levy found too high. He opined the figures were "exorbitantly" high and the 20% appreciation rate low. Levy opined those properties were in better neighborhoods and could not see the rational of applying lower appreciation rates for those properties. He takes issue with the vacancy rate allocated to the 99 Street properties (4%), finding they are lower (3%). He rejected Esposito's square footage allocations (8,925), finding them inconsistent with New York City building records (10,500). He also notes one boiler heated all of the buildings on 99 Street for $35,000.00, yet Esposito applied boiler installation of $35,000.00 to each building. He found that to be duplication. Levy conceded that an appraiser is to treat each building as a stand-alone basis (that is, as if each building had paid for a boiler). However, it is his opinion one should not deduct the boiler replacement as expense for all of four properties (T, 2432). Levy opined his changes impact Esposito's cap rates (T, 1389-1396).

102. As to the property at 278 Mott Street (Rx 10), Levy notes differences in payroll of $20,000.00 and legal expenses of $7,500.00, which were too high. He takes issue with the appreciation rate of 15%, which should be higher for the 10-year hold period. He concluded the vacancy rate (4%) should be lower because apartment rent fast at this property (T, 1397-1400).

103. As to 6 and 8 Spring Street properties (Rx 6 and Rx 7), Levy took issue with Esposito's use of a mortgage rate of 5.65% for one of the Spring Street properties. He finds it suspect

because Esposito used a mortgage rate of 5.5% for the other Spring Street property. He noted the higher mortgage rate would affect the calculation of the cap rate. He finds the appreciation rate of 20% is too low (Rx 10, pp 77-78).

104. Levy found the square footage recorded by Esposito for retail units of the subject properties was different in New York City buildings records; testifying they indicated larger retail space and therefore more income. Thus, he opined an adjustment for rents was required (T, 1400-1408).

105. On cross examination Levy testified that some of the same square footage noted by Esposito was noted by the petitioner's expert witness, Leitner (Px L-1 and Px M-1 [6 and 8 Spring Street properties]; T, 2419-2421).

106. Finally, Levy noted to 223 East 96 Street property, the development site. Levy reviewed Esposito's appraisal (Rx 19), and testified to several observations regarding the comparables used. He would make a 5% adjustment for configuration from one comparable (not 10% [212-214 East 95 Street]) and a size adjustment of 5%. He would not make a zoning adjustment. Thus, the price per square foot would be higher than Esposito's calculation based on square feet. He would not use a comparable property located north of 96 Street, particularly 101 Street, unless one make appropriate adjustments, such as, location. He finds the latter to be a different neighborhood and inferior; it opines it is not a comparable. Out of the comparables used, Levy would only use comparables 1, 2 and 6. The other three he rejects as comparables to 96 Street property. He seeks an "apples to apples" analysis and opined the comparables used by Esposito above 96 Street property were not "apples to apples" (T, 2437-2438).

107. In addition, Levy testified he would not make a plot, configuration or zoning adjustment for the properties. Levy opined that based on his use of the comparables 1, 2 and 6, and applying the above, he arrived at a price per square foot of $380.00 (T, 1410 -1418).

108. In fact, Levy opined that had he used the 2023 First Avenue (104 Street) comparable (though he rejects it), he would have made an upward adjustment of 50%, but only as to rental value or cooperative/condo sale. He would not use 2023 First Avenue as a comparable for land sale (T, 1417-1424).

109. Levy opined that the comparable at 2023 First Avenue(the Observatory), is directly across from a NYCHA housing project would have a substantial effect on value for condo/cooperative sales. He opined the reason why the comparable units were selling at $575/$700 a square foot was as a result of the NYCHA project being across the street (T, 1425-1429). Levy had no knowledge of whether there was a NYCHA projects directly behind the 96 Street property site (T, 2435-2436).

110. Finally, with regard to the use of GIM (a value arrived by applying a multiple number times the gross rent or the Gross Income Multiple, Levy opined it was a misleading type of analysis (the value divided by rent roll) because different properties have different operating expenses and there is no reflection of the operating expenses in GIM analysis. He opined most appraisers do not employ GIM. But, he conceded Esposito's reports do not indicate that she relied on the GIM specifically when she valued the properties (T, 1430-1431, 2439).

111. Joel Leitner ("Leitner") a licensed real estate appraiser and consultant as well as principal of the Leiter Group, Inc., testified as petitioner's expert on valuation of the properties. He

holds a Masters Degree Real Estate Investment and Finance from NYU. Obtained in 1991. A member and immediate past president of the New York City chapter of the Appraisal Institute, he also holds a MAI designation from that institute. He is a counselor of real estate and member of the Counselors of Real Estate and holds the CRE designation. He is a fellow member of the Royal Institution of Chartered Surveyors and past chair of the valuation committee for the Real Estate Board of New York. Leiter also teaches real estate courses at NYU in the Master Program in Real Estate (T, 570-572).

112. Leitner has appraised Manhattan tenements similar to the subject properties. Leitner identified the Real Estate Appraisal Proposal (Px G) provided by his office and prepared for the attorneys of both Janet Giaimo Vitale and Robert Giaimo (the parties herein). The proposal was with regard to work performed by Leitner in 2007. Leitner was retained by the parties to prepare real estate appraisals of the subject properties. He understood the properties are owned by EGA and FAV (Px I re: 43-49 First Avenue Retainer Letter; Px J re: Spring Street properties, 1057 First Avenue and 1063 First Avenue properties Retainer Letter). The parties stipulated (without prejudice) that as of the valuation date the subject properties were held under the names of the two entities, EGA and FAV (T, 573-585).

113. Leitner testified he did his March 2007-appraisals on behalf of both petitioner and respondent and did not favor one over the other (T, 641-642). He concedes that at the hearing he was retained by petitioner to provide an updated valuation for July 2007 and, hence, his testimony is rendered on behalf of the petitioner (T, 664-665). He has never met nor spoken with petitioner (T, 1206-1207).

114. Leitner understood when he did the March 2007-appraisals it was also for estate tax

purposes and understood from the attorneys for both parties in March 2007 that he was to be as accurate as possible on valuation and did not understand at that time that his valuations were to be used in an "fair value" hearing; he was not aware that Janet Giaimo Vitale had elected to purchase petitioner's shares in EGA and FAV. His services for March 2007 were paid by the Estate (Px AH Demonstrative Exhibit) (T, 666-669).

115. Leitner was also not aware that the properties were managed by the parties' decedent brother. He did not know that the brother had died on March 26, 2007 and understood that the information provided to his offices were from respondent Janet Giaimo Vitale. He has never met her nor spoke with her. He did not know what role Ms. Giaimo Vitale played in the management of the buildings and did not know when she began to manage the properties. Neither Robert Giaimo nor Janet Giaimo Vitale testify at the hearing (T, 695-697).

116. The issue of ownership of a certain share has been in litigation. After submission of this matter for report and recommendation, the Appellate Division determined that any transaction of shares following the death of the parties' brother to the respondent sister regarding certain share(s) was null and void (see, *Giaimo v EGA Associates Inc.*, 68 AD3d 523). Thus, the parties are now deemed to hold equal share interest in both EGA and FAV. But, there is an ongoing dispute over ownership of three or four other properties involving the parties and their mother's Estate: the Antoinette Giaimo Estate.

117. Leitner identified all of his appraisal reports for the subject properties (Px K [43-49 First Avenue Appraisal]; Px L [6 Spring Street Appraisal]; Px M [8 Spring Street Appraisal]; Px N [1057 First Avenue Appraisal]; Px O [1063 First Avenue Appraisal, also known as 350

East 58 Street]; Px P [278 Mott Street Appraisal]; Px Q [356 East 57 Street Appraisal]; Px R [328-330 East 66 Street Appraisal]; Px S [324-326 East 66 Street Appraisal]; Px T [314 East 62 Street Appraisal]; Px U [1144 First Avenue Appraisal, also known as 400 East 63 Street]; Px V [209 East 59 Street Appraisal]; Px W [440 East 58 Street Appraisal]; Px X [341 East 76 Street Appraisal]; Px Y [223 East 96 Street Appraisal]; Px Z [155 East 99 Street Appraisal]; Px AA [157 East 99 Street Appraisal]; Px AB [159 East 99 Street Appraisal]; Px AC [161 East 99 Street Appraisal]).

118. Leitner testified to his valuation, beginning with the rent role for 43-49 First Avenue (Rent Roll- 45 First Avenue). Leitner learned from that rent roll that his initial valuation of that property did not include rent for the "West Apartment." He included that rent and revised his valuation for that property.

119. Leitner noted the appraisals are valuations of the properties as of March 26, 2007, and were delivered to both attorneys at or about that time. Leitner's reports were marked as "drafts" (T, 668).

120. Leitner received a request from the petitioner's attorney to update the very same appraisals as of August 1, 2007 and he updated them (Px AD re: June 25, 2008-Letter Request to Update Appraisals]). These updated appraisals are as of August 1, 2007, and update the 2007-appraisals (Px K-1 through Px AC-1). He saw no material difference between July 31 to August 1, 2007 with respect to valuation (T, 587-596). He changed certain income and expenses, but incorporated the balance of the March 2007-appraisals (T, 739-742).

121. Leitner testified how he arrived at his valuation for those properties other than the 96 Street development site. The properties were inspected, data collected, taxes reviewed, zoning and

market place and neighborhoods analyzed. But, the use of comparables for operation expenses did not require that they be in the same neighborhood as the subject property. However, tax comparables must be in the same neighborhood as assessment are based on location. His comparables for tax were close to the subject property. He would not use a tax comparable on Spring Street for a subject property on 58 Street (T, 1162-1163).

122. Leitner reviewed data on residential and retail rent data and vacancy rates in the neighborhood compared to the subject property. Leiter also reviewed the rent roles and expenses for each subject building and comparable. He completed an income approach based on comparison of existing rent roll to market rent in the neighborhood in order to determine any potential upside for the properties. His updated information of August 2007 reflects some changes in the rent roll and minor changes in the expenses projections other than changes made for 43-49 First Avenue as to rent for the additional apartment noted above. The change in valuation for that property (including increase in expenses) was $100,000.00.

123. Leitner relied on market data sources, which he incorporates in his appraisals (Id Only, Px AE [Citi Habitat Rental Market Update 3d Qtr 2007]), and retail/residential market rates. Based on his review, Leitner opined the vacancy rate for the East Village, the location of 43-49 First Avenue, was 0.84% and overall for New York City the vacancy rates were about 1.0 % . For properties in the midtown east and upper east side of Manhattan the vacancy rate was 0.7% and 0.72%, respectively. He also relied on market data from Prudential Douglas Elliman Market Overview 3d Qtr., 2007 (Id Only, Px AF), which provided information on the Manhattan rental market for the third quarter 2007 for residential rents

(T, 597-605).

124. Leitner opines rents were at a record high and based on the same information the condo market in Manhattan as of August 1, 2007 was its peak. There was no information he could glean from the sources that revealed market rents for Manhattan tenements such as the subject buildings were in decline (T, 597-605).

125. Leitner concluded the cap rate for 43-49 First Avenue based on the above analysis and market data was 4.25. His rate was derived from the market data, the sale comparables, the actual income and expenses data of the comparables and surveys. His analysis of the cap rate was based on market data relied on and provided by Massey Knakal Realty Services, a large New York broker in the tenement market. He relied on that report data that reported cap rates below 96 Street property for walk-up tenement buildings averaged 4.8 for 2nd Qtr., of 2007. Leitner found the market information was consistent with his findings; he performed the same analysis to obtain a cap rate with respect to each of the properties other than 96 Street development site (T, 606-607).

126. He valued 43-49 First Avenue as of March 26, 2007 at $16,300,000.00 and in his updated value the property at $17,800,000.00 (Px K and Px K-1). He opined all of his valuations are his best determinations of values for the subject properties. For each valuation he ascribed a management fee although he understood they were all self-managed. But, a managing company for each building would provide leasing, collecting rents, operating and managing services and book keeping as well as filing out expenses reports or RPIEs.

127. Leitner reviews the RPIEs, but does not use them as a primary source because owners tend to inflate expenses for tax impact (T, 876-877). In fact, Levy confirmed the same

understanding, that is, owners put "in whatever they want on it" (T, 2446). Esposito also did not rely on them nor use them as expense comparables (T, 447-449).

128. Leitner also testified an owner would not have a separate office to do what the managing company was hired to do. His cap rates for each building were different although the appraisals are all dated the same date. He testified the cap rates are influenced by upside potential in rent. But, rent regulated, rent controlled, apartments, have an upside potential that varies from building to building depending on the number of regulated/controlled apartments compared to market rent apartments. Buildings with potential future high rents impact the cap rate. Each building can be identical in all respects, but where apartments are regulated versus market, the upside potential will be different and, hence, the diversity in his cap rates (T, 608-612).

129. Leiter rejects the use of a "mortgage -based formula" for cap rates. He believes the better method for determining cap rates is to use comparables with known income and expenses. Mortgage -based formula, he believes, contains data that is inherently subjective where as the comparables' income and expenses are hard, real numbers (613-620).

130. He testified the appreciation of the buildings for the past years was more than 20% and estimates the future 10-year appreciation for 43-49 First Avenue will be about 40%. His appreciation rate has two components: (1) natural appreciation in the market; and (2) coupled with upside potential based on the spread between market rate and average rent in place. He opines investors will hold on to a building for 10 years and appreciation is therefore projected for 10-year period. He looked back to the last 10-years (1997-2007) and looked forward 10-years (2007-2017) (T, 615).

131. Leitner uses a 10-year holding period as the majority of the subject properties contained rent-stabilized/controlled apartment. It is his opinion that in 10-years the majority of the apartments after review of current rent rolls and factoring in capital improvements, etc.,, will likely be at market rent (T, 1196).

132. Leitner opines investors of such properties understand the market and are familiar with costs and expenses and are only interested in the gross rents. The GIM varies by quality of the neighborhood where the property is located, e.g., East Harlem, Upper Eastside, Midtown, etc. Leitner reports in his appraisals the GIM of the neighborhoods. The GIM for the neighborhood where 356 East 57 Street is located (Px Q and Q-1, p 131), was 14, based on the average gross income of the comparables used in that property's valuation. Leitner also opined the cap rate for that property was 4.75 (Px Q and Q-1, p 111; T, 613-620).

133. As to his appraisal for 440 East 58 Street (Px W and Px W-1) he includes miscellaneous income of $27,600.00 that he attributes as income for a basement apartment had was not included on the rent roll provided by Ms. Janet Giaimo Vitale. The respondent supposedly provided Leitner with expense and income information on that property. But, he maintains did not include the above rent. He also include rent for the apartment occupied by Ms. Janet Giaimo Vitale at that same address. He described it as the "garden apartment." He opines its market rent for Sutton Place neighborhood is $5,000.00. He included the annual rent for that apartment, which totals $60,000.00 (T, 621-626).

134. Leitner did not know whether there were access issues to the garden apartment. He understood the basement apartment in the same building was separate from the garden

apartment. He ascribed income of $2,300.00 a month from the basement apartment (T, 1081-1083).

135. He calculated the balance of the furnished income and expenses (Px W, p 96). But, noted a "zero" payroll thought he understood from Ms. Giaimo Vitale there was a superintendent. He also testified there were no individual superintendent for each property, some superintendents were caring for multiple buildings. Leitner includes $5,200.00 for a part time superintendent for the subject property based on his review of the comparables of that property, which also provided for part-time superintendents. Leitner used the payroll figure of $5,200.00 in all of his appraisals other than the development site (T, 866).

136. The part-time superintendents provided general cleaning and maintenance. He opined superintendents for buildings holding between 8-20 apartments generally did not work full time (T, 621-626).

137. He also understood EGA and FAV provided free apartments to superintendents and he reflects that in his reports. He included a payroll for the particular superintendents, noting some were responsible for servicing more than one building. His management fee for the July 2007-valuation was 5% compared to the March 2007-appraisals , which he pegged at 3%. Leiter ascribed a lower fee in March 2007-appraisals, as he treated his valuation of all properties at that time as a "portfolio" sale rather than in July 2007,wherein he valued each property as a stand-alone. The 5% rate is based on a managing company caring one each specific building as a stand-alone. He denies any correlation between his 5% rate and that provided by Esposito (also 5%), though he read her valuations (Px W and Px W-1) (T, 627-631).

138. Leitner's cap rate for 440 East 58 Street of 4.25 (Px W and Px W-1, p 103-104), was based on the above analysis as well as consideration of the property's income and expenses compared to the comparables and a GIM of 9.75%. His appraisal of expenses and income for each property was based on blended information from both the market and Fannie Mae/Freddie Mac lending institutions. He recognizes that the market place drives expenses. But, does not ignore conservative items that lending institutions require, such as, reserves. He opined the building owners of residential tenements such as the properties in issue have little or no reserves for repairs and replacements. However, he ascribes a reserve for the buildings to acknowledge bank lenders' conservative requirements for a reserve to cover replacement of major capital items.

139. He noted EGA and FAV provide no reserves in their expense accountings (see, Px W, p 96). But, Leitner accounts for $300.00 per unit as a reserve or another amount, weighing the condition of the buildings, the age of the roof, boiler, etc. The older the condition the more the reserve allocated per unit (apartment). He allocates $300.00 a unit or total $2,400.00 to 440 East 58 Street (Px W, p 102; T, 631-637).

140. His $300.00 reserve is set out in his report (Px K, p 116), but testified owners of similar buildings do not do so from a market stand point. Leiter opined the reality is that brokers, buyers, sellers do not discuss reserves. Leitner noted he does not include the $300.00 reserve because of "prudent management." He does so because lenders expect (T, 691-695).

141. Leitner also trended forward income where the rent rolls changed between the two valuation dates or when he learned an apartment was not revealed in the rent rolls. He trended rents for 2007 and 2008 for all of the properties other than 96 Street property. For example,

reviewing 43-49 First Avenue rent rolls (Px K-1), he noted the increase of rent for rent-controlled apartments by 7.5% reflecting the period of August 2007 to July 2008. He increased by 3% the rent-stabilized rent for apartments at 43-49 First Avenue. He arrived at his percentage based on rent stabilization and rent control laws (Px K, p 98-103), though a 1-year lease under rent stabilization law was 2.75% (T, 843-847, 1193-1195).

142. In his March 2006-reports, Leitner projected the property's operating expenses for the year based on the owner's historical expenses for 2006 and cross-checked against a sample of market comparables, which he presents in his reports (e.g., Px W, p 96). He denied his expenses were based on 2005 comparables operating expenses (Px K, p 111), maintaining he used them partly to come up with projected numbers for 2007 and 2008. He relied on actual categories of expenses, e.g., insurance, repairs, utilities, etc. Thus, certain instances his expenses were lower than the average of his comparables. His expense analysis is based on a gross building area and his analysis of expenses for fuel, electricity, repairs, etc., were based on "apples to apples" (T, 849-859).

143. Leitner allocated part-time superintendent payroll at an annual rate of a$5,200.00. His low payroll was premised on his belief that superintendents were given rent-free apartments and he treated that as an added benefit. He noted 43-49 First Avenue property was the only elevator property and had more than seventy-seven units of which seventy were residential and the rest retail. He also noted one rent-free superintendent apartment (T, 859-860).

144. Leitner noted to his September 17, 2008-Letter to an attorney concerning 43-49 First Avenue (Rx 35) which related to the above property. Therein, Leitner used a superintendent payroll figure of $5,200.00, but his latest August 2007-update changed it to $17,000.00 (Px

K-1). He explained his update was based on learning of another apartment on the rent roll and he adopted the new rent. Furthermore, reviewing the payroll, he conceded it was too conservative so he increased it to $17,000.00. He added the new rent and the market rent of the superintendent apartment to his valuation (T, 865-872).

145. Leitner looked at the 2005-2006 operating expenses of his comparables and trended the income as well. He also gathered what he had of the expenses for the comparables to arrive at an estimate. He did not "stick" with 2005 comparables operating expenses. Leitner looked at all expenses available for 2005 and 2006 and realized his estimates in the updated appraisals did not warrant any changes (T, 872-878).

146. With respect to particular apartments in 43-49 First Avenue (Px K, p 94), Leitner noted rent for apartment 5H at $787.00 in March 2007, but in his August 2007-appraisal raised the rent was increased to $3,500.00. Leitner understood the apartment was at market although he noted there was litigation. He did not know if apartment 5H was still occupied by the prior tenant who had a rent-stabilize lease (Rx 36) when he generated his updated valuation (Px K-1). Had he stayed at the rent of $787.00 in his August 2007-valuation, the annual income would have been less ($42,000.00 to $9,444.00) and the cap rate higher resulting in lower valuation (T, 883-893).

147. He maintains the rent roll he relied on were his primary source for rent rolls and came from Janet Vitale Giaimo (Px AK [rent roles 8/1/07]; T, 1152). The rent roll listed Apt 5H at $787.00 in rent, but noted also that apartment was vacant (Px AK) as of August 1, 2007. Leitner deemed this rent roll directly from the owner was a primary source of information that he incorporated to determine the cap rate. He testified he was never given a lease that

indicated the prior tenant continued occupancy. Therefore, he applied market rent (T, 1154-1155).

148. Ask whether he received any other rent records from Janet Giaimo Vitale (Id Only, Rx 58), Leitner could not recall, but the information was incorporated by reference in his appraisal (Px AK) and updated appraisal (Px K, p 94), and that information indicated there was some sort of litigation, but he did not know whether there was ongoing litigation for apartment 5H as time of his appraisal. He did not inquire of the owner in August 2007 whether there was ongoing litigation when he updated his appraisal (T,1214-1219).

149. A second apartment rent on that property, apartment 2Q, was listed in the March 2007-appraisal at $1,313.00. The owner had projected $1,500.00 rent after March 2007. Leitner ascribed $2,000.00, understanding capital improvement and a vacancy rate (applying the principle of "highest and best use") would increase the rent to $2,000.00. Had Leitner used rent at $1,500.00, the annual income would have been lower and the cap rate would change and decrease the value of 43-49 First Avenue (T, 893-898).

150. Leitner reduced the vacancy rates from 3% to 2% on the properties because the 3% was a little too conservative and he opined there was no problem in leasing up vacant apartments under prudent management. His reduced vacancy rate of 2% for all of the properties increased income and thus value of the properties (T, 901-903).

151. Leitner also updated the management fee to 5% from 3% in the March 2007-appraisals due in part to the below market rents in place and because he was treating the management of the properties individually not as a portfolio of buildings (T, 904-907).

152. His March 2007-appraisals do not separate legal expenses (T, 901-908), but Leitner

incorporated them in his reserve estimates, there was no separate designation "legal fees." He testified the $300.00 replacement/reserve includes legal expenses. His August 2007-appraisals referenced $200.00 of the reserve as allocated for emergency repairs and $100.00 for legal (T, 908-914).

153. Reviewing the different payroll figures in the March 2007 and August 2007-appraisals, Leitner allocates $5,200.00 for superintendent regardless of size of the properties and continued the allocation in August 2007 other than the change he made for 43-49 First Avenue (discussed, *supra* [T, 865-872]).

154. He opines the $100.00 weekly allocation for part-time superintendent reflects how many units were to be maintained, noting to 209 East 59 Street (Px V, Px V-1), which consisted of 35 units and 2 retail spaces, Leitner noted for the largest property the superintendent was paid $100.00 a week and provided a rent-free apartment (T, 916-918).

155. As to collection of taxes for seven (7) of the nineteen (19) properties, Leiter conceded corrections were made (Rx 37 Id., Only, [Letter re: correction on tax payments]) for the 2007/2008 assessment. The corrections resulted in a combined savings of $500,000.00 (Rx 38 [Real Estate Taxes]). Leitner conceded no change in value to 155 East 99 Street (Rx 37, Id., Only ; PxZ and Z-1), but the tax difference was only $3,500.00 (T, 918-923).

156. Leitner use of a 10-year hold period was based on his understanding of a standard in the industry. His appreciation rates ranged from 25% to 50%. For 6 Spring Street (Px L and Px L-1), Leitner used a 50% appreciation rate. He used a 40% appreciation for 43-49 First Avenue (Px AH).

157. His cap rates summarized on his report were used in his income approach and depended,

in part, on the appreciation rate used for each property. All things being equal, a cap rate would be lower if a higher appreciation rate is used (and vice versa). Determining the appreciation rate is not an exact science there is no absolute formula. But, Leitner opines that one can project an appreciation rate based on average market rent compared to actual rent in place (T, 929-934).

158. He notes the difference in appreciation rates is attributed to the upside potential of a given property, the spread between the average rent in place, and what the average rent would be if the entire building goes to market rent (T, 1196-1199; Px L and Px M).

159. Looking at his build-up method amplified in the appraisals for 43-49 First Avenue (Px K, p 119), Leitner projects a 40% increase in value over the 10-year hold period with a mortgage rate of 6.5%, which he opined was a prevailing interest rate for a property such as the subject. He used an equity yield of 8%. The cap rate-calculating chart (Px K, p 119), was similar for all of the other properties (not including 96 Street property).

160. A 5% downward adjustment (if he agreed to one) in the appreciation rate reduces the value of the property. Leitner opined he uses another method as well as the Ellwood Method[2] alluded to on cross examination. He derives his cap rates from specific appraisals; he arrived at his cap rates from comparable sales based on actual projected income and expenses. His cap rates are not "guesstimates of projections" (Px K, p 120). Leitner list

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[2] The testimony by the experts indicate that the Ellwood method is money and time. This method forms a multiple called the "capitalization rate" or cap rate that represent cash flow produced by the investment (here, property) over the holding period (here, 10-years). The first year income from the investment is capitalized to determine value of the investment. There are three factors: (1) the investor holds the property for a period of years; (2) the equity in the property builds up during the period of paying down mortgage; and (3) at the end of the period, when the buyer sells to a future purchaser, proceeds are obtained.

fifteen (15) cap rates from 2.67 to 5.94 and averaging 4.30. He then applies a cap rate of 4.25 for the subject property, which he opined was a slight upside than the average comparable (T, 934-942).

161. Leitner notes to investor surveys in his appraisals; he reviewed them. But, found them to be distinguishable because they were more market-oriented, unlike the subject properties which have better than investment grade because of upside potential of the rent-stabilized and rent-controlled apartments going to market rate. He considered the surveys, but relied on the comparables that had rent-stabilized and rent-controlled apartments. Out of the fifteen (15) comparables he found, he elected to use six (6) in his adjustment grid for the properties (T, 942-944).

162. Leitner noted his adjustment grids for four (4) of the properties (Rx 40) as well as fourteen (14) other subject properties (Rx 41). He used the same comparables in the adjustment grids for the four (4) subject properties (43-49 First Avenue; 6 and 8 Spring Street; 279 Mott Street). He made no adjustment to them other than net operating income. He opined no other adjustments were made for market condition, size, utility or condition (T, 945-948) and that they were comparable to the subject properties (T, 950). As an example, he opined the sixth comparable for 43-49 First Avenue was similar in average income as the comparable at 10 Street (11,400 per unit v 10,773 per unit) and no adjustment was made (Rx40; T, 1202-1203).

163. Reviewing another of his comparables at 165-169 East 89 Street, Leitner listed the sale price of $26,000,000.00, but New York City certified documents reveal a sale price of $26,200,000.00 (Rx 43) (T, 965). He used this comparable in the appraisal of 328 East 66

Street (Px R, p 117), and his cap rate for the subject property was based on the lower sale price (T, 963-976).

164. Referring to another of his comparables, 176-182 West 82 Street (Rx 47), used as one of six (6) sale comparables for 440 East 58 Street (Px W), as well as a comparable for fourteen (14) of the subject properties, Leitner confirmed Massey Knakal was the broker on the sale of comparable. The cap rate Leitner used from that comparable sale was 4.68%.

165. As he did for each comparable to determine the cap rate, Leitner took the net operating income (from a primary source), here the buyer, of $574,938.00 and divided it by the sale price of $12,282,000.00 and the result was 4.68% which he noted could correspond to the cap rate on his sale sheet in his reports (T, 1115).

166. He was not familiar with an article reporting on that transaction (Rx 45 [Massey Knakal reports on cap rates]), but the cap rates were either actual or pro forma with respect to periods of sale of rent stabilized apartment buildings. His practice is to review such reports on cap rates as a start to verify the information obtained from his primary sources. He maintains there are cap rate reports that are accurate and some that are not. His practice to have direct contact with a person to confirm the information on reports (T, 1010-1014).

167. A third comparable was 405 East 77 Street with a cap rate of 7.25, used by Leitner as a comparable for fourteen (14) of the subject properties. He used this comparable on a per unit basis and cap rate comparable, it is reflected in the grids (Px W, pp 105-106).

168. The sixth comparable was 209-211 East 25 Street (Px W, p 121), used for both per unit basis and cap rate comparable. Leitner was not sure whether the property consisted of two distinct buildings, but the block and lot numbers were different (Px W, p 121). New York

City certified documents reveal the blocks and lots are located on separate streets (Rx 48): (1) 209 East 25 Street; and (2) 290 West 12 Street (Rx 49), but his appraisal reports do not reveal this difference (Px W, p 121) (T, 1018-1022).

169. Leitner maintains he was well aware that this comparable consisted of two buildings in separate physical locations and the second address was inadvertently omitted. He confirmed the income, sale price, expenses and cap rate for both properties are also included in his appraisal. The omission of the address did not affect his math (T, 1119-1121).

170. His testimony sought to confirm his practice that appraisers cannot separate two buildings sold together in a sale even if separated by blocks since there is difficulty of attributing value to one property over the other, unless value is specifically stated by the seller and buyer. He noted respondent's deed exhibits (Rx 48 and Rx 49) reveal each lot sold for $9,000,000.00 each or the total of $18,000,000.00, but the two buildings are not similar, one has six floors the other five, one has more apartments than the other and blocks apart. He opined it was beyond chance that both plots have equal value. But, his appraisal captures values as to both of them in his comparable analysis (T, 1140-1147).

171. Leitner's residential sales adjustment grid (Rx 41) references the six sales comparables in the appraisal for <u>440 East 58 Street</u> (Px W, p 106), of which five are also referenced in the comparables for cap rates (Px W, p 106), except 426 East 58 Street. Leiter does not know why the sixth sale comparable is not referenced in the cap rate list (T, 1023-1025).

172. Had he included the cap rate for the sixth comparable (4.28), it would have resulted in a lower cap rate, as the cap rate of the sixth property was below his average cap rate of 4.42 (T, 1118-1119). He also opined that reports by Massey Knakal Realty on sales (Rx 42, <u>Id.,</u>

Only; Px AL, Id., Only) revealed no substantial difference between the two cap rates. He therefore opined his cap rate of 4.25 was reasonable (T, 1159-1161).

173. Leitner reviewed the appraisal for 324-326 East 66 Street (Px S, p, 108), and noted the comparable at 426 East 58 Street does not appear in the comparable cap rate list, but is listed as one of six sales comparables. He conceded the omission, and testified he did not use the average of the comparable cap rates to compute the cap rate for the subject property. He also opined his sales comparables and the comparable cap rates are separate and distinct for the purpose used as outline in the appraisal. He opined the listings should not be merged for the purpose of analyzing whether the use of one or omission of another moots the use of the comparable in either sales comparisons or cap rate comparisons (T, 1025-1038).

174. In his appraisal of 43-49 First Avenue (Px K, p 136-139), Leitner makes no adjustment to the sales comparison other than net operating income. Leitner made no market adjustment because all of the sales occurred within eight months of the appraisal date. He explains his no location adjustments in the net operating income level adjustment, noting to the unique difference in residential buildings and the effects of rent regulation. Therefore, he opines he made no adjustment to size, location, and why he did the same as to net operating income level. He also made no adjustment for location because the comparables were similar in terms of location that the effects of rent regulation prevailed. He used th same reasoning for his decision not to do size adjustment as well as the reason that discounts to size within the range of 10 to 48 units are not observed in the local apartment market. He used the same reasoning for utility. The subject property (43-49 First Avenue) is also an elevator building while the comparables were both elevator and walk-ups buildings (T, 1040-1045).

175. With respect to age and condition, 43-49 First Avenue was found to be fair to average condition, whereas the comparables averaged in good condition. He made no additional condition adjustment for age/condition. Leitner reiterated he weighed the same when he did the net operating income adjustment (T, 1044-1048).

176. Reviewing his valuation of 43-49 First Avenue (Px K and Px K-1, p 111), and cap rate, Leitner testified that the information obtained for the comparables were from primary sources not market data. The primary sources consisted of his own appraisals of these buildings and some comparables as well as from sellers, purchasers, brokers and their attorneys. He could not identify which of these primary sources were solely based on his own company's materials as opposed to other primary sources. But, he valued each building as a stand-alone in the July 2007-valuation (T, 676-689).

177. Leitner testified that in his approach in valuing the subject properties, he used the net operating income approach as a majority of the subject buildings had apartments that were rent stabilized/controlled. He relied on the net operating income approach, but used the sales comparables approach as a check on the former approach. Hence, his updated appraisals do not contained updated sales comparables. His updates only related to his most recent income/expenses (T, 1116-1118).

178. Another comparable used was 322-326 Grand Street. It was included in the adjustment grid for four (4) properties (Rx 40). Leitner was not aware that the comparable has been sold in an assemblage of other lots for development (Rx 50, Id., Only; Px K, pp 178-179). Moreover, he did not reference the other assemblage properties in conjunction with that comparable (T, 1048-1051).

179. Leitner relied on his information as to that comparable as it came directly from his office files, he did an appraisal of this very property and had direct communication with the buyer or seller and based on the income and expenses or operating on a continued basis, he was able to determine the purchase price. His analysis of that comparable did not weigh any attributions as a development site. He valued the comparable based on the rent stabilized/controlled apartment in place and treated the comparable as if the investor would continue to use it for a rental purpose (T, 1106-1108; Px K, pp 128-130).

180. Leitner determines a property is a comparable by considering whether it is a development site and took into consideration that very fact before deciding to use it. He used the same comparable in his appraisal of 6 Spring Street. He noted he did not appraise any of the subject properties as development sites other than the 96 Street property (T, 1051-1054).

181. Leitner also knew the broker on the sale of that comparable was Eastern Consolidated, but does not recall whether he used that broker as a primary source in his materials. Leitner maintains he has primary source information as to the net operating income for the comparable, calculated at $485,296.00. Moreover, had he referred to an offering plan from Eastern Consolidated he would not use it as a primary source as they typically show gross income and his appraisal seeks to reveal the "effective gross income" (see, Rx 47; T, 1055-1058).

182. Leitner sees a difference between gross rents, actual rents and net operating income. The former is the total potential gross, all rents that a property can derive, including ascribing market rent to vacant apartments. Deducting vacancy and collection loss one arrives at "effective gross income." Leitner then determines the net operating income or the GIM for

a particular comparable (T, 1109-1112).

183. Another comparable was the 259-261 Broome Street (Px K, p 125). He notes to the net operating income, but the primary source could not be recalled. He had no recollection of seeing respondent's document that indicated it was an offering plan by Consolidated Edison for the comparable (Rx 51 [Id., Only]) but he could not recall the broker on the sale of the comparable. However, Leitner opined brokers have an incentive for a high commission based on high value sale of a property and thus their memorandum and listings containing prices are self-interest assessments (T, 1059).

184. Leitner could not recall the number of rent stabilized/rent controlled apartments on the 259-261 Broome Street comparable; his appraisal does not reflect whether any of the 48-units were at market-rent. Leitner opined this property was nevertheless a reasonable comparable for the subject properties and referenced in the sale grid (Rx 40) (T, 1060-1061).

185. Leitner noted upon review of the updated appraiser for 324-326 East 66 Street (Px S and Px S-1), that the rent for a vacant two bedroom apartments $2,500.00, was a typo. He corrected it to read $2,200.00. He conceded the $2,200.00 was also reasonable (T, 1068-1069).

186. With respect to 324-326 East 66 Street, Leitner noted the superintendent was residing rent-free in an apartment (Px S-1), based on the rent roll provided to him. He ascribed a $5,200.00 payroll for part-time superintendent for that property. His $5,200.00 is based on the comparables. He also set aside a rent-free apartment for a superintendent of 159 East 99 Street, but not for the adjoining three properties on East 99 Street (155 East 99 Street, 157 East 99 Street, 161 East 99 Street) (Px Z-1, p 88; see also, Px AA, Px AB, Px AC). Rather he assigned pay roll for each at $5,200.00. He presumed the free-rent apartment was

additional compensation and that this kept the values of the properties lower. He also stated the owners reflected no actual salary for a superintendent (T, 1070-1077, 1095-1100).

187. With respect to his updated appraisal for 328-330 East 66 Street (Rx 53), which was more than $100,000.00 than his last valuation (Px R-1) (T, 1084-1085), Leitner noted to two New York City certified documents for comparables 200 Eleventh Avenue (Rx 54) and 305 East 85 Street (Rx 55) that indicated building floor areas used by Leitner (T, 1086). He was not familiar with an architect article on the 200 Eleventh Avenue property (Rx 56, Id., Only) (T, 1086-1094). Leitner opined mechanical and basement areas as well as parking areas are not included on FAR. But, Leitner reiterated the New York City documents (Rx 54, etc.,), reflect gross building areas (GBA) (T, 1102-1104).

188. Leitner identified a chart that summarized the addresses, the values, the renovation costs, the effective gross income, net operating income, the cap rates used in his appraisal reports (Px AH [Demonstrative Exhibit]; T, 662-663).

189. Leitner opined all of his appraisals are primarily based on income capitalization, not on sales comparison. He prepared a sales comparable analysis for each subject property. But, using the latter approach was not as important as his use of the income capitalization approach. The latter was important for reconciling a final value of each appraisal of the properties other than 96 Street property; he opined the "value indicated by the income approach represents a prudent investor's analysis of an income producing property." Thus, his need for an analysis of income, expenses, and all cap rates, was considered the more appropriate approach. His use of the sales comparison approach was used to validate the

income approaches (T, 1063-1064).[3]

190. As to the preparation of the materials and inspections, Leitner noted that his offices have approximately 18 appraisers; his group appraised more than a hundred tenement buildings in the last five years. As to the subject buildings in issue, Leitner inspected them along with another appraiser. He is familiar with the buildings (T, 674-675).

191. Leitner recalls signing each appraisal, that is, any appraisal signed contained his signature. His assistant Michelle Zell also signed the certification page. Ms. Zell also inspected the property and prepared the analysis for the report. Leitner understands that his certification of the report complies with the standards of the Appraisal Institute and although Ms. Zell is stated to have prepared the appraisal, Leitner testified he reviewed the same and was also an integral part in finalizing the appraisals. He signed them his capacity as both reviewer and preparer although the report does not specifically state that, this was his testimony. His testimony was the same as to the assistance provided by another associate appraiser, Melissa Sohn (T, 704-720). Leitner inspected every property, interior and exterior with on more of his assistants who accompanied him during each visit (T, 726-730). He identified a documents reflecting the associate appraisers' credentials (Px AM) (T, 1167-1169).

192. With respect to the development site, 223 East 96 Street property (Px Y and Y-1), Leitner valued the property separate from the other properties. He applied a land appreciation value, searching comparables and other land sales. He identified six comparables (6) and applied adjustments and arrived at a value per square foot of floor area ratio ("FAR"). The

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[3] As to the property located at 314 East 62 Street (Px T, Px T-1, 2), Leitner adopted the owner's projected monthly rent for Apartment 2A at $2,000.00; he concluded upon analysis that the same was reasonable market rent (T, 1064, 1105-1106).

six comparables ranged prior to adjustments between $303.00 to $450.00 per square foot of FAR (Px Y, p 105), and after adjustments from $303.00 to $423.00 per square foot of FAR. The average was $387.00 per square foot or $397.00 at median. He concludes the square foot average was $375.00 and values the site at $10,500,000.00. He then subtracts costs for demolition and values the property as a rental. His value is $9,900,000.00, which includes $500,000.00 for legal expenses connected with a buyout of the remaining tenant. Leitner's final valuation for July 2007 is the same for the subject property, his analysis did not change(T, 638-642).

193. Leitner estimates cost of construction of a building would be at least $5,000,000.00 and calculates that sum to be about $258.00 a square foot (using 19,360 square feet) (T, 734-737). Reviewing his $9.9 million appraisal for <u>223 East 96 Street</u> property (Px Y and Px Y-1), Leitner used one approach, the sales comparison. As to asbestos removal, confirming his awareness of the same from Nakrosis' memorandum, Leitner did not factor the cost of the abatement. Moreover, his $500,000.00 legal expenses was derived from his prior experiences. He opined applying his $375.00 a square foot to the 19,360 square feet noted in the memorandum and deducting demolition costs of $104,550.00 and legal expenses of $500,000.00, results in a net valuation of $6,655,000.00 for the <u>223 East 96 Street</u> property (T, 764-774).

194. Leitner was not aware of the Nakrosis memorandum (Rx 19, p 89 [John Nakrosis]) when he valued the site for March 2007. He learned of it after his initial valuations were completed in February 2008. Nakrosis' memorandum was not generated until June 2, 2008. After June 2008, Leitner reviewed it and updated his appraisal for <u>223 East 96 Street</u>

property. But, his valuation does not change. Leitner opined that his value remains the same on several grounds: (1) reasoned there may be the possibility of a variance for zoning; (2) possibility of assemblage of lots, creating a larger site to develop; (3) possible purchase of air rights; and (4) building that maximizes full FAR (T, 643-644, 669-670).

195. But, Leitner does not apply any discount to his valuation. He is not an expert in zoning nor an expert in complex zoning ordinances. He is not an architect (T, 700-701).

196. Leitner relied on the Yale Robbins Condo Sales Report (Px D Id., Only [Condo Data]), in his analysis of the value of condominiums/cooperatives. He opined the value per square foot of such apartments around 223 East 96 Street in July 2007 ranged was low at $800.00 and as high as $1,500.00 per square foot. This range depended on location, quality and age of the property, layout and amenities as gym, doorman, etc. His $800.00 square foot is the lowest range without any amenities. He also opined that the building at the square foot limit set out in Nakrosis memorandum (14,000 sellable space) would be approximately $900.00 a square foot, $100.00 more than the square feet for a building without any amenities. Applying the 900 multiple to 14,000, he values the development site at $12,600,000.00, before deducting demolition/construction costs (T, 648-654).

197. Recalculating his square footage at the price of $1,200.00 for 14,000 total rental square feet reveals gross value of $16,878,000.00, and deducting construction cost of $5,000,000.00, demolition cost of $104,550.00 and legal costs of $500,000.00, results in net value of $11,273,450.00 (using the comparable "Observatory Building") (T, 1169-1171)[4]. His

[4] Esposito did not do a survey of the condominium square foot values other than her awareness two luxury condominium projects (Carnegie Hall and The Observatory) commanded between $600.00 and $1,000.00 a square foot (T, 309-327).

valuation of $9.9 million for the East 96 Street property (Px Y and Px Y-1, p 92), is lower.

198. Leiter opined two of Esposito's comparables for the development property were not reasonable without adjustments. He would impose an adjustment for 2023 First Avenue property. But, he also testified he would not have used it because it was located in East Harlem and the 233 East 96 Street is not in East Harlem. Leitner would apply an adjustment factoring in the average price per square foot for condos in the East Harlem neighborhood compared to condo square foot pricing in the neighborhood of 223 East 96 Street . He also would make substantial adjustment to the 2023 First Avenue property, finding it was directly across from a NYCHA housing project (Px AG [Sanborn Tax Map]; T, 655-657; see also, Levy testimony at T, 2435-2436).

199. Leitner maintains there is no NYCHA project directly behind the 233 East 96 Street property (T, 1086-1094), that the building directly behind the site is a luxury residential building, One Carnegie Hall (T, 1150). He could not recall any NYCHA projects near or about the 96 Street property (Rx 57, Id., Only]) (T, 1209-1212).

200. Leitner testified that Esposito's second comparable at 101 Street and Lexington Avenue (known as 1591 Lexington Avenue), was also East Harlem and he would apply an upward adjustment because that comparable was inferior. But, he also would not use that comparable for the 96 Street site. Leitner testified that no developer would look at a comparable north of 96 Street property if sales comparables south of 96 Street property exist. Leitner opined market participants make the market and they do not analyze land sales above 96 Street property. An appraiser should not "make a market" by considering land sales north of 96 Street property. The appraiser "is supposed to reflect the market."

It is his opinion appraiser are suppose to mirror how the market participants reflect the market (T, 659-661, 751-757).

201. Leitner uses six comparables for the development site (Px Y and Y-1, pp 92-105) that he gleaned from a universe of land sales in Manhattan south of 96 Street property. He selected six from data he testified was accurate and from primary sources (T, 774-782).

202. The first comparable at 305 East 85 Street (Px Y, p 92), consisted of a proposed development of 105,000 square feet. The subject lot was zones commercial ("C2-8A"), and allowed for a ten FAR. But, that comparable as constructed could not be built at the 223 East 96 Street site. Leitner made adjustments to the comparable for location, its utility, size (T, 782-785, 800-802), but made no adjustment for the difference in zoning (T, 799).

203. He noted the comparable had retail/commercial frontage on Second Avenue. But, he was not familiar with any permits for the comparable site. The certified New York City permit (Rx 28) reveals 115,220 square feet was approved for the site rather than the 105,000 noted in his appraisal report. But, Leitner stated the 115,200 square feet was inclusive of mechanical areas, which are not included in FAR. Mechanical and basement areas as well as parking areas are not included on FAR. However, they are included in the GBA (T, 1102).

204. Including the 115,200 lowers the price per square foot of the buildable area used. He also used the sale price of $45,250,000.00 for this comparable. But, New York City certified deed records reveal the sale price was $43,004,662.00 (Rx 29). Assuming the 115,200 square feet was only FAR and the sales price $43,004,662.00, the price per square foot for the comparable would be $373.00. Based on the above, coupled with the adjustment for the

comparable, and applying the $373.00 figure, his square foot price drop from $373.00 to $299.00 (T, 785-804).

205. Leitner noted the source reference by respondent (Rx 29), was a deed which he does not consider a primary source. He relies on broker, seller, buyer direct information and understood the difference of $43,004,662.00, was an escrow fund not recorded on the Deed (T, 1173-1181). It is his practice to rely on deeds as leads and following up with brokers, owners, buyers, etc., which he did in follow up as to the two building sale for $18,000,000.00 (T, 1174-1175; see also, T, 1140-1147).

206. He does not estimate square footage in his appraisal. His measurements are pulled from New York City certified documents (Buildings Department) with factual numbers. He obtained the square footage for property at 440 East 58 Street from the New York City Buildings Department. An estimation of square footage above the factual square footage alters calculation of expenses per square foot and expenses would be larger, thereby decreasing value (T, 1163-1165).

207. The second comparable was 446-450 Eleventh Avenue (Px Y and Px Y-1, p 94), located opposite of the Jacob Javits Convention Center at West 37 Street, which has 100 feet of frontage on both Eleventh Avenue and 37 Street. Leitner found this site inferior to the development site and applied a 5% upward adjustment. He opined the neighborhood of the comparable is mostly commercial and lacks neighborhood services, public transportation and large commercial spaces (T, 1187).

208. The comparable is zoned commercial with a ten FAR. Leitner noted 98,750 square feet building could be constructed on that site. He was not aware that two buildings were

constructed after the land sale. He conceded the comparable had different permissible uses than the 96 Street property. The comparable allows for commercial/office building, while the development site best and highest use is residential (T, 1184-1185). But, Leitner makes no adjustment for the difference in zoning (T, 805-812).

209. The third comparable at 148-150 East 24 Street includes two story garage with 90-car capacity. Leitner's analysis does not make an adjustment for the parking garage since he noted it was slated to be demolished. This comparable is zoned commercial. But, he makes no adjustment. He testified it does not mean that this comparable -without any adjustment - is the most comparable. This comparable has a per square foot price of $303.00 (T, 812-817).

210. The fourth comparable at 180 East 93 Street has a negative 5% adjustment because it is in a superior location than the subject property (T, 817). The fifth comparable at 200 Eleventh Avenue at the corner of 24 Street and is located in the "highland corridor" district. Leitner was not familiar with recent construction or proposed construction in the area, e.g., deluxe hotels or residences (Rx 30, Id., Only [news article]; Rx 32, Id., Only [NY Post Article, Oct., 7, 2007]).

211. This comparable is zoned commercial, but he understood there was a proposal to construct a 24-story residential building on that site. He noted a building on Eleventh Avenue with an unobstructed view of the Hudson River would be attractive property whereas 233 East 96 Street property has no view of the Hudson River. Leitner makes a downward adjustment of 5% to offset by the lack of subway access relative to 96 Street property and desirability. He concludes this comparable is inferior to the subject property (T, 817-828)

not as desirable as the 96 Street property (T, 1186).

212. Leitner maintains the building area for the above comparable is 55,131 square feet, with a FAR of 7.5 times the building area of 7,351. He was not aware that New York City certified documents list a permit for 60,964 square feet (Rx 33). He was not sure whether the difference was inclusive of basement and mechanical areas. He noted the permit (Rx 33) listed total construction floor area of 60,964 square feet, not gross building area. Using the 60,974 as the FAR reduces the price per square foot from $402.00 to $364.00 (Px Y, Px Y-1, p 105), and applying his adjustments (time), results in a square foot price of $382.00 (T, 828-832).

213. Leitner would not use "construction floor" area to appraise a property and in his 23-years in the profession never new of an appraiser that measured construction floor areas for determining FAR to arrive at a price per square foot, which he noted also would include mechanical areas, ceiling space, parking (T, 1188-1190).

214. Leitner's final comparable at 385 Third Avenue is zoned commercial. The site is reportedly planned for a 49-residential unit with retail ground floor space. Leitner makes no adjustments for the retail space. His appraisal lists the space at 44,392 square feet. Leitner was not aware that the actual floor area is 59,790 square feet (Rx 34). Applying the 59,790 square feet reduces the price per square foot from $366.00 to $272.00. But, he also made an upward adjustment for time and the that increases the value from $272.00 to $286.00 (T, 834-839).

Respondent's Rebuttal Expert Witness: Howard C. Gelbtuch re: Leitner's Valuation Method & Valuation

215. Howard C. Gelbtuch ("Gelbtuch") testified in rebuttal to Leitner's valuation. He is a real

estate appraiser - like Esposito as well as a consultant and a licensed broker. He has 35-years of appraisal business (Rx 88 [Gelbtuch Curriculum Vitae]) and principal of Greenwich Realty Advisors. He is also designated a MAI, and member of the Appraisal Institute (T, 2468-2472). Gelbtuch has appraised hundreds of multi-family buildings, which the respondent's first expert Esposito already testified to (T, 2473; **FINDINGS OF FACT**, ¶¶ 3-6).

216. Gelbtuch was not retained to value the subject properties, Esposito was paid to complete that task. Gelbtuch's opinion is weighed only as rebuttal to Leitner's appraisals. Gelbtuch's opinion cannot supplement Esposito's opinion testimony. It was noted at certain instances by the Court that Gelbtuch's testimony appeared to be more direct testimony than rebuttal. The respondent had an ample opportunity to ask the same questions on direct from her expert, Ms. Esposito (T, 2503).

217. During his cross examination (February 18, 2009), Gelbtuch revealed he had communications with his client's attorney (respondent's attorney) of his direct testimony and in anticipation of cross examination. He testified his conversations centered on his preparation for cross examination. Gelbtuch conceded he did further research to back up his direct testimony and conferred with his client's attorney regarding the same; he did additional research related to his direct testimony on income, expenses, cap rates, looking further than he had a "chance to do prior to" his direct testimony. He shared his research with respondent's attorney and discussed with the attorney "questions [respondent's attorney] believed [petitioner's attorney] might ask . . . during cross examination and Gelbtuch "attempted to answer them to the best of [his] ability" (T, 2589 [underscore added

for emphasis]).

218. Gelbtuch also prepared notes for his cross examination (Px BC [Id Only, Gelbtuch's Notes Feb. 18, 2009-Cross Examination]) (T, 2590). Petitioner moved to strike all of Gelbtuch's direct testimony, but it was denied, although the credibility of Gelbtuch's opinion is in issue (T, 2590).

219. Gelbtuch reviewed Leitner's appraisal reports of March and August 2007. He opines that the valuations by Leitner were optimistic in the way the rents were treated and optimistic as to low cap rates employed. But, he opines the cap rates are not supported by market evidence and concludes Leitner's appreciation rates are too high, which led to cap rates that were too low and therefore value too high. His specific conclusion is the rents should be lower. In the end, he seeks to "rebut" the values pressed by the petitioner. As to the development site, he seeks to rebut the valuation as too high (T, 2475-2478).

220. Gelbtuch maintains Leitner misused the sales comparison approach and voided its effectiveness by using it as a check against his income approach (Rx 40 and Rx 41). He opines the sales comparison approach is suppose to value real estate separately from income approach and that it was wrong for Leitner to base his sales comparison approach on income for each property rather than weighing physical attributes, location, condition, date of sale of the properties (T, 2478-2481).

221. He notes Leitner made no adjustments on the March 2007-appraisals (which he simply incorporates by reference in the August 2007-appraisals) other than the net operating income adjustments and that Leitner improperly employed a "different application of the income approach." Gelbtuch opines that what should have been done was to adjust the

properties for sale, size, time, condition, age, independent of income level of each property (T, 2478-2481).

222. Gelbtuch reviewed Leitner's appraisals and certifications. He noted the appraisal for 43-49 First Avenue (PxK-1), was not properly certified by Leitner. Gelbtuch does not know what Leitner testified too, but just reading the signature where it appears, he opines nothing in the report reveals Leitner also inspected the properties. Thus, the certification is a departure not permitted by USPAP regulations (Rx 24 [Id., Only]; T, 2482-2483).

223. But, he did not know whether Leitner personally inspected the properties and prepared reports along with his office associates (T, 2578-2581). Esposito also testified she did not inspect the interiors of the buildings, she only saw the exteriors while her husband personally inspected in one day all of the properties, basements to roofs (T, 49-52).

224. During cross examination, Gelbtuch compared Leitner's March and August 2007-reports (see, PxAA and AA-1) and confirmed both reports used the same methods of valuation, income and sales comparable approaches and that Leitner stated therein he gave the greatest consideration to the income approach in valuing the subject properties - not sales comparison (T, 2575-2577).

225. Gelbtuch confirmed in the August-appraisals Leitner indicates the updated appraisals were done under the income approach and that Leitner trended rents in both reports, changed the reserve amount to segment out the legal and professional fees in the August 2007-reports. However, there were no other material changes from the earlier and updated reports, excluding the 96 Street property (T, 2575-2577).

226. Gelbtuch learned at the hearing that Leitner's March 2007-appraisals were done while he

was retained by both EGA and FAV with the consent of the principals and to do a joint appraisal (Px I, H and J [retention letters]; T, 2578-2581).

227. As to the trending of rents forward, Gelbtuch noted Leitner did not trend forward expenses, which are noted in each of the updated appraisals (August 2007), expenses were not trended forward (see, K-1, p 4). For example, reading the 43-49 First Avenue (Px K-1), appraisal report, Gelbtuch understood that Leiter trended rents forward for a 12-month period (August 2008), resulting in approximately $12,000.00 of overstated rental income, with no expenses trended forward from that property (K-1).

228. When asked if Gelbtuch understood that Leitner had "projected the subject [property's] operating expenses for the stabilized year based on the owner's historical expenses for 2006" (see, Px W, p 96), Gelbtuch interpreted "projected" to mean to look forward, and not that Leitner estimated those expenses (T, 2582).

229. Rather, Gelbtuch opines that his research (Px BC) revealed the average expenses per square foot basis between 2005 and 2007 for New York City apartments similar to the subject properties went up. But, his information was obtained from data provided by owners of buildings to the New York City Rent Guidelines Board, and generally in the form RPIEs (T, 2591-2597; see also, **FINDINGS OF FACT**, ¶¶ 18, 128).

230. He compared Leitner's projected increase in expenses for the subject properties over the comparables average per square foot basis (see, e.g., Px W, p 101 [440 East 58 Street Appraisal]), and opined Leitner's average exceeds the comparables by about 24% per square foot basis and per unit basis. He criticizes Leitner's projected expenses as they exceed the average expenses per comparables by more than 46% (T, 2591-2597).

231. Gelbtuch understood the permissible rent controlled and rent stabilized rents are 7.5% for rent control (with adjustments for field cost, labor pass-along) and 4.25% or 7.25% for rent stabilized depending on 1 or 2-year extensions. He understood the average expense increases for 2005 and 2007 was 8.4 % and 4.7%, respectively, for a total of 13.1%. He considered vacancy and capital improvement for rent stabilized apartment would add 2.5% more to stabilized rent on an annual basis (or 1/40th). Gelbtuch did not have any personal knowledge (he did not inspect apartments) of the interior condition of <u>43-49 First Avenue.</u> He confirmed a vacant apartment allows for a 20% vacancy rate increase over the old rent and with a two-year lease extension adds another 7.25% on top of the new rent (T, 2599-2608).

232. Gelbtuch understood Leitner recorded expenses for 2006 for each subject property and compared them to 2005 expenses for comparables (<u>see, e.g.</u>, K-1, pp 110-116), thus using 2005 and 2006 expense data to estimate the 2007 expenses (T, 2485).

233. He noted the total operating expenses (<u>e.g.</u>, K-1, p 115), of comparable properties generated by Leitner and the conclusion that the subject property's square feet basis fell within the range of the comparable expenses. However, Gelbtuch opined that one subject property's square foot expense (K-1), was $1,000.00 less than the lowest comparable expense. Hence, he concludes it was improper to exclude the trending of expenses for the subject properties because Leitner looked backwards with 2005-2006 expenses for comparables and mixed them with income looking forward (2008). Thus, he opined the result was a high estimate for net operating income and that increased value that was too high (T, 2484-2487).

234. He opined trending forward of rent without trending expenses results in a difference of

value estimated by Leitner to total $84,200,000.00, rather than Gelbtuch's estimation of $80,800,000.00 (Rx 89 Id Only) for the same properties (T, 2487-2494, 2558).

235. Gelbtuch opined that Leitner's lowering of the vacancy rate from 3% to 2% (PxK-1) was literally a 33% decrease in the rate. But, he opined there was no material change in the vacancy rate for the time period to support a decrease to 2% and lowering the vacancy rate gave a higher operating net and higher value. As to the treatment of reserve per unit[5] (PxK-1), and Leitner subsequent separation of legal and professional from the capital reserves, Gelbtuch opined the July 2006-reserve amount ($200 to $300), was too low (although he finds the legal/professional fees of $10,000.00 a year reasonable) (T, 2495 - 2504).

236. He opines Leitner's purpose was to increase value by lowering expenses and in turn increasing net operating income. When asked whether that was still the case where Leitner increased management fee from 3% to 5%, thereby increasing expenses, Gelbtuch opined the increase was not supported by the market, which he opined was "below market." He concludes rental income for two apartments for 43-49 First Avenue was over stated, i.e., Apts., 5H of $3,500.00, when the last lease had rent at $787.00. This resulted in rent being overstated by $2,712.00 or $32,544.00 per year. Gelbtuch opines Leitner's use of overstated rent, lower vacancy rate, higher management fee, mixed expenses and trending rents and not expenses increased the value by more than $787,953.00 of 43-49 First Avenue. (T, 2495 - 2504).

237. Gelbtuch also opines rent was overstated for apartment Apt 2Q. He concludes the rent for

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[5] Again, where there is testimony by Esposito that covers issues such as reserve rates noted in Leitner's reports, Gelbtuch's opinion is simply cumulative and supplementing; it is not rebuttal testimony.

apartment 2Q should have been no more than $1,500.00 (after applying a vacancy rate increase) and the $2,000.00 allocation was high. Applying the same analysis from apartment 5H, Gelbtuch concludes the overstated rend increased the value to 43-49 First Avenue by $123,482.00 (T, 2495 - 2504).

238. Gelbtuch criticize Leitner's similar treatment to other properties, such as, 440 East 58 Street (Px W-1) and the garden apartment. Like respondent's first expert, Ms. Esposito, Gelbtuch also inspected that property and testified it was a two level apartment for which Leitner applies rental income for the first floor level of the premises. Based on his own observations of the interior he opines Leitner over valued the market rent ($5,000.00 per month) for this three-bedroom apartment (T, 2495 - 2504).[6]

239. Gelbtuch opines the garden apartment rent is more like $4,000.00 a month. Based on his factual observations, coupled with his expert experience, Gelbtuch opines Leitner's valuation of that apartment market rent is not reasonable. He concludes that factoring an overcharge of $1,000.00 of rent, Leitner overstated the value by $12,000.00 a year and using Leitner's other adjustments increased the value of the 440 East 58 Street by more than $300,000.00 (T, 2504-2509).

240. Gelbtuch concedes the property in issue is considered to be in the Sutton Place neighborhood (Px AL [Id Only]), and that it is a desirable neighborhood (T, 2608-2610). But, opines the $5,000.00 rent for the three-bedroom garden apartment is not reasonable.

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[6] But, respondent expert, Ms. Esposito testified the garden apartment was worth $3,500.00 a month. Gelbtuch was testifying to an "independent inspection" which had already been done by respondent's first expert, Esposito and for which she testified of her valuation based on the inspection. It appears to the fact finder that this branch of Gelbtuch's testimony is not rebuttal, but improper direct testimony (T, 2505-2506, 2509).

He could not specifically recall what document he relied on to render his opinion other than it looked similar to the document marked for identification at the hearing (Px AE Id Only, [Citi Habitat Rental Market Update 3d Qtr 2007]; T, 2611-2626).

241. As to Leitner's appreciation rates and cap rates (PxAI and/or AH), Gelbtuch noted the following: (1) the appreciation rates varied from 25% to 50%; and (2) holding period was for a 10-year term. He opined the rates were too high and the impact was to make the cap rates low and that increased the values of the properties (T, 2534-2545).[7]

242. Gelbtuch concedes that cap rates are influenced by supply and demand and where supply exceeds demand, cap rates are pressed upward and if vice-versa, cap rates are pressed downward (T, 2635-2636).

243. Gelbtuch opined that using a market approach based on a history of sale prices of similar properties and his independent analysis of income approach, the appreciation rates are lower.[8] Using his own notes (n.b., But, how about Esposito's? [emphasis added]) for both cap rates and sales of properties for the first half of 2007 (Rx 90 and Rx 91[9] [Gelbtuch notes re: appreciation rates]; Rx92 Gelbtuch notes re: building sales 6 month period]), Gelbtuch opined the market was healthy at the relevant time with 178 sales. However, Gelbtuch does

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[7] Petitioner's attorney objected to this testimony on the ground it was covered on respondent's direct case with its own witnesses (T, 2534), that it, Gelbtuch's testimony on appreciation rates and cap rates was not proper rebuttal. The objection was noted and will be weighed (discussed, *infra*).

[8] Sounds more like what Esposito testified about, rather than what Leitner opined on.

[9] As to Rx 91, incredibly on cross examination, Gelbtuch testified he "saw this document" but did not suggest that he "relied" on it, although the very document was marked in evidence by the respondent's attorney as evidence to support Gelbtuch's direct testimony. Some answers by Gelbtuch during cross examination appeared evasive (see, e.g., T, 2635-2636).

not amplify whether his 178 sales represent 10, 20, 30, 50% of available apartment buildings or 1, 2, 4, 8% of the apartment buildings (T, 2534-2545). .

244. It is his opinion that the appropriate appreciation rates for all properties and the properties downtown, is 30%, noting he found various appreciation rates that ranged from 2%, 3% and 17% during the years of 2005 and 2006, but found the lowest and highest insufficient are not sustainable and considered the 3% over a 10-year period. Hence, his 30% rate (T, 2534-2545).

245. Gelbtuch opined the appreciation rates for the Spring Street and properties was 35% for the first two and 30% for Mott Street property (Rx 94 [Id Only, data on appreciation of properties Spring Street]) because there is greater potential for downtown property. He rejects Leitner's 50% appreciate rate for the Spring Street properties as too high (T, 2546).

246. He concedes the upside of appreciation rates reflects anticipated increase in value. Gelbtuch notes one reason why he assigned a higher rate for the downtown properties than the other properties, coupled with his judgment in the field. He applied a higher appreciation rate for only two of the eighteen (18) properties, and opines it is reasonable based on how he interprets the market and how it describes value for all of these properties. Indeed, Gelbtuch looks first at the appreciation rates for these properties to arrive at his cap rates- this was one approach used (T, 2637-2640).

247. With respect to appreciation rates and rents, Gelbtuch compared the average rent per unit charged on the properties and the existing average per unit market rents charged for the Spring Street properties (Px L and Px L-1) and calculated a 210% difference between the two. He compared average rent per unit and average market rent per unit for the property

located at 341 East 76 Street (Px X and Px X-1), calculating a 37% difference. Although a marked difference in the upside for rents for the downtown properties, Gelbtuch would not agree there was potential of more rent from the downtown properties. He concedes the Spring Street properties had greater potential for a buyer over the other (demand over supply), but opines the appreciation rates have other factors and 50% was still high. His testimony is the same as to the absence of an upside potential of rent for the properties at East 99 Street (Px AB and AB-1) (T, 2641-2649)[10].

248. Gelbtuch compared ACRIS documents dated April 2003 and January 2007 for 145 Spring Street, represented to the Court as a comparable used by Leitner. The ACRIS documents reveal the sale of the 145 Spring Street property in 2003 and 2007 (Px BI and Px BJ [145 Spring Street]) and the first sale was for $7,035,000.00, while the second sale four years later was for $13,250,000.00. This comparable was located within the same vicinity of 6 and 8 Spring Streets (Rx 6 and Rx 7). The appreciation for that property was 22%, but Gelbtuch rejected that property as a comparable to the subject properties. He noted the 145 Spring Street building may have had seven apartment units, it was also an elevator building and zoned as an "artist residence" classification was "D-2" (T, 2661-2667).

249. As to cap rates, Gelbtuch refers to Leitner's appraisal report for 43-49 First Avenue (Px K and Px K-1, pp 125-135), and averaged all of the cap rates to a 4.9 cap rate for uptown

[10] Two documents were marked (Px BE and Px BF), as they are ACRIS documents regarding 176 and 178 West 82d Street, but no material questions were asked about them (T, 2651-2653). Another two documents, regarding a property which was not demonstrated by petitioner to be a comparable in any report in evidence nor a comparable to the subject properties (Px BG and Px BH) were marked. The testimony solicited from respondent's expert appeared immaterial (T, 2657-2660).

properties and 4.7 for downtown properties. Gelbtuch testified that the 50% appreciation rate was too high, instead he uses a 35% rate of appreciation, which results in a higher cap rate. Gelbtuch testified that the higher the cap rate lowered the value of the very same property (what Esposito also sought to contradict). Gelbtuch opined all eighteen (18) income-producing properties' cap rates would be lower than Leitner's cap rate estimations and the collective value of these properties would be reduced by $6.2 million from Leitner's valuation of more than $84.2 million or adjusted to $78 million (T, 2546-2555).

250. Gelbtuch summarized his adjustment to Leitner's valuation (Rx 93 [Demonstrative Chart, Final Reconciliation of Adjustment to Leitner's Values]) that included all of the adjustments made by him (T, 2556-2563).

251. With regard to the 96 Street property valuation, Gelbtuch opined Leitner used the wrong square feet to build at the site, and thus the wrong FAR. He also found that a housing project adjacent to the property impacts the value. He concedes a tall residential tower (One Carnegie Hill) wraps along the side of the 96 Street property. He identified three photographs that depict a view of 97 Street looking south with a parking garage and One Carnegie Tower. He noted the parking garage abuts the rear of the 96 Street property (Px BD [Photo of One Carnegie Tower with Garage rear]) (T, 2627-2629).

252. Gelbtuch maintains Leitner incorrectly relied on 28,090 as the square feet for the development site as buildable space or FAR, when the proper square foot is 20,107. He understands that "Sliver Law"[11] restricts height of the building and requires a rear yard and

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[11] Gelbtuch was also aware of Nakrosis' calculation of the FAR, but was being objection of his FAR calculation (T, 2527-2528).

site measure of 29 feet wide and 101 feet deep. He opines that the result is 2,004 square feet per floor up to nine floors and an additional floor with 1,612 feet, resulting in 20,107 feet of FAR. The per square foot would be less than Leitner's allocation of $375.00. Gelbtuch opines the value of the site is more like $280.00 per FAR or building square foot (T, 2510-2516).

253. Gelbtuch questioned Leitner's comparables. As to the 305 East 85th Street comparable, he takes issue with the sale price (but see, T,1140-1147, 1173-1181), for which Gelbtuch notes an adjustment from $431.00 to $410.00 per square FAR. Gelbtuch also adjusts by 30% a second comparable for location and utility (15% each) and that negative adjustment he allocates to his $410.00 per square FAR, which lowers value to $287.00 FAR for that comparable (T, 2516-2517).

254. Gelbtuch adjusts the value for another comparable located at 446-450 11th Avenue, which he opined he would not used as a comparable being that its location was on the west side, vastly different, zoning was limited to commercial and not residential and located near the Hudson Yard District; he would discard the sale data (T, 2517-2518).

255. He rejects the third comparable at 148-150 East 24th Street, which sold for $303.00 per FAR on the ground it was much wider than the subject site, in a better location - across from Baruch College (CUNY), and had superior features that required a -25% , reducing the FAR to $227.00 (T, 2518).

256. Turning to the comparable at 178-180 East 93rd Street, Gelbtuch noted it is superior location than 96 Street site, which was closer to FDR Drive traffic, located in Community Board 11 or East Harlem. Gelbtuch does not consider East Harlem to be a better location. He noted

the sale date for that comparable was in 2006. He made several downward adjustments with a net -10%, reducing the FAR to $380.00 (T, 2519).

257. He rejects the suggestion that the 96 Street property is on the northerly end of the Upper East Side. It may be located near very good transportation, but rejects the notion that this site is a desirable neighborhood in close proximity to the Manhattan employment center or midtown. He concedes the area is near easy access for shopping, recreation and cultural facilities (T, 2629-2630).

258. However, although he deems East Harlem not desirable compared to other neighborhoods, he understands that cooperatives located in One Carnegie Center, adjacent to the 96 Street property, sold for more than $1,000.00 a square foot (T, 2631-2633).

259. Gelbtuch reduced the value for the comparable located at 200 11th Avenue. He noted this comparable was in a "very, very , hot" location and desirable (Chelsea section of Manhattan) and zoned residential. The site was also located on a corner. The apartments on the site after its development sold for $5.7 million to $15 million and he averaged the value at $2,400.00 to $4,400.00 per square foot. Thus, he found this comparable was vastly superior to the subject site. He opined the FAR was about $2,401.00 (T, 2520-2522).

260. Turning to the comparable at 385 Third Avenue, Gelbtuch opined the site between 27th and 28th Streets was a superior location to the 96 Street site and with his adjustments ranging from 5% upwards to 20% downwards with a -40%, he arrives at a FAR of $293.00 (T, 2523-2524).

261. In conclusion, Gelbtuch opined the FAR allocable to the 96 Street site is $281.00, but that FAR involves property Gelbtuch included which was not considered by any witness on

respondent or petitioner's direct case. He extrapolated from his analysis "sites" he factored in which were never testified to by any of the parties' on their direct cases.[12] Thus, using the five Leitner's comparables with his adjustments averaged (minus the one he did not even consider, located at 35 Street and 11th Avenue) $285.00 per FAR. He multiplies by his 20,107 square feet to arrive at his valuation of 96 Street property of $5,730,495.00 (T, 2526).

262. This does not include the demolition cost nor the "buy out" of the last remaining tenant. He deducts demolition and legal expenses of $604,550.00, resulting in an adjusted value of $5,095,450.00, which he rounds off to $5,100,000.00 (T, 2527-2528, 2557; Rx 93 [Final Reconciliation of Adjustment to Leitner's Values]).

PART TWO: VALUATION OF FAV & EGA AS ONGOING -CONCERN

Respondent's Experts -Discounts Lack of Marketability & Built-Up In Gains Tax & Valuation of Interest in EGA and FAV

263. Ms. Joan Lipton ("Lipton") testified on the respondent behalf. But, her testimony was limited. She provided no expert opinion as to the exact value of EGA and FAV. She identified her curriculum vitae (Rx 59), and testified of her education background. She is a Certified Public Accountant and accredited in business valuation as well as her 20-years of experience in valuating close corporations. She testified about the valuation methodology and "fair value" proceedings pursuant to Business Corporation Law § 1118 ("BCL"). Lipton does not opine on the "fair value" of the parties' interest in EGA and FAV. Her report encompasses entity-level discounts consisting of built-in capital gains and

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[12] Which provides ample reason to conclude Gelbtuch's testimony is more like direct testimony and not rebuttal (T, 2523-2525).

discounts relating to lack of marketability, distinguishing them from discounts relating to shareholders and minority interest (Rx 60) (T, 1435-1449).

264. Lipton knows the history of EGA and FAV and the corporate structure, C-Corporations. She noted the tax attributions that pass directly to the shareholders. She specifically noted that the "fair market value" of the subject properties, which she has no opinion of, is distinct and different from the legal construct imposed by BCL§ 1118-a of "fair value" (T, 1450-1451).

265. Lipton knows all of the properties purchased years ago (1960s) and that the corporations are basically real estate holding companies. Moreover, the properties have virtually all depreciated and there is *di minimus* basis. The properties have appreciated in value as they are all real estate and this gives rise to considerations relating to discounts. She noted as EGA and FAV are closed corporations and lack the marketability of shares. She was aware of a dispute over a percentage ownership but the issue of whether the petitioner was still a 50% holder of certain interest has been determined by the Appellate Division (*Giaimo v EGA Associates Inc*., 68 AD3d 523 ; T, 1450-1452).

266. Lipton explained her opinion premised on a willing buyer and seller in two forms of investments. She referred her diagram (Rx 61 Id., Only [diagram re: Lipton hypothetical]) and explained the difference in motivations for investors with respect to buying an interest in a C-Corporation viz-a-viz share purchase and a direct purchase of real estate property.

267. She understands that the instant valuation under BCL § 1118 [a] requires the shareholder to be paid his or her interest in the entity as if it is an ongoing concern without any consideration of a discount for minority interest. She opines that in this "fair value"

valuation she can apply a "discount for lack of marketability" ("DLOM") (T, 1452- 1457).

268. In articulating her opinion, Lipton testified she did not review cases that involved partnerships, only C-Corporations. Nor did she review Estate matters. Her cases are limited to application of BCL § 1118 (T, 1494).

269. She cites to several cases in which she bases her analysis and opinion that DLOM can be applied in BCL § 1118 [a] valuations (*Wechsler v Wechsler*, 58 AD3d 62, *appeal dismissed* 12 NY3d 883; *Friedman v Beway Realty Corp*., 87 NY2d 161; *Matter of Seagroatt Floral Co.*, 78 NY2d 439, 442). But, she is also aware of other cases (*Cinque v Largo Enterprise*, 212 AD2d 599; *Whelan v Dunetz*, 299 AD2d347) that indicate otherwise and that she references in her testimony and report (Rx 60;T, 1538, 1561).

270. She has no recollection of reading cases that hold DLOM is not applicable to C-Corporations that owned only real estate (T, 1494-1495). She would apply DLOM to EGA and FAV (T, 1495-1501). She also would apply a discount for built-up in gains tax ("B.I.G.") associated with C-Corporations (T, 1559-1560).

271. Lipton would apply a discount for B.I.G. in the fair value analysis. She considers B.I.G. relevant to her valuation of fair value (B.I.G. relates to highly appreciated property, the built-in tax associated, and the difference between those asset values and the nominal tax basis as to the subject properties). She understands the properties are valued in the millions and have nominal tax basis. Thus, a B.I.G. tax impact likely be incurred by EGA and FAV.

272. She opines (Rx 60, pp 23-24) 100% of the B.I.G. is applicable and that will reduce the net asset value of EGA and FAV. She opines if the value of all real property is determined by

the Special Referee to be $58.6 million (an assumption), and the B.I.G. was $26.9 million (taxed at 46%), then that sum should be subtracted from value, leaving a net of $31.7 million, before addressing the fair value for EGA and FAV (T, 1458-1460).

273. Lipton opines a willing purchaser would offer to purchase EGA and FAV, but only along with a discount of the 100% of the B.I.G.. Although the purchaser does not pay the tax assessment at the time of purchase, July 31, 2007, the seller does by way of the 100% B.I.G.. She opines the any purchaser of EVA and EGA will be exposed to the B.I.G. as that is the risk assumed upon purchase of the stock and the capital gains that accompany the purchase. Her opinion of applying the B.I.G. does not change regardless of the period the purchaser intends to hold the properties. Her analysis is limited to fair value and not based on future conduct by the purchaser (T, 1461-1466).

274. Lipton identified potential tax liabilities, such as, double taxation in the C-Corporation structure and, thus, she considers a discount adjustment to valuation of the subject shares (T, 1466).

275. The purchaser of an interest in a C-Corporation may consider and weigh the issue of double taxation as an adjustment to price. Ask whether a buyer of EGA and FAV could convert the entities from C-Corporation to a S-Corporation after purchase to avoid paying a double tax, Lipton opined not in the hypothetical that she presumes is taking place here. She does not presume as does the petitioner that the respondent is the true purchaser and she may convert to a S-Corporation after buying out the petitioner to avoid the B.I.G. (T, 1531-1537).

276. She concedes it is possible the respondent would convert EGA and FAV to avoid the

B.I.G.. Lipton opines one cannot make that presumption under BCL § 1118 [a]. The expert must presume a willing buyer is from a universe of buyers. She cannot presume that after the valuation date the purchaser will convert the entities to S-Corporations to avoid the B.I.G. (T, 1484).

277. She further opines experts cannot assume that a willing seller is selling to a specific and unique buyer. She reiterated that the scenario presented by petitioner is not a "premise of value " (T, 1531-1537).

278. Lipton also applies a DLOM to this transaction because she opines shares of a C-Corporation are less marketable and there is diminished liquidity of shares, which affects value regardless of the percentage held by seller. She also weighs the hold-period, transactions costs, legal and accounting costs, and the due diligence required. She weighs the potential tax liabilities and disputes that a willing buyer considers when seeking a discount against value. But, Lipton does not quantify the amount of the DLOM. She rejects the notion that the DLOM is a minority discount (T, 1466-1470).

279. She understands that all appraisers in this proceeding have opined that the properties are to be held by the willing buyer for a hold period of ten years. But, Lipton testified the investor who purchases the realty on the open market compared to the investor who is purchasing an interest in the shares of EGA and FAV that hold the properties, are two different scenarios (T, 1517-1518).

280. She sees no relationship between the investor who buys on the open market realty and the investor who buys the share interest in the C-Corporation. She ignores the possibility that the both investors will hold the assets and shares for a ten year period to avoid the B.I.G.

(T, 1569-1571).

281. Lipton learned at the hearing of the circumstances of how both Leitner and Esposito were initially retained. She reviewed retainer letters (Px H, Px I and Px J), and learned Leitner was retained by both parties to appraise the subject properties, not to value the interest in EGA and FAV (T, 1520-1521).

282. Lipton was also aware the appraisers factored the marketing period after the valuation date as part of the properties' values. She understood the experts considered a deduction for time for marketing the subject properties (ranging from 9-12 months) (Rx 15, p 11).

283. She too factors a deduction for time of marketing (the holding period) as part of her analysis for DLOM (Rx60, pp 27-28). But, opines this is not double counting. She views the two as distinctly different: market time for the properties and marketing time for share marketing. She sees them as separate and distinct. She opines shares of EGA and FAV have a holding period as well as other risks that have to be taken into account in terms of a willing buyer who would consider the illiquidity risks associated with these shares (T, 1522-1530).

284. Lipton sees no double counting in her analysis of market exposure and DLOM for shares in EGA and FAV and respondent's expert appraiser's testimony of built-in market exposure for the properties. In her DLOM analysis, the buyer is purchasing shares in EGA and FAV as well as the risks associated with those shares, e.g., expense for due diligence, negotiating over value of share, time period of no sale, holding period where there are additional risks and transactions costs (T, 1570-1571).

285. Lipton agrees a willing seller (petitioner) may not want to sell shares with a 100% B.I.G.

or accept a DLOM, but that it is not up to the seller. One has to look at fair value in the universe of willing buyers, not just sellers, and if the seller wants to sell and the buyer wants to buy, both will have full knowledge that there is a universe of willing buyers who are not willing to pay more than the net asset value after 100% of the B.I.G. and DLOM and that is the value the seller will sell the interests in EGA and FAV. Her opinion is premised on a willing buyer going out and purchasing the same property without the embedded capital gain and the DLOM found in a closed corporations (T, 1502-1504).

286. Lipton believes a willing buyers can buy similar properties as those held by EGA and FAV without buying them through C-Corporations that are embedded with tax gains. She opines that the market has ample properties as those owned by EGA and FAV available for purchase in 2007 out of an inventory of more than 17,000 tenement buildings, approximately 2% of that number (T, 1546-1552).

287. Thus, Lipton opines a willing purchaser can go outside the corporate wrapper of EGA and FAV and purchase fourteen similar properties in 2007, rather than purchase an interest in the C-Corporations with the risks associated with the taxes. Under this market, Lipton opines a willing buyer would want the willing seller to agree to a B.I.G. adjustment and DLOM (T, 1546-1552, 1558-1559).

288. Lipton agrees no valuation premium or discount has any meaning until the base to which it is applied is defined and that to determine "fair value," one starts with the understanding of a willing seller and willing buyer in an arm length transaction with the seller offering and the buyer accepting an interest in EGA and FAV as ongoing concerns. She is familiar with restricted stock studies and DLOM, but did not use any such study in her report (Rx 60; T,

1510-1515).

289. Jeffrey L. Baliban ("Baliban") is another of respondent's expert and a consultant with NERA Economic Consulting. He was retained to determine the "fair value" of EGA and FAV. Baliban is Certified Public Accountant with more than twenty years of experience. He has a Master Degree in Economics (Rx 62) and holds a professional accreditation in business valuations (ABV).

290. He has valued thousands of close corporations. He has testified on valuation of stock in closely held corporations. Baliban's expert testimony is amplified in his two (2) reports, the first report has been supplemented by a second report (Rx 63 [Report re: FAV/EGA Valuation]; Rx 64[Report re: FAV/EGA Supplemental Valuation]) (T, 1578-1586).

291. In reaching his conclusion on "fair value" of EGA and FAV, Baliban maintains he did not rely on a "fair market value" analysis, documents, tax returns or opinions in his conclusion. However, he references documents in both of his reports that he relied on (T, 1586-1592).

292. Baliban also noted that EGA and FAV are real estate holding companies. He testified about the shareholder structure of EGA, treating the petitioner as a holder of 49.75% of the 200 shares of EGA, noting that before his death, Edward Giaimo Jr., sold 1-share to Janet Giaimo Vitale. Baliban valued the petitioner's interest in 49.75% of EGA (T, 1596-1598).

293. The Appellate Division-opinion of December 15, 2009 (*Giaimo v EGA Associates Inc*., 68 AD3d 523), has basically invalided the sale and the parties are now equal shareholders of EGA.

294. Regardless of the percentage of each party's share interest, Baliban does not weigh any controlling interest of shares nor make a deduction for minority discount or lack of control.

He does not apply an control premium in his analysis. Baliban treats EGA and FAV as C-Corporations and weighs that fact in his analysis. He notes the difference between the value of assets held by each corporation and shares of stock of each corporation (T, 1598-1600).

295. Baliban opines FAV and EGA as closed corporations have no little market for their shares. He notes the illiquidity of the stock and that a purchaser would seek a discount for the shares. Baliban has determined an appropriate standard of “fair value.” He uses the net asset value approach as the best method, rejecting the income method approach or market approach.

296. Baliban uses three steps: (1) he gathers the “fair market value” of the assets (cash, real estate, liabilities) to arrive at “fair market value” of the net assets; (2) he determines adjustments because he was not valuing fair market net asset value, and to the extent it impacted on value, he considers the “corporate wrapper impact”; and (3) after applying the adjustments, he determines an appropriate discount to reflect consideration of risks associated with illiquidity of shares (T, 1600-1602).

297. Baliban understands the legal construct of BCL § 1118 [a]. His analysis is what would a willing buyer offer to purchase the petitioner’s interest in EGA and FAV. He uses fair market value techniques, but does not employ a discount for minority interest. He notes a willing buyer is a willing buyer and looks for a return on assets, looking for a financial return and not interested in changing the corporate entity. Because the valuable assets of EGA and FAV consist of the realty, Baliban opines the best approach for valuating is the net asset approach and values both corporations as ongoing concerns (T, 1603-1608).

298. Looking at his report (Rx 63, exhibit 3), Baliban refers to his chart that reflects the net asset

value of EGA as of July 31, 2007. He lists assets, liabilities, and notes sources of how he arrived at the value (Rx 64). Referring to the balance sheet for EGA as of July 31, 2007, Baliban added other assets he understood were "damage claim receivables" he valued at $750,000.00, after deducting legal expenses supposedly incurred by respondent (T, 1609-1611).

299. Baliban is aware of a$750,000.00 claim for damages suffered by EGA to the 96 Street site, but no other information other than what he footnotes in his document (Rx 65 [exhibit 3, Note E]). He has not made an independent analysis to determine collectability or the validity of the claim amount. He knew nothing about the building, who told him, what was the claimed damage other than what he was told and he never saw the complaint 1674-1678).

300. Baliban was not aware that an action had commenced in 2004 against third parties for damages suffered at the 96 Street property (EGA Associates v HRH Construction, Index No., 111322/2004) and that it was settled in March 2008, before Baliban was retained and before the valuation date, July 31, 2007. The settlement was for $1,225,000.00, which Baliban knew at the time he completed his report (T, 1678-1690).

301. Baliban did not include that sum in his supplemental report and chart. Rather he relied on what existed before July 31, 2007, which was a "Board resolution" that listed as the "chose in action"[13] that a settlement of $950,000.00 would be acceptable. He reduced that sum to $750,000.00 after factoring in legal expenses (T, 1678-1690).

[13] Pronounce as "*shows*" in action, a french term which literally stands for an intangible claim or right to sue at law based on a claim of an ownership interest in or right in intangible property which is not in one's possession, but which is enforceable through legal process.

302. He testified he was not aware that his client, Janet Giaimo Vitale, had rejected the $950,000.00 as insufficient and sought more. But, he concedes had he known that fact, he would have considered it with respect to valuating the "chose in action." But, he does not value the "chose in action" in the amount that it was actually settled as it was impossible to determine at the time of the valuation date, unless the buyer and seller stipulated to add back the settlement sum on a balance sheet. But, he also includes the expenses incurred to obtain the $1,225,000.00 (T, 1678-1690).

303. He has no document for his estimate of $250,000.00 in fees. Indeed, he was not sure if expenses paid in the litigation before the valuation date was not part of his estimated $250,000.00, and ask whether ignoring that would amount to double-dipping (taking out fees that have already been paid), Baliban he would be adjust the estimation to reflect only the unpaid estimated expenses (T, 1678-1690).

304. The legal fees of $250,000.00 (Rx 65, note 1 and Rx 66, Note F), is based on what Baliban learned . He also testified he learned $117,861.00 was billed by the law firm Salibello & Broader LLP, but that sum was billed after the valuation date. He also allocates legal expenses from the law firm of Kostelanetz & Fink, but does not know when they were incurred, i.e., before or after the valuation date. He was told by his client that the attorneys were retained to do amended tax returns of EGA or FAV and understood it had to do with the issue of unreported income (T, 1692-1703).

305. Baliban also includes the sum $4,294,931.00 (Rx 1 [exhibit 5]; Rx 65), which represent cash assets from bank statements. He understands the cash was found in one of the buildings' basement and supposedly stashed by the parties' decedent brother, Edward P.

Giaimo, Jr., and unknown to the parties. He also includes securities held in a Merrill Lynch account on behalf of EGA. He further values a promissory note at $75,000.00 owed to EGA by the petitioner (the claimed loan is $150,000.00, which petitioner disputes in a separate litigation). Lastly, he adopts Esposito's valuations of the properties. Thus, the total value of EGA is placed at $57,171.960.00 (T, 1612-1615).

306. Baliban considers whether there is a potential "contingent asset," but does not include contingent assets on the balance sheet unless there is something more than risk and costs associated with the contingent asset. An expert valuator may include a contingent asset if he/she understands the nature of the asset, that value may exist, value is placed on the asset by the seller, and value is known at that time of the valuation date. However, a willing buyer will not pay full value if there is potential risk that is great and associated with the value or the event is too remote to happen. The buyer will seek a discount including the costs associated with the contingent asset (T, 1617-1620).

307. Where the risk is great or the event is too remote to happen, a buyer will not offer full value and will seek a discount or offer nothing for the contingent asset, unless the "willing seller" would accept a discount,(T, 1617-1620).

308. As to liabilities, Baliban accounts for security deposits totaling $253,604.00. He also accounts for unreported income that is presently under negotiation with the IRS (discussed, infra). He has no information as to the status, but counts it as a liability, relying on tax and accounting records for the last three years (2005-2007). He includes the interest incurred from those dates, but does not add tax penalties. He includes accrued tax expenses related to 2007-tax and he understands were paid in 2008, but only as of the valuation date. Finally,

he accounts for accrued legal expenses understanding it represents work required to complete the amended tax returns up to the valuation date (discussed, *infra*). Based on the above deductions, Baliban testified EGA has a net asset value of $34,326,076, before applying any discount (Rx 63; Rx 65 [EGA Latest Balance Sheet]) (T, 1620-1623).

309. He understood - either from the client or her attorneys - that over a period of time the decedent, Edward P. Giaimo, Jr., skimmed rent payments and that the unreported income consisted of monies actually found in, among other places, unmarked envelopes consisting of cash in a basement or attic or elsewhere. Baliban had no knowledge of the amount of money skimmed or the years of rent represented. He was not familiar with an accounting firm (Wieser LLP) that provided an accounting and calculated the total rents skimmed. He does not ascribe a value to the unreported income (T, 1692-1703).

310. Baliban was asked whether a business valuator would ascribe a value to the skimmed rents against Edward P. Giaimo, Jr., Estate or other third parties for monies that were recorded on a second set of books, but not accounted for by accountants, Baliban opined he would have to obtain information of the assets collectable, whether there was a claim, and what was the cost to collect. He gives zero value to such a claim against the Edward Giaimo Jr., Estate, regardless of an estate tax return and other documents available to Baliban for review in determining the possible collection of a judgment against Edward Giaimo Jr., Estate (T, 1704-1711).

311. However, his opinion was the opposite as to his calculation for the "chose in action" that he calculates as $750,000.00 for damages suffered on the 96 Street site. Baliban was quite satisfied with the oral representation from his client who attributes $750,000.00 as the value

for that "chose of action" (T, 1704-1711).

312. Baliban also applies the B.I.G. adjustment based on EGA's C-Corporate status. His testimony mirrors Lipton's opinion as to the 100% B.I.G.. He recognizes EGA and FAV own the properties as assets and by acquiring an interest in the shares, the willing purchaser is acquiring an interest in the properties. He incorporates the risk of ownership in the properties into the risk of ownership EGA and FAV stock. His valuation factors in the value of the properties as appraised by Esposito ($45,165,000.00) and applies the B.I.G. on the built-up gain of $42,844,691.00. He subtracts the tax rate (45.87%) as of July 31, 2006 ($19,065,957.00), leaving a total appraised value net of $25,514,043.00 (T, 1624-1629).

313. Baliban opines (like Lipton) that the willing buyer of petitioner's interest would factor in a dollar to dollar B.I.G. against the petitioner's share of the B.I.G. (percent of the tax of $19,065,957.00[14]). Like Lipton, he adopts the reasoning that the willing buyer of petitioner's interest in EGA shares would inherit the share of the tax burden (Baliban used percentage share of 49.75%, but in view the Appellate Division decision, the percentage allocation is 50%) (T, 1624-1629; Rx 63, Rx 64 and Rx 65).

314. Baliban testified the fact this case is being determined under "fair value" rather than fair market value standard does not affect his analysis of the B.I.G.. Baliban's cumulative testimony as to the application of the B.I.G. and DLOM discounts were noted; it mirrored Lipton's testimony as to the same methodologies (T, 1636-1640). The only difference is that Baliban quantifies the DLOM and the B.I.G. (T, 1641).

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[14] Baliban noted that if tax payment was deferred one, two, three, four, etc., years the tax payment value would be lower (T, 1630).

315. Baliban applies the DLOM at 20% for EGA, based on his opinion that the stock is restricted, has limited liquidity and lacks marketability. He bases the 20% DLOM discount as an "acquisition discount" for a stand-alone private firm. He weighs the marketability of a controlling interest and considered the holding time that follows when the seller seeks out a purchaser, opining the cost incurred to generate such a sale. Baliban's testimony on the issue of double counting mirrors Lipton's testimony, that is, applying both DLOM and B.I.G. was not double counting (T, 1641-1645).

316. Asked if he included a transaction costs for the petitioner to sell his interest to a willing buyer, Baliban testified that in one of his various scenarios such costs are weighed in the DLOM of 20%. Asked whether he was aware of any position in his field that held transaction costs should not be factored in any expense analysis attributed to the seller, Baliban could not recall nor understood if that was such a position (T, 1714-1715).

317. Referring to his reports, balance sheets and charts (Rx 63, Rx 64, Rx 65), Baliban testified the fair value of the petitioner's interest in EGA are based on the following: (1) net asset value of $34,326,076.00; (2) discount of 20% DLOM or $6.8 million, yielding a net asset value of $27. 4 million (assuming the calculation of the B.I.G. and tax to be paid is made on July 31, 2007).

318. He concludes, after multiplying the allocation of petitioner's claimed interest of 49.75% (but, now 50%), that the pro rata basis of petitioner's far value interest in EGA is $14,030,000.00 (T, 1645-1646).

319. As to FAV, Baliban testified based on his understanding there was an acknowledged dispute between the parties as to four properties (6 and 8 Spring Streets and 1063 and 1057 First

Avenue), although there was no actual litigation commenced at of the valuation date. Based on his reading of the instant petition - also not in existence at the time of the valuation date - (Petition, ¶ 52), he concludes sufficient information was available as of July 2007, to conclude there was a valid dispute over ownership. As a business valuator he excludes these four properties from the valuation of FAV assets (T, 1648-1659).

320. Baliban employs three scenarios: (1) a willing buyer would offer zero for these four properties; (2) a willing buyer would offer 50% of the value on the assumption that FAV had a 50% chance of being successful; and (3) includes all four properties in the valuation regardless of any dispute. Baliban opines that he would not need to know whether there was any formal litigation to support his opinion that none of the properties would be purchased from a willing buyer. He assumes a willing buyer with knowledge about the dispute, coupled with the seller disclosing the same, would offer no more than 50% of the value.[15] Moreover, that on July 31, 2007, if the seller knew of such dispute, it would be disclosed to the buyer. Regardless, he testified that he believes the dispute was identifiable from tax returns that predate the commencement of this action based on his review of the petition (Petition, ¶ 52) (T, 1648-1659).

321. Baliban identified his valuation of FAV (Rx 66) as of July 31, 2007, and corresponds with his analysis and the scenarios amplified by him, including the DLOM of 20%, the B.I.G. application, and his exclusion or partial inclusion of the value of the claimed four disputed properties. But, had he included all four properties in his valuation, he would give a greater

[15] Baliban's opinion ignores the possibility of a 100% recovery and a windfall to the buyer.

discount (T, 1659-1660).

322. With all of the above, and adopting Esposito's appraisals of the subject properties (other than the four he claims are in dispute), Baliban testified that the total assets of FAV are valued at $17,172,111.00, deducting the B.I.G. in the sum of $5,834,165.00, results in a net asset of $11,337,943.00 (Rx 64, Rx 65 and Rx 66 [exhibit 3]).

323. However, he then adds his adjustments (deductions, liabilities) as reflected in his reports (Rx 63 and Rx 64), that total either $742,815.00 or as supplemented in his second report, $988,587.000 (Rx 64 [exhibit 3]). Baliban applies his scenarios of either zero offer for the disputed four properties or an offer of 50% for the same. He provides a scenario of all four properties added to FAV assets. He amplifies his three scenarios as well as his alternative testimony with respect to incorporating Leitner's appraisals of the subject properties and the effect on the B.I.G. and DLOM, in a chart generated for this hearing (Rx 67) (T, 1661-1670).

Petitioner's Experts -Discounts Lack of Marketability & Built-Up In Gains Tax & Valuation of Petitioner's Interest in EGA and FAV

324. Christopher Mercer ("Mercer") was petitioner's expert on business valuation of EGA and FAV. He has valued C–Corporations under both the fair market value and the legal construct fair value. He is a graduate of Stetson University (Deland, Florida) and holds a Master in Economics from Vanderbilt University. He is the founder of Mercer Capital, headquartered in Memphis, Tennessee. His company appraises businesses in forty-eight (48) states. He holds an ASA designation and is an accredited senior appraiser of the American Society of Appraisers (T, 1790-1797).

325. He also holds a CFA designation, chartered financial analyst designation. He has published

more than 150 articles relating to business valuation. He has published books in his field, "Valuing Financial Institutions," "Quantifying Marketability Discounts" published in 1992 and 1997, the latter book dealt with quantifying marketability discounts for minority interests of businesses and marketability discounts to controlling interests in businesses. He has testified on numerous occasions in State and Federal Courts (T, 1790-1797; Px AO [Mercer]).

326. Mercer's valuation of EGA and FAV (Px AP) is as of August 1, 2007; his report is dated October 16, 2008 and updated as of January 2009. He identified a second document for the same time periods as to FAV (Px AQ and Px AR).

327. Mercer noted that these two documents update the valuation of EGA and FAV noted in his report (Px AP) with two exceptions: (1) a small adjustment to the tax rate used in calculating the B.I.G. from the report to the updates (Px AQ and Px AR); and (2) upon changes made by petitioner's expert appraiser (Leitner), to his valuations - to the extent of a few thousand dollars, the same was updated (a reduction in value to some of the properties). His update for FAV (Px AR) reflects adjustments for tax liability, tax rate, blended Federal, State, Local tax rates its properties (T, 1796-1802).

328. Mercer rejects the opinion that a deduction based on DLOM and B.I.G. must be factored in the valuation of EGA and FAV, whereas here the shares are valued under the concept that the corporations continue as two separate ongoing concerns at the "financial control level of value." Mercer opines that fair value with respect to EGA and FAV should be determined as a whole and no discounts should be applied for B.I.G. or DLOM (T, 1803-1824).

329. Testifying from his report as supplemented (Px AP; Px AQ; Px AR), coupled with a "slide presentation" (Px AS [Id Only]), Mercer opines Lipton and Baliban's DLOM analysis is applied to an entirely different level of value. For example, DLOM would be applied to a marketable minority level of value to reach the nonmarketable minority value. Here, however, he opines Lipton and Baliban's application of DLOM simply converts a financial control level of value in EGA and FAV into an "illiquid minority interest value" (T, 1803-1824).

330. Mercer maintains fair value under the legal construct of BCL § 1118 [a] is to provide a proportionate interest in "the ongoing concern value of the corporation [such as EGA and FAV] as a whole" and he cannot in his opinion apply a DLOM. He presses that fair value level of valuation in this instance is the financial control value level over EGA and FAV. Mercer points to the same finding by respondent's expert, Lipton, who too opined the valuation of the shares should be "on a control level" (Rx 60, p 4) though Lipton testified the application of a DLOM was appropriate, which Mercer rejects (T, 1803-1824).

331. Mercer opines there is an additional economic reason why no DLOM should be applied in a fair value valuation, and here, the controlling interest valuation of EGA and FAV, two real estate holding entities. He opines that with a controlling interest valuation the application of a DLOM is not appropriate (T, 2011). His understanding of fair value in New York is that it is a controlling interest valuation where 100% of the enterprise is being sold (T, 2012).

332. Mercer rejects an expert's reliance on restricted stock studies to value interest in EGA and FAV, opining that restricted stock studies (Px AT) are best limited to minority interest

transactions and not, as here, a "control interest" transaction. He rejects Baliban's reliance on restricted stock studies, opining that they were not applicable to controlling interests as EGA and FAV are being valued and notes the base for restricted stock studies is marketable minority and nonmarketable minority interest subject to restrictions. Mercer doubts the relevancy and weight of the restricted stock studies and rejects consideration of them in valuing EGA and FAV. He also criticizes Lipton's application of a DLOM (and, thus, Baliban who adopted the same analysis) as it amounts to lowering the level of value at the very least. Moreover, it is a disguised minority interest discount (T, 1803-1824, 1883-1887).

333. Throughout this portion of his testimony, Mercer reference the case of Beway (T,1815-1822) a case noted and considered by Lipton in her opinion on valuating the interest in EGA and FAV (T, 1538, 1561).

334. Mercer specifically noted his valuation of a control level of interest in EGA and FAV captures the risks in the control valuation, rather than apply "a nebulous unspecified marketability discount that no one can justify" (T, 1825).

335. He opines there is no conceptual basis for DLOM if one is valuing at an enterprise level, otherwise one would convert a financial control value to a lower or illiquid minority interest value to apply a control premium (T, 1826).

336. Mercer is aware that realty assets of EGA and FAV were appraised at different values by Leiter and Esposito. He noted that both experts factored a holding period from valuation date to hypothetical sale (the exposure time for appraisals). Thus, he opines that a seller would not accept a further diminishment of value based on "some nebulous exposure of

time to the market" that Lipton and Baliban coin as a DLOM, after the appraisal of the properties as it is in all likelihood an improper discount to the extent one is discounting for the same thing twice; it is doubling the discount. Thus, the valuation takes place on the hypothetical date of July 31, 2007, and there should be no further discount under any name for "marketing time after the sale" (T, 1827-1834).

337. He agrees there is a difference between the value of stock of EGA and FAV, closely held C-Corporations and the value of the real estate owned by EGA and FAV, e.g., the real property may be worth $5 million on the market, but the Corporation that owns it has a mortgage of $2.5 million; if the property is valued $5 million and there are zero liabilities of the C-Corporation, then the value is simply $5 million (T, 2002-2004).

338. But, he noted that from a business point a view there is no difference in valuing a partnership and a corporation, experts in his field use the same valuation principles and techniques to value a partnership or a corporation. However, he concedes where a corporation has a B.I.G. it has to be considered (T, 2010-2011), but he rejects the application of 100% of the B.I.G., as pressed by respondent's experts.

339. Mercer opines that if a B.I.G. allocation is appropriate, it is not 100% as to EGA and FAV because here the real property sold under EGA and FAV in this transaction cannot be easily replaced by the seller nor easily purchased on the market by the buyer. Mercer opines the availability of similar properties as the subject properties owned by EGA and FAV is tight and the demands exceeds the supply. Thus, based on what he relied on, that similar properties were just as depreciated as the properties held by EGA and FAV, they too were selling at discounts of 15/20 percent of net asset value or the equivalent of 35/40% of B.I.G.

(T, 1835-1842.

340. Mercer relied on information gathered from third party sources, e.g., Massey Knakal (following a thirty-minute conversation relied on to form his opinion) and opines that in fair value analysis it is not appropriate to charge 100% of the B.I.G. as to EGA and FAV, where the ability to go out and buy the same assets, specifically real estate consisting of similar properties held by EGA and FAV, is minimal and/or not readily available. He noted the assets of EGA and FAV were not similar to selling securities and buying other securities on the market (T, 1835-1842, 2064-2065).

341. Mercer learned from his research and conversations with people in the industry (as an expert he relies on representations to form an opinion) that there was a "rule of thumb" in the industry under such a circumstance of a discount of 15 to 20% of the property value[16]. Mercer concluded that as this was a fair value valuation, he found it appropriate to use an adjustment factor of 40% as an appropriate B.I.G. He calculated his 40% based on his review of the above data as well as consideration of a recent case (*Murphy v United States Dredging Corporation,* ___ Misc3d ____, 2008 WestLaw 2401230 [discussed, *supra*]). His calculation of the 40% is amplified in his report (Px AP pp 11-14). He concedes it is not appropriate for an appraiser to rely solely on a "rule of thumb" in measuring value if it can be shown that market participants do not use the "rule of thumb" and employ it. Mercer opined he viewed Massey Knakal as a reliable source and a "market participant" in the industry. Based on what he learned he opines that if a B.I.G. is imposed in this transaction

[16] Respondent's attorney noted at the close of Mercer's testimony of a "standing objection" to the "rule of thumb" testimony (T, 1835 ["standing objection"]; T, 2166).

is would be no more than 40% (T, 2063- 2070).

342. Mercer amplified his reasoning by noting the distinction between a “naked asset,” e.g., a house sold directly by the seller to buyer, versus assets sold inside the corporate wrapper of EGA and FAV, C-Corporations holding real estate.[17]

343. Mercer reasoned there is no readily available substitute in the public market for the assets sold by EGA and FAV(similar buildings) and the limited supply of similar properties (based on third parties conversations -regardless of any truth of the matter asserted - relied on to form his opinion), impacts the amount of allocation of the B.I.G. (T, 1835-1842).

344. In the final analysis, after considering the limited supply, the assets sold and not readily available to purchase elsewhere; his review of court cases for the facts presented therein; his third-party discussions on the market and reliance thereon, and applying present value methodology, he opines the B.I.G. allocation should be approximately 40% for both EGA and FAV (T, 1835-1842).

345. Mercer’s opinion rejects Lipton and Baliban in this regard. Baliban testified there was indeed readily available properties for a buyer to go out in the market and purchase without the need to buy similar property in a corporate wrapper, such as FAV and EGA. Hence, the 100% treatment of the B.I.G. under the presumption that the buyer of EGA or FAV stock could avoid the B.I.G. by simply buying on the market and thus under a neutral sale, the seller and buyer of stock would reach agreement for 100% of the B.I.G. as a discount. Mercer rejects that presumption, concluding there is no readily available market that allows

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[17] Respondent’s expert, Baliban also considered“corporate wrapper impact” (T, 1600-1602).

for the potential buyer to go out and buy similar assets as those offered by FAV and EGA (T, 1864-1866).

346. As further proof of the lack of a readily available properties, Mercer noted that in the appraisals provided by respondent's expert, e.g., Rx 7 [8 Spring Street Appraisal], there is reference to cap rates that ranged between 4.0 and 4.8. Mercer concludes that information supports his opinion that there was a very strong market for sellers and a tight market for buyers. He noted to his research and conversations with market participants (e.g., Massey Knakal and other brokers that revealed putting a portfolio of buildings - such as FAV and EGA - on the market would be extremely attractive to buyers as such a portfolio was not readily available (T, 2064-2066, 2143-2146).

347. Mercer had no personal knowledge (neither do the other experts) of the number of walk up apartment buildings in New York nor whether such apartment buildings were owned by C-Corporations; he would be surprise to know of anyone having knowledge that most walk up buildings in New York City in 2007 were owned by C-Corporations (T, 2070-2074).

348. He used this information to support his conclusion for a 40% B.I.G. discount (T, 2075-2077). He opined -based on his review of materials and investigation and research - that buyers out number sellers (T, 2077-2083). Moreover, that few alternative properties exists out of ownership in a corporate structure, i.e., C-Corporation. He recalled Dr. Lipton testified most real estate is not held in C-Corporation form. Furthermore, Leitner informed him that it would be an exception, not the norm (C-Corporations owned a large amount of walk-up apartment buildings). He noted Lipton's assessment of 182 sales of properties in a six-month period was not the equivalent of readily available properties when the 182 sales

was derived from a pool of 17,000 properties or less than 2% of properties (T, 2087-2098).

349. He opines that where there is a readily supply of naked assets available in the marketplace then 100% of the B.I.G. should be taken into account (T, 2042-2048; Px AP [Mercer Report, Appendices: article "Embedded Capital Gains"]; Rx 69 [Id. Only re: Mercer article "Embedded Capital Gains In Post- 1986 C-Corporation Asset Companies]).

350. Mercer has written an article confirming his position that 100% of a B.I.G. is applicable only where there is a substitute and readily available asset or where the 100% allocation of the B.I.G. in a "fair market value" valuation, not, as here, "fair value"(Rx 70 [Mercer Article][18]). But, in the "absence of a substitute investment" which he opines is the case here, the rational buyer would negotiate the B.I.G. adjustment with the seller (T, 2053-2058).

351. Mercer conceded his awareness of case law that held for the allocation of 100% of the B.I.G. (*Wechsler v Wechsler,* 58 AD3d 62), but noted those cases did not also apply a DLOM, which is what respondent also seeks as a discount. Here, Mercer points out that Lipton and Baliban also apply a DLOM. Moreover, here there is no consideration of expenses of liquidation of the asset portfolio (T, 1843-1844).

352. As to the "chose in action" by EGA and FAV against the Estates of Edward Giaimo, Sr., and Edward Giaimo Jr., Mercer understood they are based on unreported rental income from EGA and FAV and that more than $10.4 million in cash was found in envelopes, some envelopes were marked with EGA or FAV. He also learned that $5.5 million in cash was

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[18] The article was written by an employee (Jean Harris) of Mercer Capital and not by Mercer (T, 2139-2140).

found in a bank accounts, gold Krugerands and Silver certificates and another $2.0 million in bonds were located and related to unreported taxable income by EGA and FAV (T, 1844-1847).

353. Mercer considered the accounting provided by Weiser LLP for a six-year period ending July 31, 2007, that reveals EGA's unreported taxable income of about $5.45 million and FAV's unreported taxable income of about $3.89 million (see, Px AU). Mercer understood the six-year look-back relates to a six-year statute of limitations for breach of fiduciary duty or other claims against the two family member Estates. Mercer noted of the under reported cash income, $1,130,421.00, was found to belong to EGA and $385,363.00 was found to belong to FAV (for the same six-year period). Mercer reduces the "chose in action" against the Estates by $1,130,421.00 and $385,363.00 , respectively (Px AP; T, 1923-1929, 1940-1941).

354. He values the "chose in action" against the brother's Estate at 100% of their value and he does not measure any cost that may be incurred for recovering the sums from his brother's estate (T, 1962-1965).

355. His balance sheet provides a line for "discovered assets" which consist of cash in envelopes in the sum of $4,155,466.00 (Rx 68 [summary of envelopes of August 28, 2008]). This sum was allocated to EGA's balance sheet. Mercer is aware the parties have stipulated that all of that cash will be allocated to EGA (T, 1953-1959).

356. Mercer concedes that "chose in action" is considered a contingent asset and that it can be difficult to value and expert opinions differ on valuing a contingent asset. But, he considers them as claims by EGA and FAV against the Estates because the petitioner and respondent

are officers of EGA and FAV and co-executors of the Estates. He opines that rather than sue themselves, the two would resolve the dispute. Moreover, he notes under the Estates, both coexecutors are beneficiaries and take 50% of the same (T, 1941-1946).

357. Mercer does not recall seeing a disclosure statement filed by the coexecutors of the Edward P. Giaimo, Jr., Estate (Rx 1 Disclosure Statement - Tax Return]), but opined the dispute is easily resolvable by the parties as they were very familiar with the intra-familial dispute (T, 1927-1932).

358. Thus, in view of the intra-familial claim (EGA and FAV versus the Estates), he opines that a willing purchaser would pay 100% for the claims, but likely place the amount in escrow and having some agreement on legal fees and expenses incurred in connection with the escrow (T, 1948-1950).

359. He further noted that placing the proceeds in escrow pending final disposition of the dispute would be the most reasonable alternative. If the buyer does not get the disputed property, he/she gets back the purchase price (T, 2159-2160).

360. But, he finds no written formal notice of claim filed prior to the valuation date; one reason why he considers and includes the "chose in action" on the balance sheets for EGA and FAV is based on the representation by counsel for the petitioner as well as an accounting generated by Weiser LLP for a six-year period ending July 31, 2007. He incorporate that information in his report (Px AP, pp 15-16) (T, 1927-1930). Furthermore, he has learned claims can be satisfied from the brother's Estate (T, 1994-1926). He also understands there are liquid and hard assets available to recover damages under the "chose in action" from the brother's Estate (T, 2132-2135).

361. Mercer's generated the balance sheets of his appraisal for both EGA and FAV (March 31) as well as the balance sheet from the tax return as reported and adjusted to August 1, 2007. As to EGA, he included cash assets of $607,000.00, other discovered monies, "chose in action" of $5,450,000.00 minus $1,130,421.00 and recent damage settlement of $1,225,000.00 for 96 Street property, assets not attributed to EGA, and $4,155,000.00 cash found in a basement (<u>see also</u>, Rx 1). Mercer also included the market value for the subject properties as appraised by Leitner, $63,600,000.00 for EGA properties. He accounts for $275,000.00 for prepaid expenses and a loan receivable of $150,000.00 (T, 1864).

362. Mercer did not know whether the "chose in action" claims included diversions of monies from the "disputed properties" (<u>6 Spring Street</u>, <u>8 Spring Street</u>, <u>1063 First Avenue</u>, and 50% of <u>1057 First Avenue</u>) (T, 1934-1935).

363. Mercer also valued the damage claim as of July 31, 2007, without reference to counsel's representation of the settlement amount, but conceded he relied on counsel's representation that the claim had been settled "shortly later." If he had speculated, he may have valued the 96 Street damages claim between $900,000.00 or $2.0 million (T, 2101-2105). But, Mercer used the settlement amount received by EGA after the valuation date (provided to him by petitioner's attorney).

364. Mercer identified an article found on his company's website , which was generated by an employee of his company (Rx71 [Mercer Capital Website Article "Fair Market Value v the Real World" 1999]). He noted the various methods of valuation by an appraiser must be premised on what a reasonably informed willing investor might have as information on the date of the valuation, not subsequent (such as a settlement). The article discussed valuations

protocols with respect to "fair market value" and its relationship to settlement claims after valuation date. But, Mercer sought to distinguish the article as relating only to fair market value and not the legal construct fair value (T, 2104-2107).

365. Mercer did not know that the EGA Board of Directors' resolution of March 2006 indicated that EGA would accept an offer of $950,000.00 for the damage claim, and had he valued the damages as of March 2008, but learned fees incurred after July 2007 to March 2008 to obtain the settlement totaled $225,000.00, he would deduct the attorneys' costs from the settlement sum (T, 2107-2110).

366. Mercer testified he was not aware of a dispute over the transfer of the four properties until this litigation; he was not aware that a claim existed before the valuation date or legal challenge as of the valuation date. But, issues raised in this proceeding are after the valuation date and in his professional opinion not available to the willing buyer before the valuation date (T, 1975-1982).

367. Respondent sought to press the issue of a dispute over the four properties was amplified in the instant petition, which it is noted did not exist on the date of the valuation (T, 1983-1985). Indeed, the supposed claim was formally filled in 2008 (see, Complaint 102750/2008]; T, 1990-1992).

368. He understands the loan receivable was in existence as of the valuation date (regardless of any post-valuation date litigation [T, 1908-1912]). Mercer did not do any "decision tree" analysis to measure what would be the cost of litigating the recovery of the $150,000.00 loan receivable claim (T, 1915-1920). He verified the prepaid expenses of $275,00.00 was listed on the EGA balance sheet of a tax return of March 31, 2007 (Px AP; T, 1920-1923).

369. He also noted to a Merrill Lynch account of $6,289,000.00 (Px AQ). Mercer arrived at a total assets for EGA in the sum of $80.6 million of which $63.6 million he calculated was from the subject properties. He noted liabilities $2,865.00 at book value as of March 31, 2007, which was pulled from tax returns. Mercer factors in security deposits on apartments for the subject properties and State and City taxes. He noted his calculation for B.I.G. as to EGA is 40% of the liability of $63.3 million. Mercer noted he calculated the B.I.G. on all assets of EGA, unlike Baliban who allocates the B.I.G. only to the real properties, but both use the same methodology. Mercer opines the B.I.G. is calculated by using 45.6% capital gain rate and 40% of the $28.9 million, that is, the B.I.G. is about $11.6 million (Px AQ) (T, 1848-1852) (Baliban calculates $19,650,000.00 B.I.G. for EGA [T, 1864]).

370. Mercer noted another liability was not listed on his balance sheet; he identified EGA's voluntary disclosures to the IRS of other unreported income for years 2005, 2006 and 2007 to both federal and state authorities. Amended tax returns were submitted by accountants. He understands that EGA (and FAV) made check payments to the IRS, which were negotiated by the IRS (T, 1852-1853). Mercer made adjustments to these liabilities. He noted to security deposits of $253,000.00 and added state and federal tax liabilities of $14.1 million (T, 1854).

371. Based on the same, Mercer arrived at a net asset value of EGA and liabilities of $66,541,000.00 or $80.6 million less $14.1 million in liabilities. He opines that the fair value for EGA is $66,541,000.00. The per share value of EGA stock is $332,705.00 (T, 1854-1855).

372. Mercer calculated FAV assets. He included the disputed properties alluded to by Baliban.

Unlike Baliban, Mercer found no legal challenge to tie up to the valuation date of the assets. He was aware of a net lease for these properties, but did not recall that tax returns indicated that Edward Giaimo Sr., and Antoinette Giaimo for 2001 through 2006 reported income from these four properties. Mercer never saw the net lease, he was told it existed, but did not know if it applied to all four properties (T, 1935-1938). H e did not learned of any dispute over the properties until this litigation (T, 2115-2118).

373. He included $1.2 million in discovered assets and considered Leitner's appraisals for the subject properties under FAV. He noted to $138,678.00 in cash; Merrill Lynch account of $2,438,000.00; "chose in action" of $3,893,982.00 minus the $385,363.00 cash found in FAV envelopes. He arrives at current assets of $7.2 million and value of properties in the sum of $35.9 million. Mercer subtracts the liabilities, which were minimal; he adjusted for security deposits for apartments. He then includes the 40% B.I.G.. Hence, FAV assets total $35.9 million, book value of assets of $7.4 million, with an embedded gain of $28.5 million. Mercer opined the B.I.G. was $5.2 million or 45.6 % times the $28.5 million (Px AR). In the end, Mercer opines a total value of equity of $29.9 million as fair value or $175,829 per share (T, 1855-1859).

374. Mercer compared Baliban's report to his own (Rx 63, Rx 64; Px AP, Px AO, Px AR), noting modest differences in cash assets ($9,000.00), and discovered assets, and consideration of certain prepaid expenses. The loan account Mercer considered is halved in Baliban's analysis.

375. He also noted a $475,000.00 difference in the damages (96 Street property) and a net difference of $4.3 million with Mercer's calculation of "chose in action," which was not

presented in Baliban's reports. He treats the "chose in action" as an asset of EGA and FAV and gave full value. Mercer concludes that in view of the amended tax returns filed there is an admission of "skimming of rents" and, hence, he opines sufficient reason to conclude the existence of a valid claim. He noted the total difference between his and Baliban's reports is $23.4 million, the majority being real estate (T, 1859-1862).

376. The liabilities comparison was amplified by Mercer, noting Baliban calculated $649,625.00 for New York State tax liabilities; Mercer calculations differ approximately $319,000.00, but he noted if the difference is attributed to interest post the valuation date, he would not recognize it as there is no difference in the calculation of the federal tax liability. He noted to other expenses calculated by Baliban ($280,502.00 accrued professional fees; accrued tax expense $73,123.00 [Rx 94]). Mercer arrived at a B.I.G. of $11,555,707.00, compared to Baliban's B.I.G. allocation of $19,650,957.00 (T, 1862-1864; PxAU; Rx65).

377. Mercer reiterated his valuation determines fair value of 100% of the stock as a ongoing concern that takes the proportionate interest with no discount, regardless if the proportionate interest is 5% or 60%. He values 100% of the stock and the presumption is 100% of the cash flow is available to the seller. To discount for time that already occurred for exposure and to discount for time when the seller has control over 100% of the cash flow is improper in his opinion. He values the entire interest for sale and opines that is the appropriate method (T, 1873-1880).

378. Mercer also prepared a comparison of his market values as of August 1, 2007 and Baliban's market values as of July 31, 2007 for both EGA and FAV (Px AU, Px AP; Rx 63 and Px AV; Rx 64, Rx 67).

379. Mercer also opined on the Lipton report and believes Lipton's report reflects a misunderstanding of the nature of the negotiations between a willing buyer and a willing seller, noting that Lipton testified only about a willing buyer. But, Mercer noted that under a fair value valuation, the analysis is premised on a "willing buyer," not a "unwilling seller" (see also, Px AP, p 5).

380. He understands the statutes relevant to this case are set up to protect sellers and that his review of Lipton's testimony reveal little attention was paid to a willing seller. He opined that Baliban and Lipton's testimonies were limited to a willing buyer and were one-sided equations without consideration to the willing seller, who is also at the negotiation table (T, 1894-1890, 1990-1993).

381. Mercer understands that under fair value there is a willing buyer, who has reasonable knowledge in the arm's length transaction of relevant facts to make an independent decision to purchase. However, the focus is not only on the fair value to the buyer, but also the fair value to the seller, otherwise the seller has no say in negotiation. As an appraiser, Mercer values only in a scenario of both willing buyer and seller, recognizing the tension that exists between the two and that without the "tension" one cannot really have an appraisal (T, 1993-2002).

Respondent's Rebuttal Expert Baliban in re: Mercer Expert Opinion on DLOM and B.I.G. Discounts

382. Baliban was recalled to rebut Mercer's opinion. His testimony is weighed limited to rebutting the evidence and Mercer's testimony or to corroborate (or repeat) his own testimony, particularly as evidence in denial of any affirmative fact pressed by Mercer that

petitioner endeavored to prove, <u>e.g.</u>, , particularly the non-applicability of the B.I.G. or if any, 40% of the B.I.G..

383. Baliban opines the 100% of the B.I.G. should be discounted; the DLOM is applicable. Baliban rejects Mercer's analysis. Baliban testified that Mercer is wrong to presume that Baliban ignored Lipton's analysis of a willing seller, he maintains he did not ignore the analysis of a willing seller (T, 2168-2172).

384. Baliban's "rebuttal testimony" as to Mercer's treatment of the "disputed property" and the treatment of "chose in action" (Px AW [demonstrative exhibit]) was a reiteration of what Baliban testified on respondent's case. Baliban basically reiterated his own opinion testimony, but added other points that seemingly appeared to be testimony that was reinforcing his analysis as opposed to rebuttal testimony of Mercer's analysis (T, 2172-2179, 2231-2241).

385. Baliban's "rebuttal testimony" with respect to Mercer's application of a 40% B.I.G. was also more about Baliban's opinion then Mercer's analysis and application of a 40% B.I.G. (T, 2180-2186).

386. With respect to Mercer's testimony of "market participants" and/or "independent families" involved in purchasing similar properties as support for Mercer's opinion of a "rule of thumb," Baliban opines such testimony should be rejected and not considered sufficient reliance for arriving at a 40% discount of the B.I.G.. He opines independent families are not "willing buyers" and that although reliance on conversations with market participants, such as, Massey Knakal, can be reasonable, the reasonableness has to also be based on data and/or studies (T, 2188-2196).

387. For example, as to reliance on information provided by Massey Knakal, Baliban testified Mercer's opinion does not support a 40% B.I.G. discount. Though he does not believe it was unreasonable for Mercer to have spoken with Massey Knakal, he rejects the same without an ancillary statistical study backing up what Massey Knakal may have indeed represented to Mercer, such as, reports by Massey Knakal or other market information. Baliban understood reports introduced in evidence by respondent's witnesses revealed sales before and after the valuation date of many similar properties (T, 2188-2196).

388. But, his recollection of reports that indicated sales of similar properties, Baliban was referring to the 182 sales of properties in a six-month period. However, Lipton noted her records revealed those sales were from a sample she derived from a pool of 17,000 properties and that sample represented less then 2% of that pool of properties (see, T, 1546-1552, 1558-1559).

389. Baliban revisited his testimony about a holding period and his prior testimony of the assumption of a minority shareholder having "controlling interest," which he rejects (T, 2195-2197), but these references to his prior testimony is not rebuttal.

390. Baliban rejects Mercer's opinion that a DLOM is not appropriate, but would not say that would be in every case having a fair value analysis. But, he would apply a DLOM regardless of petitioner's interest in EGA and FAV. Indeed, he would apply a DLOM even if the petitioner had a 100% interest in FAV and EGA because he views them as having illiquid assets and with certain discounts and risks as well as exposure time to sell the business. Baliban disagrees with Mercer's criticism of a DLOM and his application of 100% of the B.I.G. (T, 2197-2213).

391. Baliban references an article by one Micah Officer ("Officer"), which he opined supports his opinion that a DLOM is appropriate as to EGA and FAV, especially with regard to the analysis of the discount as to control companies. He noted that the Officer article was one of several he considered to conclude that DLOM was applicable to EGA and FAV, although they two entities hold only real estate (T, 2647-2650).

392. He identified the article he reviewed in this analysis (Px BM [Micah Officer Article]), and considered it applicable to this case although Officer makes no mention of real estate holding companies including in the various studies noted by Officer in the analysis. Baliban adopts the article to support his opinion that the concept of liquidity discount for private firms are applicable across the board, irrespective of the private firm's business or assets (T, 2684-2687).

393. But, Officer's article compared publicly held companies, subsidiaries of corporations, and stand-alone companies. The article noted the divestiture of subsidiaries were recorded as stressed sales and the purpose was a need for liquidity infusion for parent firms. But, Baliban saw no material distinction of a sale for liquidity infusion versus a sale where there is a willing buyer and a willing seller with no pressure to sell. Nor does he see any material distinction - as far as he was concerned - to his understanding of the article and why he believed it supported his opinion of a DLOM in this instance as to EGA and FAV and a subsidiary sale that was on average motivated by the need for liquidity to ease the parent corporation's liquidity (<u>but see</u> Px BM, pp 589-591).

394. He saw no material distinction between the concept of the article as to a subsidiary sale, where one has a motivated seller (the parent corporation seeking cash, liquidity) and the

instant concept which involves a willing seller and willing buyer, equal in all terms, including motivation. Baliban conceded the Officer's article considers an owner of a business with a great need for liquidity when alternative sources of liquidity are not available and thus a "weaker bargaining position relative to the proposed buyer of the corporation being sold and, therefore, will be prepared to accept a lower acquisition price" (T, 2651-2654).

395. Baliban sees no substantive difference between a subset of subsidiary corporations in Officer's article and EGA and FAV. He concedes that in Officer's article, the sample companies included subsidiaries were being sold in a "fire sale" largely due to problems with the parent company, not the subsidiary. Baliban concedes a portion of Officer's sample companies may have driven the prices for the unlisted targets in certain circumstances and for liquidity needs, but also he understands the concept being amplified by Officer is that unique circumstances do not solely drive the analysis and that there still is a DLOM (see, Px BM, pp 590-591; T, 2655-2657).

396. He admits there are issues that any individual subsidiary or individual company may have differences from what is motivating a sale or the type of business that is in data used by Officer versus EGA and FAV, but opines it is not appropriate to say the data used by Officer is not comparable to EGA and FAV, that is, they are not comparable because they are being sold (the former group) by liquidity-constrained parent corporations (T, 2657-2660).

397. However, the Officer article explicitly states the hypothetical that on average unlisted targets sell at a discount for or at a lower premium over fair value than comparable listed targets (Px BM, p 576, Hypothetical 1).

398. The Officer article also compared various multiples of publicly traded targets to unlisted targets (public v private companies), priced to book value and earnings per share, EBITA and deal value to sales. Baliban understood the information may reveal that the stand alone private companies - looking at the "mesne as the measure of central tendency," and subsidiaries and listed targets sold for a multiple greater than the publicly traded targets (T, 2670-2680).

399. Moreover, the Officer article (Px BM, p 580), indicates acquisitions of publicly traded targets, acquisitions of unlisted targets (private companies) were significantly more likely to be completed successfully (suggesting that the private companies were marketable) than public companies. Nevertheless, Baliban opined the balance of the article also discussed that unlisted targets were "all cash versus cash or stock" and there was nothing in the article that stated it was the sole source on such information nor that it was directly on point in every "conceivable way to EGA and FAV" (2660-2670).

Respondent's Retention of Attorney Skarlato re: Tax Liabilities of Respondent-Individually and Ancillary Tax Liabilities of Non-Clients EGA and FAV

400. Bryan C. Skarlato ("Skarlato") is a tax attorney and partner of the law firm of Kostelanetz & Fink (Rx 72). Skarlato testified on behalf of his client and respondent, Janet Giaimo Vitale, who retained him in her individual capacity and not as an officer of either EGA or FAV (see, T, 2291-2292).

401. Nevertheless, the respondent seeks to allocate the bulk of the attorneys' fees incurred or paid under the retainer she executed with Skarlato between EGA and FAV. But, Skarlato testified the retainer was executed by his client in her individual capacity and he was never legally retained by EGA or FAV (T, 2292).

402. In short, he owed no fiduciary relationship to non-clients. In fact, the respondent's attorney in this action contacted Skarlato to get involved in the individual tax matters involving the respondent. Skarlato concedes he was retained by respondent in her personal capacity, but in doing work on her behalf maintains he did work that was related to EGA and FAV, the Estate of Edward P. Giaimo, Jr., and the Estate of Antoinette Giaimo.

403. He testified that in order for him to render services for Ms. Giaimo Vitale, he had to look at six (6) separate parties: his client-the respondent, the Estates of Edward P. Giaimo, Antoinette Giaimo, Edward P. Giaimo, Jr., and the entities EGA and FAV. His testimony does not reveal any work done on behalf of the petitioner.

404. Skarlato testified that he was contacted in 2007 to provide legal services relating to the discovery of cash in connection with the Estate of Edward P. Giaimo, Jr., and the potential tax liabilities arising from the discovery of this cash. Skarlato understood the tax liabilities arose during the period the decedent managed several buildings and up to the time of his death in March 2007 (T, 2249-2282).

405. Skarlato testified to the tax strategy employed on behalf of his client with the IRS. He testified to his visit to the IRS in April 2008 and the filing of amended tax returns on behalf of EGA, FAV, the Estates of Edward Giaimo Jr., and Antoinette Giaimo as well as his client, the respondent. He also did six (6) years of amended tax returns on behalf of the Estate of Edward P. Giaimo, the father of the parties to this action, but on behalf of that estate individually.

406. He also filed amended tax returns on behalf of his client that required the filing of tax returns of EGA and FAV for three (3) years. The purpose of filing 6-years for certain filings

was based on his analysis of purposeful tax evasion, e.g., Edward P. Giaimo and Edward Giaimo Jr.

407. Skarlato testified that he also conferred with the petitioner's attorney regarding his strategy of submitted amended tax returns as well as with the accounting firm Weiser LLP, the accountants for EGA and FAV - this accounting firm had done a significant amount of work in identifying the amounts of unreported income (T, 2337).

408. Skarlato' filings were limited to tax and interest only and no penalties were contemplated to be paid. Skarlato conferred with the corporate accountants and understood from his conversations that the strategy he employed was approved (T, 2251-2257).

409. Skarlato identified his law firm's letter to the IRS, dated November 21, 2008 (Rx 73) and enclosed within the letter checks representing payment of back taxes. Skarlato submitted payments for back taxes with the amended tax returns. Checks for payment of EGA and FAV were executed by Janet Giaimo Vitale. He understood the source of the funds that were used came from the bank accounts for EGA and FAV.

410. The payments are reflected in the letter, to wit: $1.6 million on behalf of EGA and $483,331.00 on behalf of FAV[19], representing tax liabilities for 2004 through 2006, which were paid to the IRS (Rx 73). These payments are reflected in the Disclosure Statement of Executors contained in the Estate tax returns (Rx 1).

411. The parties stipulated that the monies set forth on the third page of the disclosure statement (Rx 1) constitute assets of EGA and FAV presently held in a segregated account under the

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[19] Skarlatos noted this payment excludes any tax that is to be paid on unreported income from properties located at 6 and 8 Spring Street and 1063 First Avenue (T, 2270).

control of the parties and that these monies are referenced as being $4,294,931.00 for EGA and $1,164,456.00 for FAV (but, Rx 1 [exhibit 5, reference to decedent is NOT included in the stipulation, which only relates to EGA and FAV]) (T, 2258-2267).

412. Again, although not retained by the Estate of Antoinette Giaimo, Skarlato did an amended tax return for that estate in view of the cash monies that were found on premises that were "in dispute" as understood by Skarlato. He was only analyzing the rents that were attributed to the subject properties and which were not reported for tax purposes.

413. Skarlato was not retained to analysis the issue of ownership or title to the subject properties. He simply understood from his client of the dispute over the properties and, thus, amended the tax returns for nonparty Antoinette Giaimo for 2004, generated by Weiser LLP (Rx 74 [Nonparty Antoinette Giaimo 2004-Tax Return]).

414. He further identified an amended 2006-Tax Return (Rx 75) from the Antoinette Giaimo Estate (already deceased at the time of the actual amendment and respondent being an executor of her mother's Estate), which was filed by Skarlato, although the tax return was generated by the accountant Weiser LLP. Both of these returns sought to amend unreported income for 2004 and 2006 from the Spring Street properties and the 1063 First Avenue (T, 2269-2277).

415. In fact, his testimony reveals that there was an issue of whether FAV or EGA could put in any amended tax return income from the "disputed property" as that would then present an inconsistency to the IRS with the amended return that was filed on behalf of the Estate of Antoinette Giaimo (T, 2339-2341).

416. Skarlato also noted that the amending filings for Antoinette Giaimo Estate were consistent

with the decedent's past filings, but not consistent with the concept that she was reportedly a "net lessee" of the subject properties (T, 2342-2343).

417. But, it was also noted on cross examination that a review of the relevant tax return for 2004 or 2006 no "depreciation" was noted on the decedent's tax returns (Rx 75, Schedule E [2004], line 20; Schedule E-3 [2006]), although Skarlato presumed a deduction was taken for depreciation and noted in another section of the tax return. But, Skarlato did not generate the tax return (T, 2344).

418. Skarlato was asked whether certain documents (Px AX [Certified Property Renovation Forms-6 Spring Street]; Px AY [Certified Property Renovation Forms-8 Spring Street]; Px AZ [Certified Property Renovation Forms- 350 East 58th Street]) refreshed his recollection as to Antoinette Giaimo's status as a net lessee of the so-called "disputed properties," to which he testified in the negative (T, 2351-2353).

419. Skarlato identified a schedule of "tax liabilities" for EGA and FAV for both federal and state taxes for years ending 2005, 2006 and 2007 (Rx 76) ,prepared by Salibello & Broder, attorneys retained by the respondent. The interest for the taxes are calculated up to February 2009. Skarlato noted this schedule was used by him in filing the necessary paperwork with the IRS.[20]

420. After submitting the amended returns with check payments, Skarlato conferred with the IRS and he understands based on his conversations that the returns are being processed by the

[20] The parties stipulated in evidence of certain documents (Court Ex 1 and Court Ex 2 [Feb., 27, 2009-Stipulation]), specifically noted on the record (T, 2692-2703). However, petitioner's attempt to mark in "redacted" portions of an affidavit of Janet Giaimo Vitale as opposed to the entire affidavit was denied without prejudice to argue that she is not precluded from moving in evidence her redacted affidavit (T, 2697-2699 [Rx 99 and Rx 100]).

IRS. However, he noted amended state returns have not been filed with New York, as Skarlato is waiting a favorable response from the IRS, which he anticipates within weeks. He intends to file the amended state returns once he is able to resolve the tax issue with the IRS (T, 2278-2287).

421. Although the legal billings were not marked in evidence, Skarlato testified that he reviewed them in detail and based on his review generated a summary of how he “allocates” the services among the various individuals, Estates and corporate entities, although he was retained only by the respondent in her individual capacity (Rx 77 [demonstrative exhibit; T, 2311-2312).

422. He noted his schedule covers the period of his law firm’s retention up to October 3, 2008. Based on his out-of-court review of legal billings and expenses, he allocates to EGA $162,651.24 and to FAV $49,543.00. He testified that he “looked at the total and . . . at the descriptions of what [he] did and . . . made a judgment that about twenty (20%) percent of everything” he did was limited to his client Janet Giaimo Vitale and the balance of eighty (80%) percent was for the tax issues. He then allocated the tax issues among his client, the three Estates, and the two corporations, EGA and FAV.

423. But, he “allocated in accordance of the amount of the tax that was owed because the theory was that was sort of the benefit to each entity. The one entity that owed the most tax, they got the most tax benefit out of” his services (T, 2288-2294).

424. However, Skarlato concedes those “benefits” are not ascertainable nor definite as the IRS has not accepted the amended tax returns nor provided a final and favorable disposition on behalf of FAV and EGA (T, 2323-2325).

425. It was stipulated that the total billing by Kostelanetz & Fink is $389,490.00 (T, 2295) and it was further stipulated that twenty (20%) percent of the fee is allocated to respondent in her individual capacity. The petitioner does not stipulate to the appropriateness of the allocation of the legal fees (T, 2295-T, 2297).

426. However, Skarlato testified to related to work he performed on his client with respect to her litigation against her brother in this action as well as avoiding any criminal tax liability on behalf of the client. In fact, Skarlato was aware that his client owned two other properties not subject to this litigation that were managed by the same brother who managed FAV and EGA during the ten-year period before his death and that rents collected from those properties were not reported to the IRS (T, 2316-2323). Skarlato was not retained by the respondent for this litigation rather than retained to sort out the tax issues evenly and owed no duty to others, only his client.

427. Skarlato testified he reviewed the billings rendered by the law firm (which were never marked in evidence) and based on his out-of-court review, concluded that twenty (20%) percent allocation as to his client was reasonable. He also concluded that eighty (80%) percent of the work was tax related, based on his "<u>best judgment</u>" (underscore added for emphasis) and allocated that sum in "accordance with the taxes that were paid by each of the entities and individuals" and thought most reasonable as it is "designed to reflect the benefit that each of the entities or individuals received as a result of . . . tax advice" (Rx 77).

428. Skarlato's judgment is premised on review of time records not in evidence, although the respondent had opportunity to do so. Skarlato's testified his billings were detail and prepared in the ordinary course of business, but examination of whether any of these tasks

sought to be allocated to EGA and FAV were duplication, not necessary, unreasonable was impossible to do without the billings. The entries were made on a computer and easily ascertained (indeed, easily generated in hard copy) (T, 2304-2305).

429. He used the $2,570,924.00, representing the tax payments for five "individuals and entities" and then determined the ratio of each tax, the percentage of each total for each entity to arrive at the multiple that he then multiplied against his eighty (80%) percent allocation (T, 2298-2315).

430. However, Skarlato conceded another method he could have used was to allocate the 80% balance evenly among all of the individuals, estates and corporate entities. He also conceded that protecting his client from tax liability was foremost, regardless of any benefit that may fall on FAV or EGA (T, 2325-2331). He never sought a retainer with EGA or FAV (T, 2334-2335).

CONCLUSIONS OF LAW

I. SCOPE OF REVIEW BCL 1118-A, BURDEN OF PROOF, INTERESTED WITNESSES, EXPERT TESTIMONY AND OBJECTIVE PROOF

1. My scope in this reference is limited by the issue referred (*Marshall v Pappas,* 143 AD2d 979 [a referee is controlled by the order of reference, and must comply with the direction contained therein]).

2. I am to report and recommend the "fair value" of petitioner's interest in FAV and EGA pursuant to BCL § 1118 [a]. The petitioner commenced these two proceedings to dissolve EGA and FAV pursuant to BCL § 1104-a. In turn, the respondent answered and cross-petitioned to purchase petitioner's interest in EGA and FAV at "fair value" pursuant to BCL § 1118 [a], thereby mooting the petitions to dissolve both limited liabilities companies.

3. I take judicial notice of the record in this matter. It includes, among other things, the petition and answer as well as legal memos in prior motion practice filed with the County Clerk (*Sam and Mary Housing Corp. v Jo/Sal Market Corp*., 100 AD2d 901, 903, *affd.* 64 NY2d 1107; *Rossbach v Rosenblum*, 260 App Div 206, *affd*. 284 NY 745).

4. In corporate dissolution proceedings, neither party has the burden to determine fair value of shares. Rather, the Court has the obligation to establish fair value (BCL § 1118; *Matter of Cohen*, 68 Misc2d 91)

5. The purpose of BCL § 1118 is to act as a "defensive mechanism" for the non-petitioning shareholder (*In Re Pace Photographers*, 71 NY2d 737, 744). Section 1118, provides for the purchase of a petitioner's shares "at their fair value" (BCL § 1118 [a]. However, the BCL does not define "fair value" or provide a criterion for its determination (*Matter of Blake v Blake Agency, Inc*., 107 AD2d 139, 146).

6. Section 1118 [a] provides the non-petitioning shareholder with "an absolute right to avoid the dissolution proceedings and any possibility of the company's liquidation by electing to purchase petitioner's shares at their fair value and upon terms and conditions approved by the court" *(In Re Pace Photographers, Ltd., supra* at 744-745).

7. Where the purchasing share holder[s] and the corporation are unable to agree with the petitioner upon the fair value of the shares, the court, upon the application of the prospective purchasers or the petitioner, may determine the fair value of the petitioner's shares as of the day prior to the date on which the petition was filed, exclusive of any element of value arising from such filing, but giving effect to any adjustment or surcharge found to be appropriate in the proceeding (BCL § 1118 [d]; *Levitt v Toohey*, 109 AD2d 502; *Cristo v*

Cristo, 97 AD2d 274).

8. Here, upon election by the respondent to buy the shares of the petitioner seeking dissolution of the closely-held corporations, the central question becomes one of valuation under BCL § 1118. "The objective in calculating fair value to determine what a willing purchaser in an arm's length transaction would offer for petitioner's interest in the company as an operating business " (*Matter of Penepent Corp., Inc*., 96 NY2d 186, 193, quoting *Matter of Seagroatt Floral Co. (Riccardi)*, 78 NY2d 439).

9. The purpose of a section 1118-election is to preserve a corporation from dissolution, that is, to treat it as an ongoing concern. Thus, the statute serves as the premise for the experts' testimony that their valuations of EGA and FAV are based on both of these corporations continuing as ongoing concerns (see, **FINDINGS OF FACT**, ¶¶ 267, 288, 297, 330). (*Matter of Pace Photographers [Rosen],* 71 NY2d 737, 744). The value of a petitioning shareholder's interest is not to be based upon the value of the corporation upon a liquidation or possible conversion[21] (id., at 746).

10. As noted in the above findings, one material dispute between the parties involved the issue of a proper valuation of the closely-held businesses with large real estate holdings, all residential apartments with the exception to one development lot. Most of the premises held rent-control and/or rent stabilization apartments, some held market rate apartments.

11. The appropriate methodology for the valuation of these real properties is necessarily the

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21 Under the above analysis, the experts treated EGA and FAV as ongoing C-Corporations as of the date of the valuation and agreed that a willing buyer would hold the properties for a ten-year period (**FINDINGS OF FACT**, ¶¶ 15, 19, 89, 93, 102, 130, 156, 159, 279). It is of no moment whether the corporate form may change in the future, regardless of petitioner's post-trial contention of the possible conversion to S-Corporations to avoid the impact of the B.I.G. (discussed, *infra*).

market value. The market value is implicated in the analysis as the value of these corporations' primary assets are the buildings. However, in addition to determining the market value of the real properties, the fact finder is required to value the stock of the corporate entities that hold title to these properties[22].

12. Thus, the valuation methodology of the corporations' stock is net asset value of the corporations as a whole on the valuation date (compare, *Matter of Blake v Blake Agency, Inc., supra*., 107 AD2d at 146 [[n]et asset value is generally the standard applicable in evaluating . . . real estate and investment holding companies]).

13. The "fair value of petitioner's interest will largely depend on the appraisal value of the building[s] at the valuation date, but will also include any other assets, such as bank accounts, less any liabilities such as debts . . ." (*Matter of McDaniel v 162 Columbia Hgts. Hous. Corp.*, 23 Misc3d 784, 792 [footnote 5]).

14. The applicable standard in determining "fair value" for purposes of an election pursuant to BCL § 1118 is "what a willing purchaser in an arm's length transaction would offer for petitioner's interest in the company as an operating business' . . . " (*Matter of Penepent Corporation, Inc.*, 96 NY2d 186, 193; *Matter of Seagroatt Floral Co.*, 78 NY2d 439 [under statute authorizing close corporation or shareholders interested in continuing to operate close corporation to elect to purchase shares of shareholders seeking dissolution, value to be ascertained is that of interest in going concern rather than interest in business in throes of liquidation, i.e., it is necessary to determine what willing purchaser in arm's length

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[22] The dispute over four properties is discussed hereafter (but see, **FINDINGS OF FACT, ¶¶** 319-323, 366-367, 372).

transaction would offer for selling shareholders' interest in corporation as operating business]; *Matter of Friedman v Beway Realty Corp*., 87 NY2d 161, 167 [It is further noted the valuation under BCL § 1118 “is to be determined on in an ongoing concern, not in liquidation . . . ”]).

15. However, the elements applicable in determining the fair value of a petitioner's share varies according to the nature of the enterprise (see, *Friedman v Beway Realty Corp*., 87 NY2d 161, 167), and the business of EGA and FAV is limited to residential tenements, some with retail space.

16. The analysis under BCL § 1118 contemplates applying the “highest and best use” of all of the properties, including the development of the East 96 Street site in order to measure the fair value of petitioner’s interest in EGA and FAV. But, the standard is a flexible one (*Amodio v Amodio*, 70 NY2d 5, 7 (“[t]here is no uniform rule for valuing stock in closely held corporations. One tailored to the particular case must be found, and that can be done only after a discriminating consideration of all information . . . ”]; citing, *Snyder's Estate v United States,* 285 F2d 857, 861; *Matter of Exterior Delite, Inc*., 14 Misc3d 910, 918 [shares of closely-held companies cannot “reasonably be valued by application of any inflexible approach; it must be tailored to the particular circumstances”]).

17. Here, the respondent seeks to prove the value of the corporations is less than what the petitioner claims. The petitioner seeks to prove that the value is more. Each has presented evidence, which I have weighed (Prince, Richardson on Evidence §3-210 [Farrell, 11th ed.]).

18. Regardless of who carries the initial burden, each must demonstrate a fair preponderance

of the credible evidence to support their respective claim. The credible evidence means the testimony or exhibits that I as the trier of fact find to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. It does not mean the greater number of witnesses or the greater lengths of time taken by either side. The weight is the quality of the evidence, that is, its convincing quality, and the effect that it has on the trier of fact. (57 NYJur 2d, Evidence and Witnesses, §164; Richardson, Evidence § 100 [Prince 10th ed.). The weight of the evidence is also an issue to be determined by the trier of fact.

19. As to witnesses, the fact that a witness may have an interest in the outcome of the litigation is highly material to the assessment of that witness's credibility (65 NYJur., Witnesses, §71, pp. 233-234; *Coleman v New York City Tr. Auth.,* 41 AD2d 812, *affirmed* 37 NY2d 137).

20. As to a witness' character, demeanor, and interest, it is the trier of fact that determines whether or not the testimony is colored intentionally or unintentionally by those factors (*Lauria v Lauria*, 187 AD2d 888, 889]).

21. The non-expert witnesses were Yates and Skarlato. The latter's testimony was limited to the allocation of approximately 80% of the attorneys' fees to EGA and FAV (**FINDINGS OF FACT**, ¶¶ 401-430). However, he was an agent of the respondent and never retained by EGA and FAV. He has an interest in the outcome of the case as a favorable allocation of fees favors his client, although she likely has paid him for his services.

22. Skarlato was not called as an expert. His testimony centered on the allocation of legal fees between FAV and EGA, although he was never retained by FAV and EGA. I have weighed his testimony accordingly.

23. The second witness, Yates is the accountant and partner of Nussbaum, Yates, Berg, Klein & Wolpow **FINDINGS OF FACT**, ¶1), but his testimony was really of no moment in view of the Appellate Division disposition (see, *Giaimo v EGA Associates Inc.*, 68 AD3d 523).

24. Here, neither party testified in Court. Instead, there was an attempt to move in redacted affidavits, which was denied as it was impossible to consider the entirety of the redacted affidavits (see, **FINDINGS OF FACT**, ¶ 419 at footnote 20). The respondent offered to reasonable explanation for offering a redacted affidavit, e.g., to omit the identity of an expert witness or confidential source (see, 3101 [d] [1] [i]; *Moticik v Sisters Healthcare*, 19 AD3d 1052). Petitioner' post-trial contention that the Court improperly sustained the objection to a "redacted" statement (see, Px Reply Post Trial Memo of Law, p 15, at footnote 12) has been considered and rejected.

25. As to the expert witnesses, evaluating the credibility of the respective witnesses and determining which of the proffered evidence was most credible are matters committed to the trial court's sound discretion (*Dobro v Village of Sloan*, 48 AD2d 243, 247-248, *appeal dismissed* 37 NY2d 804; *Matter of Adirondack Hydro Dev. Corp.*, 205 AD2d 925, 926).

26. As the trier of fact, I am at liberty to disbelieve the testimony of such witness even though it is not otherwise impeached or contradicted. Issues of credibility are for the trier of fact (*Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.,* 46 NY2d 528, 534).

27. With respect to the expert opinions by Esposito, Leitner, Lipton, Levy, Baliban, and Mercer, the admissibility of their testimony is a question of law and fact and subject to the discretion of the court (*Selkowitz v County of Nassau*, 45 NY2d 87).

28. The expert's expertise as well as involvement in the issues raised are probative to the

reliability of his or her testimony (*Greenman v Greenman,* 175 AD2d 360, *appeal dism*., 78 NY2d 1124). To determine value, the court may rely upon the testimony of the expert despite a claim that the expert's method of determining the price is critically flawed (*Dissolution of Funplex, Inc*., 252 AD2d 923). Each expert's testimony must not be merely intuitive, but based on objective facts and his/her judgment in this regard must be rational and based on the evidence (see. *In re Petralia*, 267 AD2d 1013).

II. VALUATION OF PROPERTIES (EXCLUDING 223 EAST 96 STREET PROPERTY) & EXPERT TESTIMONY

29. As to the valuation of the subject properties by experts Esposito and Leitner, I have weighed the experiences, credentials, and most importantly the testimony of both of them (see, **FINDINGS OF FACT**, ¶¶ 2-57 [Esposito], 111-214 [Leitner]) and find Leitner was very credible with respect to his valuations of the real properties, not including the development site at East 96 Street (discussed, *infra*). I credit his testimony as to methodology employed, subject to adjustments discussed herein.

30. My conclusion is not to be interpreted as degrading Esposito's as a qualified appraiser and that she inspected the subject properties (see, **FINDINGS OF FACT**, ¶¶ 2-4), but she lacked the vast and quality experience in appraising that was clearly amplified by Leitner (**FINDINGS OF FACT**, ¶¶ 111-114)[23]. She is qualified in her field, but her knowledge

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[23] I note that respondent's experts referenced Leitner's appraisals in their respective opinions and/or reports or updates (see, e.g., PxA-Q and PxA-R), paying little attention to the appraisals generated by Esposito. This too suggest that the majority of Esposito's reports were (*well* . . .) unconvincing. Respondent's continued reliance on the entire contents of these reports in her Post Trial Memo of Law (see, Rx Post Trial Memo of Law, pp 121-153) exemplifies "*duty and faith*" (maybe "*hope*"). But, it now appears from the reading of her Reply Post Trial Memo of Law, that the respondent may have abandoned Esposito and instead seeks to have the Court treat her rebuttal witness, Gelbtuch, as her direct witness (Rx Reply Post Trial Memo of Law, pp

and experience - although beyond the ken of a lay person - were not equal to that of Leitner. Leitner is a highly-qualified expert (*Matter of McDaniel v 162 Columbia Hgts. Hous. Corp.*, 23 Misc3d 784). Moreover, there were contradictions, discrepancies and inconsistencies in respondent's appraisals (see, e.g., **FINDINGS OF FACT**, ¶¶ 26-27, 44-45, 48-49;see also, Px Post-Trial Memo of Law, pp 46-47).

31. The contention that Leitner erroneously certified the appraisals (Resp., Memo of Law, pp 182-184) is a weak contention and if relevant simply *di minimus*. The credible testimony reveals that Leitner personally inspected the premises and his testimony as to the properties in issue, that is, his inspection was more than a glance of the properties. The respondent's contention to the contrary (id., p 183) if of no moment. Leitner was very credible (**FINDINGS OF FACT**, ¶¶190-191).

32. Indeed, respondent's expert, Gelbtuch, only opined that certifying appraisals of properties not inspected is improper. Gelbtuch's opinion in this regard was of no real moment, as he conceded he based it on the understanding Leitner did not personally inspect the properties - or so he assumed from reading the report (**FINDINGS OF FACT**, ¶¶222-223) - which does not rebut the credible testimony by Leitner. The testimony by Leitner reveals he indeed inspected the properties and erred when he signed his name in a location that indicated otherwise **FINDINGS OF FACT**, ¶¶ 190-191).

33. Here, the expert testimony reveals that both Esposito and Leitner appraised the properties by both physical inspection and by way of income and sales comparison approaches, the former by incorporating findings and/or presumptions based on third party data and the

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7-9). But, that too fails.

latter by using sales during the period surrounding the valuation date as the correct method to be applied (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 8-14; 121-124, 177).

34. However, numerous errors were found in respondent's expert's appraisals as well as credible rebuttal testimony by Levy, a credentialed expert (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 63-64) who demonstrated many weaknesses in Esposito's expert opinion regarding: (1) capitalization rates; (2) square foot measurements from ACRIS; (3) vacancy rates; (4) absence of consideration of upside potential of regulated/control rentals; (5) reasonable management rates, but improperly coupled with separate owner-offices expense; (6) no consideration of free superintendent apartments as value toward compensation; (7) appreciation rates; (8) comparables treated as one sale, when in fact two sales; (9) weak consideration of upside potential retail rent; (10) replacement reserves in different amounts; (11) unusual mirroring of all income and comparison valuation; (12) inconsistent adjustments; (13) credibility of July 2007-appraisals as to repair and inconsistent with findings as to conditions and material or immaterial impact on valuation from earlier March 2007-appraisals; (14) lack of understanding of capital improvement and recovering 1/40 of same viz-a-viz rent; (15) inconsistent treatment of cap rates for properties as to adjustments of zoning and location in the March and July 2007-appraisals; (16) lack of actual rent rolls for comparables or actual visits of retail space of comparables; and (17) excessive expense allocation, utility expense (one boiler for 4-buildings as 4 boilers for 4-buildings), superintendent salaries, "fuel-residential only charges," as well as estimated expenses, which are suspect (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 11, 13, 18-30, 48-54 [Esposito Testimony]; **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 64-111[Levy Rebuttal Testimony]; <u>see</u>, Px Post-Trial Memo of

Law, pp 50-57).

35. The credible rebuttal testimony by Levy revealed that these failings devalued the subject properties because these numerous errors materially impacted the capitalization rates for the subject properties. Some of her adjustments were subjective as it was impossible to have all of eighteen (18) properties mirror both sale and income values. Esposito used expenses that she did not verify with reliable data or sources, and Levy rejected her conclusion of market rent for the garden apartment that was not based on any identifiable source (**FINDINGS OF FACT**, ¶¶ 65, 67-69).

36. Levy's credible rebuttal reveals inconsistencies and unreliability in Esposito's opinion regarding size adjustments of the subject properties and comparables, which impacts the capitalization rates and, thus, valuation. Such as actual square footage, location of the properties and/or comparables, conditions, percentage of time adjustments, condition and zoning adjustments, identifying comparable as single sale, when in fact it was a double sale (a second building part of the transactions, but price not recorded) (**FINDINGS OF FACT**, ¶¶ 71-85, 94-100, 104).

37. He also credibly identified expenses for legal and payroll that were excessive or out of line. He was credible as to the analysis of high capitalization rates employed by Esposito, but premised on low appreciation percentages for many of the properties. Levy was credible that the appreciation rates for the properties at the relevant time were at the least approximately 30% (discussed, *infra*). Levy demonstrated by credible testimony that part-time superintendent pay of $100.00 a week was reasonable in view of a free apartment provided that could be rented at regulated or market rates- with the exception of one large

property (discussed, *infra*) (**FINDINGS OF FACT**, ¶¶ 87-93, 97-99, 102-103).

38. He further identified inconsistent application of comparables to one property with a block of another property, but not applied for both - though the properties were similar, and also identified convincingly the high vacancy rates applied by Esposito for apartments below market rents, which would rent easily as well as incorrect square footage and boiler expense allocation as if four separate and distinct boilers, rather than one boiler heating four buildings and inconsistent reserve allocations (**FINDINGS OF FACT**, ¶¶ 95-97, 101).

39. Weighing all of the above, I find Levy's rebuttal testimony was totally credible and convincing (*Matter of Wentland v Rousseau*, 59 AD3d 821, 823).

40. With regard to Leitner, although he was retained by the petitioner in this litigation, he had originally been retained by the parties to generate the March 2007-appraisals on their behalf as executors of their brother's estate (Edward P. Giaimo Jr., Estate). Tho March 2007-appraisals were delivered in draft form to both parties, but Leitner's testimony was credible that although they were marked as "drafts," the substance of the information therein was final. He was simply asked to update the March 2007-appraisals on behalf of the petitioner (**FINDINGS OF FACT**, ¶¶ 112-121).

41. I find there is a complete absence of bias or hostility by Leitner toward the respondent, especially in view of his reliance on the March 2007-appraisals generated on behalf of both parties, which were updated for this litigation on behalf of the petitioner (*Badr v Hogan*, 75 NY2d 629; *Platovsky v City of New York*, 275 AD2d 699; see, Px Post-Trial Memo of Law, pp 43-45).

42. Leitner's valuations of the properties followed applicable appraisal protocol, to which he

testified too. He weighed data collected from the market, reviewed municipal records and analyzed comparables as well as the properties. He personally inspected the properties. His reliance on residential and retail data and his opinion on vacancy rates in comparable neighborhoods and buildings, particularly with respect to rent controlled and/or regulated apartments, was credible (except the issue of appreciation rates, discussed, *infra*) (**FINDINGS OF FACT**, ¶¶ 120-123, 150-151).

43. Nevertheless, although he was more credible than Esposito, some of the updated appraisals on the properties (excluding 96 Street property, discussed, *infra*), are adjusted. I have considered portions of Gelbtuch's rebuttal testimony to reach this conclusion, but also reject portions of Gelbtuch's rebuttal on other issues.

44. First, the record supports[24] the finding that Leitner's opinion and August 2007-appraisals incorporate by reference all of the information contained in his March 2007-appraisals., Including the sales comparables, market data and surveys from market participants, such as, Massey Knakal (**FINDINGS OF FACT**, ¶ 125).

45. What Leitner employs for the August 2007-appraisals is an income approach to reach his valuation of the same properties and his credible testimony is that he then compared the

[24] It is important to note the "record" consist of the marked evidence and testimony as well as court records that consist of prior filed legal arguments, stipulations and orders. It is also important to note that documents submitted by counsel with their post-trial memos of law, e.g., appendices that do not consist of the above, were not considered by the Special Referee (see also, Px Reply Post Trial Memo of Law, pp 2-3, 9 [re: claim of respondent "appendices 1-4 and 6]; see also, Rx Reply Post Trial Memo of Law, p 23). It is plain, if the subject documents were not marked in evidence and are not court records that consist of prior filed legal arguments, stipulations and orders, they have not been considered by the Special Referee. Respondent's reference that such documents in her reply papers serve as some sort of "*guidance*" for the Court, is rejected (Rx Reply Post Trial Memo of Law, p 19). Petitioner's post-trial objection to appendices 1-4 and 6, is sustained.

valuations that are derived from income approach to the valuations derived from the sales comparisons. He credibly testified that this methodology (simply using both methodologies) of valuation was reasonable. Gelbtuch's opinion that it was both optimistic, a rarity - if anything - and a misuse of the sales comparison (**FINDINGS OF FACT**, ¶¶ 219-221) is of no real moment

46. There was much ado as to Leitner's trending of rent, but the claimed failure to trend expenses (see, **FINDINGS OF FACT**, ¶¶ 227, 232-234). But, Leitner's testimony reveals he indeed "projected" the operating expenses for the subject properties based on historical expenses. The fact finder weighs Leitner's testimony in that regard to mean he indeed estimated expenses, which the factor finder infers is the same as trended (see also, Px W, p 96; **FINDINGS OF FACT**, ¶¶ 141-143; cf., Px Post Trial Memo of Law, pp 58-60).

47. Gelbtuch's interpretation of the term "projected" is also of no credible moment (but see, **FINDINGS OF FACT**, ¶ 228). In fact, Gelbtuch's credibility is suspect in view of his testimony during cross examination that he conferred with his client's attorney and discussed with him questions respondent's attorney believed petitioner's attorney might ask during cross examination (**FINDINGS OF FACT**, ¶ 217). This is not a case where the witness testified that he discussed prior testimony. Indeed, Gelbtuch's testimony at the hearing is that he discussed with his attorney not what he had testified about, but what he would likely be testifying too. Therefore, questions of credibility and reliability as well as the weight of Gelbtuch's testimony are raised (*Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.,* 46 NY2d 528, 534).

48. Gelbtuch's reliance on RPIEs to support his testimony that expenses for similar apartments

went up (<u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 229- 230), is of no credible moment as I find it credible that Leitner relied on primary sources to ascertain the expenses, rather than rely on self-inflating RPIEs (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 127, 147, 181; Px Post Trial Memo of Law, pp 60-61). Therefore, I do not give weight to Gelbtuch's opinion that expenses for similar properties are actually higher than those found by Leitner whereas here, Gelbtuch relies on sources (RPIEs) that are not a reliable. Indeed, Gelbtuch understood Leitner recorded expenses for 2006 for each subject property and compared them to 2005 expenses for comparables, using 2005 and 2006 expense data to estimate the 2007 expenses (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 230-232). I reject Gelbtuch's opinion that Leitner's trending, etc., was a ploy to understate expenses, over state income, for the purpose of manipulating the cap rates.

49. Finally, Levy agreed the trending of rent rolls to come up with the income on property was appropriate, but only when coupled with expenses for the same period (**FINDINGS OF FACT**, ¶ 66). Here, I find credible testimony and proof that Leitner did trend/project expenses and income, but did not employ methods to inflate income or decrease expenses for the purpose of manipulating toward a higher value rate.

50. But, this does not end the query. Leitner's valuation of <u>43-49</u> <u>First</u> <u>Avenue</u> property for August 1, 2007 of $17,800,000.00, was $1.5 million more than his March 2007-appraisal ($16,300,000.00) (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 126). It is noted the capitalization rate used for August is the same used for March 2007 of 4.25. At the time of the initial cap rate, Leitner was acting as agent for both respondent and petitioner. His cap rates were derived from market data for similar apartments (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 125)

51. The only distinction is the net operating income (see, Pet., K, p 121; compared, K-1, pp 5-6), which was higher in August based on rents included that were not included in March 2007 as well as retail income. I credit the testimony with respect to vacancy rates and management rates (and excluding a home office as not reasonable) as well as a set reserve fund for emergency improvements and legal work. Leitner's reasoning of upside of future rents on regulated and control rents was credible and reasonable (**FINDINGS OF FACT**, ¶¶ 132, 137, 138-140, 141-154). His inclusion of rents from two apartments (Apts., 5H and 2Q) was also reasonable as he relied on the information provided to him by the respondent (**FINDINGS OF FACT**, ¶¶ 146-149). I credit Levy's opinion that Esposito's reserve funds were inconsistent (**FINDINGS OF FACT**, ¶¶ 96-98). I reject Gelbtuch's opinion that Leitner's reserve funds were "too low" (**FINDINGS OF FACT**, ¶ 235). Finally, I credit Leitner's testimony on over all cap rates, use of comparables (his error as to some was *di minimus*), (**FINDINGS OF FACT**, ¶¶ 164-189).

52. Furthermore, I found it credible that Leitner relied on rent rolls provided to him by the respondent with regard to the apartment on this property and his attribution of rents for specific apartments though there was an indication of litigation. I also credit his testimony of attributing rent for a "West Apartment" (**FINDINGS OF FACT**, ¶ 118). Finally, the superintendent payroll of $17,000.00 for this large building as well as rent-free apartment for the superintendent is credible (see, **FINDINGS OF FACT**, ¶¶ 144). In addition, his use of primary sources to ascertain expenses as opposed to relying on "self-inflating" RPIEs was very credible (**FINDINGS OF FACT**, ¶¶ 123-124, 126-127, 131).

53. Leitner's renovation loss did not change from his March 2007. Thus, the net operating

income of $817,429.00 for this subject property is supported by the credible testimony and evidence.

54. However, I take issue with Leitner's appreciation rate of 40% for this property (see, **FINDINGS OF FACT**, ¶ 131), and I credit petitioner's expert, Levy, that the appreciation rate at the relevant time was approximately 30% (**FINDINGS OF FACT,** ¶¶ 89, 95-97, 99-100)[25], an opinion adopted in part by respondent's expert, Gelbtuch (**FINDINGS OF FACT**, ¶¶ 244-246; see also, Rx Post Trial Memo of Law, pp 7-8). The appreciation rate impacts the cap rate, the latter is higher when the former is lower (**FINDINGS OF FACT**, ¶ 157).

55. Thus, I find credible testimony to conclude that the 40% appreciation rate allocated to 43-49 First Avenue by Leitner is too high (see, Px K, p 119 [Change in Value]). I reject petitioner's arguments to the contrary (but see, Px Post Trial Memo of Law, pp 62-63).

56. Therefore, the appreciation rate is reduced by 10% points (a 25% downward adjustment). Leitner concedes a downward adjustment of the appreciation rate by 5% impacts the cap rate (**FINDINGS OF FACT**, ¶ 160). It follows the 4.25 cap rate is adjusted upward, but not by a full point (e.g.,see, **FINDINGS OF FACT**, ¶ 89). Levy's downward adjustment of 1.0 point was premised on the opinion that Esposito's appreciation rate of 15% over a 10-year hold period was too low, and that the appreciation rate was , which was a 100% upward adjustment requiring a downward adjustment from 5.5 to 4.5, a whole point.

57. Logic follows that as there is a 25% downward adjustment to appreciation, and there should

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[25] Leitner testified the appreciation rate is influenced by many factors, such as potential upside, spread between average rent in place and rent at market, etc., (**FINDINGS OF FACT**, ¶158). But, presumably Levy weighed the same factors when he testified to the 30% appreciation rate for the properties. Moreover, I was not convinced by Leitner's testimony that the appreciation rates higher than 30% were supported by market and historical data. Petitioner's post-trial contentions that Leitner's appreciation rates should remain undisturbed (see, e.g., Px Reply Post Trial Memo of Law, pp 9-11) are rejected.

be a 25% upward adjustment to the cap rate. In this instance the cap rate is adjusted to 4.50.

58. Accordingly, the value indication for 43-47 First Avenue is adjusted (817429 ÷ 4.50 =) to $18,165,088.00 or rounded to $18,165,000.00 minus renovation of $1,440,000, and as of value of **$16,725,000.00.**

59. Applying the above conclusions as to the balance of the properties **(CONCLUSIONS OF LAW**, ¶¶ 45-54), other than the 96 Street development site, and finding that respondent's objections noted above are rejected, I have made the following adjustment to Leitner's appraisal.

60. As to the 324-326 East 66 Street property, Leitner's rental correction as well as allocating $5,200.00 as superintendent payroll is reasonable in view of the rent-free apartment provided. Moreover, the omission of a comparable cap rate to compute the cap rate for the subject property is *di minimus* (**FINDINGS OF FACT**, ¶¶ 173, 185-187).

61. But, for the reasons concluded above, the 40% appreciation rate is too high (see, Px Ex S, p 107), and it is reduced by 10% points (a 25% downward adjustment). Leitner concedes a downward adjustment of the appreciation rate by 5% impacts the cap rate (**CONCLUSIONS OF LAW,** ¶54) and the 4.25 cap rate is adjusted upward to 4.50.

62. Accordingly, the value indication for 324-326 East 66 Street property is adjusted (292135 ÷ 4.50 =) to $6,491,188.00 or rounded to $6,491,000.00 minus renovation of $101,000.00 and as of value of **$6,390,000.00.**

63. The 209 East 59 Street property valuation is reasonable for the conclusions noted above **(CONCLUSIONS OF LAW**, ¶¶ 45-54), including the superintendent payroll (**FINDINGS OF FACT,** ¶ 154). But, the 40% appreciation rate is adjusted to for the reasons already stated (**CONCLUSIONS OF LAW,** ¶54) and the 4.25 cap rate is adjusted upward to 4.50. The valuation is adjusted (142557 ÷ 4.50 =) $3,167,793.00 or rounded to $3,168,000.00,

less renovation of $173,500.00 and as of value of **$2,994,500.00.**

64. The <u>440</u> <u>East</u> <u>58</u> <u>Street</u> property valuation is also reasonable. I credit all of Leitner's testimony as to the expenses (including payroll) and income as well as the market rents for the garden apartment and the separate basement (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 133, 138-139, 171, 206).

65. I reject Gelbtuch's testimony (regardless if it was improper rebuttal [<u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 235, 238, 241, 261, at footnotes 5, 6, 7 and 12]; 238-239]) with respect to 440 East 58 Street (garden apartment, etc., [<u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 238-239]). Indeed, he conceded that the premises are located in a desirable neighborhood (**<u>FINDINGS</u> <u>OF</u> <u>FACT,</u>** ¶ 240).

66. The 40% appreciation rate is too high and adjusted to for the reasons noted above (**<u>CONCLUSIONS</u> <u>OF</u> <u>LAW,</u>** ¶54). The 4.25 cap rate is adjusted upward to 4.50. The valuation is adjusted (111495 ÷ 4.50 =) $2,477,666.00 or rounded to $2,478,000.00, less renovation of $105,000.00 and as of value of **$2,373,000.00**.

67. The valuations by Leitner of the <u>8</u> <u>Spring</u> <u>Street</u> and <u>6</u> <u>Spring</u> <u>Street</u> properties are reasonable with regard to income and expenses. I also credit Leitner's testimony on the use of comparables for the Spring Street properties (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 162, 180).

68. However, I do not find it reasonable for Leitner to have applied a 50% appreciation rates for these properties (<u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 156). I credit Levy's opinion that overall there is a 30% appreciation rates applicable to the properties. I also credit Gelbtuch's testimony that the appreciation rate for the Spring Street properties fell between 30-35% (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 244-245).

69. Therefore, the 50% appreciation rate is too high and adjusted to 30% for the reasons noted above (<u>see</u> <u>also</u>, **<u>CONCLUSIONS</u> <u>OF</u> <u>LAW,</u>** ¶54). This is a 40% adjustment (20 x 50 =

40). The cap rate for 6 Spring Street of 3.50 is adjusted upward to 3.90. The valuation is adjusted (78220 ÷ 3.90 =) $2,005,128.00 or rounded to $2,005,000.00 less renovation of $945,000.00 and as of value of **$1,060,000.00**.

70. The cap rate for 8 Spring Street of 3.50 is adjusted upward to 3.90. The valuation is adjusted (119678 ÷ 3.90 =) $3,068,666.00 or rounded to $3,069,000.00 less renovation of $1,040,000.00 and as of value of **$2,029,000.00**.

71. As to the 328-330 East 66 Street property, I have weighed Leitner's testimony relating to one of his comparables for this property listed a lower contract price (by $200,000.00) (**FINDINGS OF FACT**, ¶ 163), which he concedes impacts the cap rate. Therefore, a slight 0.05 adjustment for the $200,000.00 error is made to the 4.75 cap rate (Pet., Ex R-1). It is adjusted to 4.80. In view of above conclusions regarding trending expenses, comparables, etc., **(CONCLUSIONS OF LAW**, ¶¶ 45-54), and the fact that in this instance Leitner applied a reasonable 30% appreciation rate, which is not high, the cap rate, as adjusted, reduces the valuation.

72. Accordingly, the cap rate for 328-330 East 66 Street property is adjusted to 4.80 (299743 ÷ 4.80 =) and the value is $6,244,645.00 or rounded to $6,245,000,000 minus renovation of $192,000.00 and as of value of **$6,053,000.00**.

73. With respect to properties located at 314 East 62 Street and 356 East 57 Street, I find no adjustment is necessary for the reasons noted above as to the other properties **(CONCLUSIONS OF LAW**, ¶¶ 45-54). Morever, Leitner applied a 30% appreciation rate for both properties (Pet., Ex Q, p 110; Pet., Ex T, p 105), which mirrors Levy's opinion as to the applicable appreciation rates (**CONCLUSIONS OF LAW,** ¶54).

74. Accordingly, I adopt Leitner's valuations for these two properties, and they are valued at: **$4,300,000.00** and **$3,300,000.00,** respectively.

75. The same reasoning is applied to Leitner's valuations for 278 Mott Street and 341 East 76 Street (Pet., Ex P and Pet., Ex X). Leitner applied a 25% appreciation rate for these two properties and all other things being equal **(CONCLUSIONS OF LAW**, ¶¶ 45-54), and not considering Gelbtuch's opinion on appreciation rates for these two properties (**FINDINGS OF FACT**, ¶ 245), which were higher, I find these two valuations credible and supported by the evidence. Accordingly, I adopt Leitner's valuations for these two properties, they are valued at: **$5,100,000.00** and **$4,400,000.00,** respectively.

76. As to properties located at 155, 157, 159 and 161 East 99 Street; 1144 First Avenue; 1063 First Avenue; and 1057 First Avenue, I find Leitner's valuations, with one exception, are credible **(CONCLUSIONS OF LAW**, ¶¶ 45-54). I reiterate the reasonableness of allocating $5,200.00 as superintendent payroll (**FINDINGS OF FACT**, ¶ 186) for these properties in view of the free apartment. The only exception is the 35% appreciation rate applied to all of these properties. For the reason noted above, I adopt Levy's expert opinion that a 30% appreciation for the properties is reasonable (**CONCLUSIONS OF LAW,** ¶54).

77. Thus, for the 155 East 99th Street property this reduction represents 14.25% (35 - 30 = 5 ÷ 35 = 14.25), and the cap rate is adjusted upward by a rounded 0.14, that is, from 4.50 (Pet., Ex Z, p 106) to 4.64. The as is value totals **$2,815,000.00** (137572 ÷ 4.64 =) $2,964,913.00 or rounded $2,965,000.00, minus renovation of $150,000.00 =).

78. It follows that the cap rate for the valuation of 157 East 99th Street property is adjusted by 14.25% (35 - 30 = 5 ÷ 35 = 14.25), and rounded 0.14, that is, from 4.50 (Pet., Ex AA, p 106) to 4.64. The as is value totals **$3,417,000.00** (165504 ÷ 4.64 = $3,566,896.00 or rounded $3,567,000.00, minus renovation of $150,000.00 =).

79. The cap rate of 4.50 for the valuation of 159 East 99th Street property (Pet., Ex AB, p 106)

is adjusted by 14.25% (35 - 30 = 5 ÷ 35 = 14.25), and rounded 0.14, for a cap rate of 4.64. The as is value totals **$2,779,000.00** (135915 ÷ 4.64 = $2,929,203.00 or rounded $2,929,000.00, minus renovation of $150,000.00 =).

80. The cap rate of 4.50 for the valuation of 161 East 99th Street property (Pet., Ex AC, p 106) is adjusted by 14.25% (35 - 30 = 5 ÷ 35 = 14.25), and rounded 0.14, for a cap rate of 4.64. The as is value totals **$2,603,000.00** (127724 ÷ 4.64 = $2,752,672.00 or rounded $2,753,000.00, minus renovation of $150,000.00 =).

81. The 1144 First Avenue property cap rate is also adjusted upward by 0.14 (from 35% [Pet., Ex U, p 107] to 30% appreciation rate. It is adjusted from 4.50 to 4.64. The as is value totals **$5,433,000.00** (263709 ÷ 4.64 = $5,683,383.00 or rounded $5,683,000.00 minus renovation of $250,000.00 =).

82. The 1063 First Avenue property cap rate is adjusted upward by 0.14 (from 35% [Pet., Ex O, p 108] to 30% appreciation rate. It is adjusted from 4.50 to 4.64. The as is value totals **$4,898,000.00** (233,009 ÷ 4.64 = $5,021,745.00 or rounded $5,022,000.00 minus renovation of $124,000.00 =).

83. The 1057 First Avenue property cap rate is adjusted upward by a 0.14 (from 35% [Pet., Ex N, p 107] to 30% appreciation rate. It is adjusted from 4.50 to 4.64. The as is value totals **$3,863,000.00** (233,009 ÷ 4.64 = $3,863,125.00 or rounded $3,863,000.00 with no renovation cost =) (Pet., Ex N-1, p 4). The 50% value of this property is **$1,931,500.00.**

III. VALUATION OF 223 EAST 96 STREET PROPERTY & EXPERT TESTIMONY

84. The parties concede the East 96 Street Property is a development site. Respondent's expert, Esposito valued this property at $3,620,000.00, applying both income approach and sales comparison approach and adopting the latter method for valuation (**FINDINGS OF FACT**,¶¶ 34-36). Petitioner's expert, Leitner, valued the property at the same value in both

the March and August 2007 appraisals at $9,900,000.00 (Pet., Ex Y and Y-1). But, he noted his initial value was $10,500,000.00, which he adjusted to account for demolition, etc., and the net value is $9,900,000.00 (**FINDINGS OF FACT**,¶192).

85. However, an adjustment of the valuation is required as the credible testimony by non-party witness, Nakrosis, demonstrates that the development site's maximum FAR is 19,360 (**FINDINGS OF FACT**,¶56), the exact footage incorporated by respondent's expert, Esposito, in her appraisal analysis (**FINDINGS OF FACT**,¶¶ 34, 36-37, 43). I also credit his testimony that the maximum floor area of the development lot cannot be used for a proposed building (28,090). Thus, Leitner's use of 28,090 as gross building area in calculating his valuation of $10,500,000.00 (Px Ex Y, p 106) is flawed and rejected.

86. I also credit Nakrosis' testimony that the owner cannot seek and an exemption and/or build a structure, e.g., sliver building, that can abut the 30-story building wall adjacent to the site (**FINDINGS OF FACT,** ¶ 59, 62). I also credit his testimony that the cost of asbestos abatement must be included, which he estimates at $300,000.00 (**FINDINGS OF FACT**, ¶ 60). I adopt Nakrosis' testimony that, at most, a 10-floor building can be erected on the site with 9-floors having 1,914 square feet each of which 1,427 is rentable space. The 10-floor can constitute as a 1,509 square foot space. However, other than an elevator, there are no other amenities, e.g., gym, garage, retail, etc., **(FINDINGS OF FACT**, ¶ 62).

87. Furthermore, aware of the asbestos abatement issue at the development site before submitting his August 2007-updated valuations, Leitner did not bother to calculate the sum and arrived at a legal fee sum of $500,000.00 that has not supported in the record (see, **FINDINGS OF FACT**, ¶¶ 192-194).

88. In addition, his reasoning of leaving the initial valuation intact is also not supported by the testimony by Nakrosis, who testified that the owner could not get an exemption

(**FINDINGS** **OF** **FACT,** ¶ 59, 62), which is the same as a "variance" as far as the fact finder is concerned. Thus, Leitner' opinion that he contemplated a possible variance for zoning is rejected; he is not an expert in zoning (see, **FINDINGS** **OF** **FACT**, ¶¶194-195). Moreover, possible assemblage of lots or purchase of air rights at the subject site (**FINDINGS** **OF** **FACT**, ¶194), is mere speculation and not supported by the evidence. I credit Esposito's testimony that she saw no value in the so called "air rights" **(FINDINGS** **OF** **FACT**, ¶ 43).

89. Leitner's reliance on condo sales data is noted, but misplaced with respect to the subject site, the range of $800.00 to $1,500.00 per square foot was derived based on location, quality, age, layout and amenities as a gym, doorman, etc. No such amenities are contemplated for the development site other than an elevator **(FINDINGS** **OF** **FACT**, ¶¶ 42, 62, 196). Leitner's analysis in this regard is weak.

90. Comparing the Levy opinion as to his analysis of Esposito's valuation to Leitner's valuation, who reached as far as the westside and south of 34 Street, specifically Chelsea section, I find the adjustments made by Levy to Esposito's six comparable are most reasonable (**FINDINGS** **OF** **FACT**, ¶¶ 106-110). I reject Leitner's opinion as he used comparables that simply inflate the value of the 96 Street property.

91. Leitner reached "far" for comparables. He selected two properties on the far, far westside (Eleventh Avenue) and two more south of 30 Street (385 Third Avenue and 148-150 East 24 Street) (Px Y). I was not persuaded that the six comparables were the most reasonable in comparison to the development site, two of the comparables sold for a combined sum of $90,000,000.00 (id., p 103). Esposito's comparables ranged in price from $1,550,000.00 to as high as $43,004,663.00, and none of her comparables were on the far Westside, or Chelsea or lower Midtown (Rx 19, p 64).

92. Leitner's second comparable located on the Westside (446-450 Eleventh Avenue) was both retail and residential and near the Jacob Javits Convention Center. I do not give credit to Leitner that this site is a reasonable comparable; it is zone commercial and had different uses than the development site **(FINDINGS OF FACT**, ¶¶ 207-208). I credit Gelbtuch's opinion that this comparable was vastly different, zoning was limited to commercial and the sale data should be discarded **(FINDINGS OF FACT**, ¶ 254).

93. The fifth comparable located at 200 Eleventh Avenue suffers the same dissimilarities. It is located in the Chelsea section of Manhattan and apartments on that site after development sold starting at $5.0 million. The same can be said of his third comparable at 148-150 East 24 Street **(FINDINGS OF FACT**, ¶¶ 209-212, 259). This comparable is also wider than the development site, and in a better location (Baruch College/CUNY) **(FINDINGS OF FACT**, ¶ 255).

94. The last comparable at 385 Third Avenue is zoned commercial and reported to be a planned 49-residential units with retail space **(FINDINGS OF FACT**, ¶ 214). It is in a way superior location and below 32 Street (**FINDINGS OF FACT**, ¶ 260). In conclusion, I find that the majority of the comparables are not comparable to the subject site.

95. Levy's opinion, coupled with the use of Esposito's comparables, was persuasive and credible (*Dobro v Village of Sloan*, 48 AD2d 243, 247-248, *appeal dismissed* 37 NY2d 804; *Matter of Adirondack Hydro Dev. Corp*., 205 AD2d 925, 926; *Greenman v Greenman,* 175 AD2d 360, *appeal dism*., 78 NY2d 1124; *Dissolution of Funplex, Inc*., 252 AD2d 923; *In re Petralia*, 267 AD2d 1013).

96. Levy noted an expert appraiser should "never" say "never" with respect to properties north of 96 Street, where there are adjustments made. And with Levy's adjustments, I have adopted Esposito's comparables north of the subject site **(FINDINGS OF FACT**, ¶ 106).

Indeed, Leitner opined adjustments could be made to Esposito's comparables, though he would not look North of 96 Street for possible comparables (**FINDINGS OF FACT**, ¶¶ 198, 200), but he looked West, far West (**CONCLUSIONS OF LAW**, ¶ 91).

97. I reject the opinion that Esposito was "making a market" (see, **FINDINGS OF FACT**, ¶ 201). I find that Levy's adjustments to the comparables (one of which was also listed by Leitner [305 East 85 Street, see, **FINDINGS OF FACT**, ¶ 202]), warrants the conclusion that Esposito was reflecting the market.

98. However, I agree with Levy's testimony that three of the six comparables provided by Esposito are also materially distinguishable. He rejects the properties north of 96 Street various reasons, such as, location, inferiority, absence of material adjustments and the improper adjustments made by Esposito as to configuration and zoning. Moreover, the record and testimony support the finding that there is NYCHA housing at both the 2023 First Avenue (104 Street) property and behind the 96 Street **(FINDINGS OF FACT**, ¶¶ 46, 109, 198). I reject Leitner and Esposito's testimony that they could not "recall" seeing an NYCHA project in the vicinity of the subject development site and/or comparable (see, **FINDINGS OF FACT**, ¶¶ 47, 199).

99. Incorporating Levy's adjustments to Esposito's comparables and rejecting three out of the six as distinguishable from the development site, which I find credible and supported by the testimony (*Dobro v Village of Sloan*, *supra*; *Matter of Adirondack Hydro Dev. Corp.*, *supra*; *Greenman v Greenman, surpa*; *Dissolution of Funplex, Inc.*, supra; *In re Petralia, supra*), I adopt his valuation of the subject development site at $380.00 per square foot (**FINDINGS OF FACT**, ¶¶ 106-109).

100. Applying the multiple of $380[26] to the maximum FAR of 19,360, results in a valuation of $7,356,800.00. However, I adopt Esposito's estimate cost of $14.50 for demolition and clearing (Rx 19, p 73), as it is credible (**FINDINGS OF FACT**, ¶ 37). I find Leitner's estimated demolition and legal costs are fluid and/or incomplete (Leitner did not consider cost for asbestos abatement) (**FINDINGS OF FACT**, ¶¶ 89, 192-194). Thus, I deduct $172,260.00 as cost of demolition and clearing and another $300,000.00 for asbestos abatement as testified by Nakrosis (**FINDINGS OF FACT**, ¶ 60). Accordingly, the valuation of the development site is **$6,884,540.00.**

101. I have considered the parties' remaining arguments on the valuation of the real properties and to the extent not specified herein, are found to be without moment.

102. Accordingly, in view of all of the above, the properties are valued at:

6 Spring Street *	$1,060,000.00	8 Spring Street *	$2,029,000.00
1057 First Avenue *	$1,931,500.00	1063 First Avenue *	$4,898,000.00
278 Mott Street	$5,100,000.00	356 East 57 Street	$3,300,000.00
328-330 East 66Street	$6,053,000.00	324-326East 66Street	$6,390,000.00
314 East 62 Street	$4,300,000.00	1144 First Avenue	$5,433,000.00
209 East 59 Street	$2,994,500.00	440 East 58 Street	$2,373,000.00
341 East 76 Street	$4,400,000.00	223 East 96 Street	$6,884,540.00
155 East 99 Street	$2,815,000.00	157 East 99 Street	$3,417,000.00
159 East 99 Street	$2,779,000.00	161 East 99 Street	$2,603,000.00
43-49 First Avenue *	$16,725,000.00		

[26] I make no adjustment for the NYCHA project located the nearby area as it presence had very little impact on the luxury building located adjacent to the development site (One Carnegie Center) where cooperatives sold for more than $1,000.00 a square foot with amenities. I find that the $380 allocated to the property weighs both the lack of amenities, ancillary variables and "location."

*** FAV Total Property Value $26,642,500.00 EGA Total Property Value $58,843,040.00**

IV. VALUATION OF THE FAIR VALUE OF EGA AND FAV, APPLICATION OF DLOM AND B.I.G. ETC.,

103. The relevant provision of BCL § 1118 [a] does not define "fair value" and does not set forth guidelines in fixing a price (*In re Walt's Submarine Sandwiches, Inc. [Basile],* 173 AD2d 980). BCL § 1118 and relevant case law charges the Court with the duty to determine fair value, and it is "free to accept or reject all or part of any expert's valuation, methodology, reasoning or conclusions," to develop its own valuation formula *(Mejia v JMM Audubon, Inc*., 1 AD3d 201; see generally *Morris v Crawford,* 304 AD2d 1018 [supreme court is vested with the authority to choose among conflicting expert opinions]; *Chemical v Town of East Hampton,* 298 AD2d 419 [supreme court could reasonably reject the opinion of the plaintiff's appraiser]; *North Colonie Cent. School Dist. v State,* 257 AD2d 727 [the court was properly permitted to strike the engineer's testimony, to decline to adopt the main premise underlying claimant's appraisal, and to accept an alternate method of arriving at a total value for the subject property by adjusting each of his comparables]).

104. The fact-finder's valuation of EGA and FAV "if it is within the range of the testimony presented, will not be disturbed . . . where valuation of the business rested primarily on the credibility of expert witnesses and their valuation techniques" (*In re North Star Electrical Contracting Corp*., 174 AD2d 373, 374; *In re Burnham (Ashford Management Group, Inc.*), 261 AD2d 863).

105. The seminal case that construes the meaning of fair value under BCL § 1118 is Blake v Blake Agency, Inc., (107 AD2d 139, 146), and it provides that the "value of the corporation should be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business, rather than as a business in the process of liquidation" (see also, *In re North Star Electrical Contracting*

Corp., 174 AD2d 373).

106. Experts Lipton, Baliban and Mercer testified on the issue valuation, particularly the application of a B.I.G. and DLOM and the validity of booking "chose in action" claims, etc. As to valuation, these experts considered the generally accepted methods of valuation: market value, net asset value and investment value (also known as income approach). There are few reported cases that employ the first two methods with regard to closely-held corporations that are real estate holding companies, as here. Indeed, all three experts testified EGA and FAV are real estate holding companies (**FINDINGS OF FACT**, ¶¶ 265, 292, 331).

107. Case law reveals there is "no uniform rule for valuing stock in closely held corporations" (*Amodio v Amodio*, 70 NY2d 5, 7; *Friedman v Beway Realty Corp.*, 87 NY2d 161, 168; *In re Pace Photographers, Ltd. (Rosen),* 71 NY2d 737, 748).

108. Lipton and Baliban opined that both a DLOM and B.I.G. should be applied against the value of the real estate properties (**FINDINGS OF FACT**, ¶¶ 267, 269-270, 278). Indeed, Lipton and Baliban quantify the B.I.G. at 100%; Baliban quantifies the DLOM at 20% (**FINDINGS OF FACT**, ¶¶ 272-273, 285, 312, 321, 383). Lipton was asked to quantify the DLOM, but she opined that she did not quantify the DLOM.

109. Upon review of Lipton's testimony on DLOM, given that she never bothered to quantify the DLOM and coupled with Baliban's cumulative testimony as to DLOM, I give no weight whatsoever to that branch of Lipton's testimony as to DLOM as it is without much weight in the absence of her quantifying the DLOM (*Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.,* 46 NY2d 528, 534). I infer that she may have differed in her opinion as to the percentage of the DLOM compared to Baliban.

110. Petitioner's contention that Lipton's opinion as to B.I.G., was simply duplicative of Baliban

and therefore should be stricken from the record, is denied (see, Px Reply Post Trial Memo of Law, p 4, at footnote 4). First, I find no reservation of the objection and/or that the objection was noted on the record after Baliban completed his testimony. It is noted Lipton testified before Baliban (see, T, 1443-1444 [Court informing petitioner to raise objection after Baliban completed his testimony]). As noted by respondent, the petitioner's attorney was provided the opportunity to do so after Baliban completed his testimony, but he did not raise or renew his objection after Baliban completed his testimony (see also, Rx Reply Post Trial Memo of Law, pp 20-23). Second, regardless of whether there was no waiver of the objection, the cumulative evidence is harmless (*Havholm v Whale Creek Iron Works*, 162 App Div 354 [Though admission of reports by state inspectors was error, the same was harmless as the reports had no tendency to establish anything not admitted or fully established by other competent evidence]).

111. Mercer rejects the application of the DLOM on various grounds (**FINDINGS OF FACT**, ¶¶ 328-332, 335-336, 351). He also rejects the experts' analysis of a B.I.G., but concedes where B.I.G. is in issue, a discount should be made, but no more than 40% (**FINDINGS OF FACT**, ¶¶ 328, 338, 340-341, 348).

112. The expert's expertise as well as involvement in the issues raised are probative to the reliability of his or her testimony (*Greenman v Greenman,* 175 AD2d 360, *appeal dism*., 78 NY2d 1124). To determine value, the court may rely upon the testimony of the expert despite a claim that the expert's method of determining the price is critically flawed (*Dissolution of Funplex, Inc*., 252 AD2d 923). Each expert's testimony must not be merely intuitive, but based on objective facts. The expert's judgment must be rational and based on the evidence (see. *In re Petralia*, 267 AD2d 1013).

113. Respondent's experts, Lipton and Baliban, are qualified in their fields of expertise and their

testimony reveal familiarity with the underlying real estate assets held by FAV and EGA and that the willing buyer is purchasing EGA and FAV as an ongoing concern. The valuation contemplated under BCL ¶ 1118 [a] is of entire assets of EGA and FAV, not solely that percentage of assets that reflect the petitioner's interest. This understanding is acknowledged by all of the experts (**FINDINGS OF FACT**, ¶¶ 263-265; 289-290, 292, 295, 297).

114. As to the experts' opinion on applying a DLOM, I have weighed the testimony by both Lipton and Baliban against that of Mercer and find that Mercer's opinion is more credible (*Dobro v Village of Sloan*, *supra*; *Matter of Adirondack Hydro Dev. Corp.*, *supra*; *Greenman v Greenman, surpa*; *Dissolution of Funplex, Inc*., supra; *In re Petralia, supra*).

115. Lipton and Baliban apply a DLOM on the premise that EGA and FAV are closely-held corporations with stock that lacks marketability (**FINDINGS OF FACT**, ¶ 267). Generally a DLOM is applied to most close corporations (*Matter of Seagroatt Floral Co.*, 78 NY2d 439 [whatever method of valuation is used in determining selling shareholders' interest in close corporation sought to be continued by corporation itself or other shareholders, method should include consideration of risk associated with illiquidity of shares, i.e., unlikelihood of finding prospective buyers for shares]).

116. Lack of marketability discounts can range from zero to as high as 45% (*Carolina Gardens v Menowitz,* 238 AD2d 189 [approved 10 % discount]; accord, *Raskin v Walter Karl, Inc*., 129 AD2d 642; *In re Joy Wholesale Sundries, Inc. (Berger)*, 125 AD2d 310; *In re Fleischer (Gift Pax, Inc.)*, 107 AD2d 97 [approved a 25% discount for lack of marketability of the petitioner's shares in a consumer products distribution company]; *Hall v King*, 177 Misc2d 126 [discounts ranged between 25% to 45%]; but see, *In re Walt's Submarine Sandwiches, Inc. [Basile]*, 173 AD2d 980 [upheld the trial court's refusal to apply any discount based on

evidence of 120 responses to a for-sale advertisement]).

117. Here, however, there is a distinction, EGA and FAV are real estate holding companies that also hold cash. Lipton was not familiar with any cases that hold DLOM is not applicable to real estate corporations (**FINDINGS OF FACT**, ¶ 270). Lipton's opinion was simply premised on the fact that EGA and FAV were C-Corporations with shares, she did not weigh nor consider the distinction that they were real estate holding companies and that the only other asset was cash. Lipton simply opined that with shares there was illiquidity and, thus, DLOM should be applied. Baliban applies a DLOM on the same ground, he simply quantifies it at 20% on the ground the stock is restricted, has limited liquidity and lacks marketability. But, he does not consider the distinction that EGA and FAV only hold real estate and cash and there is no testimony or proof that EGA and FAV have "good will" (**FINDINGS OF FACT**, ¶¶ 314-316).

118. Furthermore, respondent's reliance on certain case law (*Wechsler v Wechsler*, 58 AD3d 62, *appeal dismissed* 12 NY3d 883; *Friedman v Beway Realty Corp.*, 87 NY2d 161; *Matter of Seagroatt Floral Co.*, 78 NY2d 439, 442; see also, **FINDINGS OF FACT**, ¶ 269), is misplaced. None of the noted cases involved the application of DLOM in a "fair value" valuation under BCL § 1118 [a] of a entity that only holds residential real property and cash[27] and has not engaged in real estate and mortgage financing (compare, *Murphy v United States Dredging Corporation,* ___ Misc3d____, 2008 WestLaw 2401230, *affirmed*, ___AD3d ____, 2010 WestLaw 2199659, 2010 NY Slip Op., 04794 [2d Dept., 2010, June 1, 2010] [holding that a 15% DLOM was reasonable in that the law does not limit the discount application of lack of marketability to the goodwill of a corporation in all

[27] Friedman did not involve an entity whose assets were only cash and real estate (see also, Px Reply Post Trial Memo of Law, pp 3-4).

instances. The Appellate Court reasoned that Murphy presented no "factual circumstances" in which applying DLOM was inappropriate]). The corporate entity in Murphy is distinguishable from EGA and FAV on several grounds: (1) it was a corporation incorporated in 1934; (2) had more than 4.0 million shares issued and outstanding; (3) shareholders were subject to a Shareholder Agreement with numerous conditions and limitations; (4) before its valuation date, sold parcels of real estate and its main asset (Red Hook Property to IKEA) for $31.5 million in cash; (5) held several out-of-state properties; (6) had complex and favorable leases with major commercial tenants CVS Caremark, Wal-Mart and Walgreens; (7) engage in an IRS 1031 tax-deferred exchange to defer capital gain taxes; and (8) engaged in mortgage and real estate financing (see, *Murphy v United States Dredging Corporation,* ___ Misc3d____, 2008 WestLaw 2401230[28]).

119. Mercer notes a distinction in his valuation, which is that the shares are valued under the concept that the entire corporate entity is being valued. What is being purchased is not a minority interest or partial interest, but a financial control level of value (**FINDINGS OF FACT**,¶¶ 328, 330). Respondent's contention that Mercer's "controlling interest" analysis misconstrues "fair value" (see, Rx Post Trial Memo of Law, pp 112-113), is completely without merit.

120. As succinctly stated by petitioner, the key theoretical differences are: (1) **fair market** value would appraise petitioner's interest as a minority interest versus; (2) **fair value**, appraising controlling interest and the petitioner's interest in same and that in **fair market value** one uses liquidation scenario versus ongoing business in **fair value** (Px Reply Post-Trial Memo of Law, p 4). Otherwise the valuation under "fair value" is one of an "minority interest."

[28] Murphy (*supra*) is also very instructive with respect to application of a B.I.G (discussed, *infra*).

The instant valuation is of the WHOLE, not of a part. The statute requires a valuation of the entire entity and from that valuation, subject to adjustments, is the value of petitioner's "share" allocated (*In re North Star Electrical Contracting Corp*., 174 AD2d 373).

121. credit his testimony that applying a DLOM to this form of transaction is merely converting a financial control level of value into an "illiquid minority interest value" (**FINDINGS OF FACT**, ¶¶ 329, 331). I also find credible the opinion testimony that reliance on "restricted stock" studies is inapplicable as those studies should only be weighed with minority or nonmarketable minority interests subject to restrictions (**FINDINGS OF FACT**, ¶ 332).

122. Mercer makes an excellent point that his valuation of a control level of interest in EGA and FAV captures the risks in the control valuation, rather than apply "a nebulous unspecified marketability discount that no one can justify" (**FINDINGS OF FACT**, ¶ 334).

123. Moreover, regardless of the above there is further reason not to apply a DLOM. I find that it would be improper to apply a DLOM to the value of the shares of EGA and FAV in this fair value hearing. As noted above, EGA and FAV are considered by the experts to be real estate holding companies (**FINDINGS OF FACT**, ¶¶ 265, 292, 331) and the record reveals the only material assets are real estate and cash (lots of cash!) (see, **FINDINGS OF FACT**, ¶ 361).

124. A DLOM should only be applied to the portion of the value of the corporation that is attributable to goodwill *(Whalen v Whalen's Moving & Storage*, 204 AD2d 468; *Blake v Blake Agency*, 107 AD2d 139, 149). There was no testimony of any "good will" attributed to EGA and FAV. Here, the value of the corporations is attributable solely to real property and cash; these entities are purely and simply real estate holding companies and therefore DLOM should not be applied.

125. "The unavailability of the discounts [DLOM] is particularly apt here, where the business

consists of nothing more than ownership of real estate" (*Vick v Albert*, 47 AD3d 482, 483; see also, *Cohen v Cohen*, 279 AD2d 599; *Cinque v Largo Enterprise*, 212 AD2d 599). Vick controls the analysis in the First Department (*Hanover Ins., Co v U.W. Marx, Inc.*, 238 AD2d 772 [trial court of the appellate department mut follow Appellate Division stare decisis where Court of Appeals has not established a precedent on the issue]).

126. Vick is unequivocal and applicable to this case. EGA and FAV only hold real property and has lots of cash, unlike Murphy (*supra*) has not engaged in real estate financing or mortgage financing, nor engage in an IRS 1031 tax-deferred exchange to defer capital gain taxes or execute complicated commercial leases nor own out-of-state properties (see, *Murphy v United States Dredging Corporation,* ___ Misc3d____, 2008 WestLaw 2401230). In short, no DLOM should be applied (see, Px Reply Post Trial Memo of Law, pp 19-25).

127. I have considered and weighed Baliban's rebuttal testimony as to the applicable percentage of DLOM (**FINDINGS OF FACT**, ¶¶ 383-400), and find it to be without moment. Indeed, during cross examination with respect to an article relied on by Baliban (Officer Article)(**FINDINGS OF FACT**, ¶¶ 391-399), it appeared to the Court that the subject analysis gleaned by Baliban from that article was not applicable to the FAV and EGA (subsidiaries, parent companies, need for liquidity, absences of real estate holding companies, acquisitions publicly traded targets, acquisitions of unlisted private targets, suggestion private companies more marketable than public), and thus did not justify application of a DLOM (Px Post Trial Memo of Law, pp 21-25, 28-36). The respondent's argument in favor of a DLOM (Rx Post Trial Memo of Law, pp 72-84, 115-120) is rejected.

128. On the issue of the application of a B.I.G., the distinction acknowledged by Lipton and Baliban is that there is a difference in "motivations" by investors who purchase an interest in a C-Corporation that holds real property (such as EGA and FAV) and investors who seek

to purchase the direct interest consisting of real property outside of the corporate wrapper and on the open market (**FINDINGS OF FACT**, ¶¶ 266, 296).

129. I agree that one must look at the transaction at the time of valuation and not speculate what an investor might do subsequent thereto without some material nexus to pre-sale facts. Thus, I reject petitioner's argument the Court should weigh the "possibility" of a corporate conversion from C-Corporation to a S-Corporation to "avoid" the B.I.G.. I credit Lipton's testimony that an expert cannot "presume" a specific buyer (respondent), but a willing buyer in the universe of buyers (**FINDINGS OF FACT**, ¶¶ 275-277, 285; see, Rx Post Trial Memo of Law, p 38).

130. But, the record does provide sufficient evidence for the Court to infer that the willing buyer intends to hold the properties for no less than 10-years. Indeed, the analysis is consistent with the analysis that the purchaser is deemed to be the holder of such realty for ten-years under the appraisal analysis employed by the parties' expert. Without the ten-year hold period, it would have been impossible to calculate the cap rates (**FINDINGS OF FACT**, ¶¶ 15, 19, 89, 93, 102, 130, 156, 159, 279).

131. Although there is no credible rational proof that a willing purchaser will convert in the C-Corporations to S-Corporations in the future to avoid the B.I.G., the purchaser is presumed to hold them for ten years (**FINDINGS OF FACT**, ¶¶ 279-289). Thus, although there is the absence of proof of conversion of corporate status to avoid the B.I.G. However, given the 10-year hold period (a pre-sale fact known to the willing seller and buyer), it is reasonable to presume the B.I.G., is contemplated at the end of the 10-year hold period and that a willing purchaser is expected to negotiate with the seller a discount in view of the contemplated B.I.G., (*Matter of Penepent Corp., Inc*., 96 NY2d 186, 193, quoting *Matter of Seagroatt Floral Co. (Riccardi)*, 78 NY2d 439).

132. Lipton and Baliban apply 100% of the B.I.G. on the ground that willing buyers will demand a 100% discount premised on the opinion that if the seller rejects the same, the buyer will simply purchase similar properties in the open market as there is an ample inventory of similar tenement buildings available for sale at the relevant time. Thus, the purchaser can go outside the corporate wrapper of EGA and FAV and find similar properties on the market and purchase the same without worrying about any B.I.G. (**FINDINGS OF FACT**, ¶¶ 248, 286-287, 313). I am not persuaded by respondent's experts' testimony nor their documentary proof that 100% of the B.I.G. should be applied.

133. But, I also reject petitioner's contention that no B.I.G. is applicable. I agree that fair value is to be computed on an ongoing concern basis, not a liquidation basis (see, Px Post Trial Memo of Law, p 15, 38-40), but that does not foreclose consideration of a B.I.G. under BCL § 1118. I reject petitioner's contention that no B.I.G. should be applied (Px Post Trial Memo of Law, pp 1-21).

134. Petitioner's own expert testified that where B.I.G. is applicable, it is to be discounted (see, Px AP; **FINDINGS OF FACT**, ¶ 338). Petitioner's suggestion that B.I.G. does not come into play in the "fair value" analysis because there is no "liquidation" taking place, is a misplaced analysis. The premise of value under "fair value" is to analyze value that takes places at the moment of the "sale" between a willing buyer and willing seller. True, the "sale" is a legal fiction, but so is "fair value." It follows - intellectual honesty demands it! - that as there is an offer and a sale, one must then take into consideration the B.I.G. implications that can be contemplated in the future. It is the "sale" that triggers consideration of the B.I.G., and not the "liquidation" of the company in the future that triggers consideration of the B.I.G., and thus both willing buyer and seller will negotiate the same. Petitioner's myopic reading of BCL § 1118 [a] must be rejected, otherwise the Court

would literally substitute the petitioner and respondent in place of the willing purchaser and seller.

135. I also reject the respondent's post-trial contention that Mercer was not qualified to give an opinion premised on his understanding of a "rule of thumb" for allocating a percentage of a B.I.G. less than the 100% (Rx Post Trial Memo of Law, pp 97-102) based on his understanding of the practice by market participants in the New York market (<u>but</u> <u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 339-346).

136. Mercer has many years of experience in valuating C-Corporations and noted EGA and FAV are unique real estate holding companies (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 324-325, 392). He has valued many businesses and his reliance on observations made by "market participants" in the industry is both credible and not rebutted by respondent (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 339-341, 346). He is a credible expert witness in his field (<u>see</u> <u>also</u>, Px Post Trial Memo of Law, pp 37-38). Indeed, the credible testimony by Leitner in this regard is that "market participants" make the market (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 200).

137. Baliban did not unequivocally reject Mercer's premise that market participants are reliable sources of information upon which one can form an opinion (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 386-388). In fact, respondent's expert literally conceded Massey Knakal was a market participant (relied on numerous reports incorporated by reference in his report [Rx 91 and Rx 92]). Baliban opined further proof of a study or data in addition to conversations with market participants is a prerequisite and in the absence of the same Mercer's opinion of a "rule of thumb" lacks proof.

138. But, it is clear from the record that Mercer's opinion on the "rule of thumb" is supported by data and credible testimony. First, I credit the testimony that the availability of similar properties as the properties owned by EGA and FAV is tight and demand exceeds the

supply; similar properties are minimal and/or difficult to replace, unlike securities (see, Px Reply Post Trial Memo of Law, pp 10-18). Second, it is beyond cavil that Massey Knakal is a market participant. Third, all experts concede that EGA and FAV are unique limited liability companies that are real estate holding companies (**FINDINGS OF FACT**, ¶¶ 265, 292, 331), and distinguishable from a simple "naked asset" versus assets sold inside the corporate wrapper. Fourth and finally, Mercer's opinion that there is no readily available substitute in the public market for the assets sold by EGA and FAV(similar buildings) and the limited supply of similar properties, is supported by the record (**FINDINGS OF FACT**, ¶¶ 329-345; see, Px Post Trial Memo of Law, pp 34-40; Px Reply Post Trial Memo of Law, pp 2-3).

139. An expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion provided: (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (*Wagman v Bradshaw,* 292 AD2d 84, 85; *Hambsch v New York City Tr. Auth* ., 63 NY2d 723). This is such a case and respondent's contentions to the contrary is without moment (Rx Post Trial Memo of Law, pp 102-106).

140. Here, there is sufficient proof to support the finding that a willing buyer cannot go out on the market and purchase similar properties that the buyer can purchase by way of shares in EGA and FAV. Therefore, respondent's argument that a buyer can avoid the B.I.G. by going out on the market fails. There is no similar existing market and therefore places the seller and buyer on an equal playing field to negotiate a B.I.G. less than 100% (**FINDINGS OF FACT**, ¶¶ 343-346). In short, there are few alternative properties that exist in the market.

141. Respondent's expert's reliance on sales data is of no moment, where the sales data consist of 182 sales of properties in a six-month period that represents 2% of the pool of properties (**FINDINGS OF FACT**, ¶¶ 248, 286).

142. The credible proof supports the finding that there is a limited supply of similar properties in New York during the relevant period. For example, there is evidence in the record that supports Mercer's opinion, specifically the cap rates ranging between 4.0 and 4.8 that is directly drawn from respondent's own appraisal reports (**FINDINGS OF FACT**, ¶ 346).

143. Mercer credibly testified that this data reveals a strong market for sellers and a tight market for buyers and it was the exception, not the rule, that limited liability companies such as EGA and FAV owned a portfolio of buildings such as the subject properties. Indeed, respondent's expert, Lipton, noted the study of 182 sales of properties in a six-month period from a pool of 17,000 properties, which is less than 2% of such properties (**FINDINGS OF FACT**, ¶ 348).

144. I find 2% of the pool available for sale indeed demonstrates that similar properties as that of EGA and FAV are not readily available. Thus, it follows the willing purchaser has no advantage in the negotiation to demand a 100% discount of the B.I.G.. Mercer's position is not inconsistent with any of his writings, that is, he agrees a 100% of B.I.G. is applicable where there is a readily supply of similar properties and valuation is premised on "fair market value" (**FINDINGS OF FACT,** ¶¶ 349-350). But, this case is not about "fair market value" and respondent's attempt to discredit Mercer in regard to his writings (see, Rx Post Trial Memo of Law, pp 97-100) fails. Another article generated by an employee of his company was not inconsistent with Mercer's opinion (see, **FINDINGS OF FACT,** ¶ 364). Respondent's attempt to recast the corpus of these articles is, at best, feigns ignorance (see also, Px Reply Post Trial Memo of Law, p 2).

145. Mercer also acknowledged case law that held for the allocation of 100% of the B.I.G., but opined is was distinguishable from this case (**FINDINGS OF FACT,** ¶ 351; see, *Wechsler v Wechsler,* 58 AD3d 62). In fact, the Court notes Wechsler v Wechsler (*supra*) is a matrimony matter involving equitable distribution and allocation of marital assets under the Domestic Relations Law. Moreover, the corporate entity in that case was not an ongoing concern doing business with third parties, but a corporate vehicle used solely by the spouse to trade securities. Furthermore, one spouse owned all of the shares. In addition, unlike real property the assets of the corporate entity in Wechsler v Wechsler[29] (*supra*) were securities which were easily traded on the open market and "readily available." Finally, there is no reference in that case to BCL § 1118 [a] and the unique, legal construct of "fair value." In brief, Wechsler v Wechsler (*supra*) is distinguishable (but see, Rx Post Trial Memo of Law, pp 26-28 [contending Wechsler is applicable in any case. But, the Special Referee reasons it is not applicable in a fair value case that involves the legal construct of BCL ¶ 1118, separate and apart from a "tax estate case, another type of tax case or matrimonial case"]).

146. There is sufficient proof in the record for Mercer to opine that, where as here, there is no readily supply of naked assets available in the marketplace as those held by EGA and FAV, then it is not reasonable to apply a 100% B.I.G. Mercer was very credible in this regard. Indeed, his own research revealed that 100% of the B.I.G. is applied only where there is a substitute and readily available asset or where the 100% allocation of the B.I.G. is in a "fair

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[29] Wechsler has been distinguished from other cases because the facts therein reveal the spouse would be liquidating assets in order to satisfy the judgment and, hence, B.I.G., was imminent. It stands to reason that in view of the imminency of a liquidation of securities that the B.I.G. was imposed after weighing the equities in the matrimony matter (see, *Murphy v United States Dredging Corporation,* ___AD3d ____, 2010 WestLaw 2199659, 2010 NY Slip Op., 04794 [2d Dept., 2010, June 1, 2010] [distinguishing Wechsler from Murphy in affirming lower court denial of applying 100% B.I.G., reasoning that Wechsler would be selling some assets of corporation every year to meet needs, thus, the built-in-gain would be assessed]).

market value" valuation, not as here, "fair value." This credible testimony supports the opinion that in the "absence of a substitute investment" the rational buyer and seller would negotiate the B.I.G. adjustment.

147. In view of all of the above, the respondent's post-trial contention as to credibility of Mercer's opinion as to the "rule of thumb" is of no real moment. Mercer's testimony as to the "rule of thumb" is not mere intuition; it is based on objective facts and his opinion in that regard is therefore rational and based on the evidence (*In re Petralia*, 267 AD2d 1013).

148. Mercer's opinion is not mere speculation, but based upon facts either in the record or personally known to him (*Pascuzzi v CCI Cos.*, 292 AD2d 685, 686) and further buttressed by his professional reliance on material and data in the record. Where "there is an absence of any evidence to the contrary, the expert['s] opinion . . . [is] entitled to some weight, and should not be readily set aside" (*Bains v Bains,* 308 AD2d 557, 558).

149. Respondent's objections are mere observations that only effect the weight to be accorded to Mercer's opinion and not the admissibility of the opinion and supporting proof thereunder (*In re Donald W.,* 17 AD3d 728). I find Mercer to be credible, rational, and his testimony based on objective facts, supported by the evidence (*Matter of Luce*, 4 Cl Ct. 212; <u>see</u> <u>also</u>, *In re Petralia*, 267 AD2d 1013).

150. In the "absence of a substitute investment" as the credible testimony and evidence reveals here, the rational buyer would negotiate the B.I.G. adjustment with the seller (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 350). I have considered and weighed Baliban's rebuttal testimony as to the applicable percentage of the B.I.G.(**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 383-400), and find it to be without moment (Px Post Trial Memo of Law, pp 21-25, 28-36).

151. Mercer's opinion testimony was based on facts in the record and/or personally known to him (*Quinn v Artcraft Constr*., 203 AD2d 444, 445; *Cassano v Hagstrom*, 5 NY2d 643,

646). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (id.). Contrary to respondent's contention, the testimony of the petitioner's expert (Mercer) was based on facts in the record and his own analysis, not speculation *(Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520).

152. Although I find Mercer credible that there is no readily available substitute or asset and that the 100% allocation of the B.I.G. is not applicable, I am not persuaded by that branch of his opinion that calculates the B.I.G., at 40% based on discount multiples factored and valued by Mercer (Px AP, p 13). I note that I do not reject the testimony of a 40% because it is not supported by the proof. I reject the 40% allocation because I am persuaded by the analysis in Murphy that is more reasonable.

153. I find Murphy instructive. Here, there is proof of no readily available substitute or asset out of the corporate wrapper, such as, EGA and FAV. Thus, the willing seller would not agree to accept a 100% B.I.G., and willing buyer would not demand a 100% B.I.G . Rather than walk away from the purchase, the willing buyer would offer to negotiate the B.I.G. (*Matter of Penepent Corp., Inc.*, 96 NY2d 186, 193, quoting *Matter of Seagroatt Floral Co. (Riccardi)*, 78 NY2d 439). It is reasonable to infer under the circumstances with the B.I.G., representing a large percentage of the corporate assets, that the willing buyer would expect and the seller would agree to deduct a portion of the B.I.G. from the purchase price (see, *Murphy*, *supra*).

154. As noted above, the hold period for the properties is 10-years (**FINDINGS OF FACT**, ¶¶ 15, 19, 89, 93, 102, 130, 156, 159, 279). Thus, it is reasonable to infer the willing buyer at the time of negotiating the purchase intends to hold the property for 10-years. It is reasonable to further infer that after the hold period there is the possibility of the B.I.G.

155. Thus, it appears from the proof that the willing buyer and seller would negotiate the B.I.G., at its present value rather than full value. It is also reasonable to infer that the willing seller and buyer would not negotiate a 100% of the B.I.G. (*Murphy*, *supra*).

156. Moreover, the record reveals that the respondent has sufficient cash (lots of cash!) or assets or financing to pay the judgment without liquidating any of the assets to which the built-in-gains tax is applied (see also, *Murphy, supra*). In fact, in her papers, respondent represents she will need time to gather financing to pay the judgment (not forced to sell assets subject to the B.I.G. (Rx Post Trial Memo of Law, pp 193-195).

157. Petitioner's expert (Mercer) has replicated the formula in Murphy (supra) for calculating the present value of the B.I.G. (Px AP, p 12). Thus, I find for both EGA and FAV the property value of the specific properties as of August 1, 2007 (**CONCLUSIONS OF LAW**, ¶ 102) should be applied against the multiple of the estimate growth rate of value 3.0% (Px AP-12; see also, **CONCLUSIONS OF LAW,** ¶54 [growth rate, i.e., appreciation rate, of 30%]) over a 10-year period from which the future value as of August 1, 2017, is then derived (current market rate at growth rate for 10 years). The cost basis for the properties as reflected in the record should then be deducted from the future value, leaving a balance that represents the "future embedded gain." The B.I.G. calculated at 45.87% should then be applied against the "future embedded gain")(not a so-called "blended federal/state rate") and that sum should be discounted at 10% discount rate to obtain the "present value of tax liability" (see, Px AP, p 12). The "present value of tax liability" is the B.I.G. that should be applied as a liability against the balance of the corporations' total assets (see, e.g., PxAU [draft chart]).

158. Finally, the Court's valuation of a present value B.I.G. and no allocation of a DLOM falls "within the range of testimony presented" (*Matter of Cortland MHP Assoc.*

[PetraliapBurnham], 267 AD2d 1013, 1013; *Matter of Ashford Mgt. Group*, 261 AD2d 863). Furthermore, this unique valuation is tailored to the particular circumstances (*Matter of Exterior Delite, Inc.,* 14 Misc3d 910, 918; see also, *Murphy v United States Dredging Corporation,* ___AD3d ____, 2010 WestLaw 2199659, 2010 NY Slip Op., 04794 [2d Dept., 2010, June 1, 2010]).

159. Accordingly, subject to the above modifications, I adopt Mercer's opinion and find ample proof in the record to support the conclusion that the B.I.G. in this instance should be applied at present value. I note that Murphy (*supra*) is instructive with respect to the application of a B.I.G. Murphy is important as it is the first B.I.G., allocation in a BCL § 1118-a case affirmed on appeal. Thus, it is now beyond cavil that a B.I.G., allocation under BCL § 1118-a may be appropriate based on the circumstances (the "Murphy Discount"). What is also clear is that in this instance a 100% B.I.G., is not appropriate .[30]

V. MISCELLANEOUS ASSETS, LIABILITIES, APPLICATION FOR INTEREST, ETC.

160. As to other assets allocated to EGA, there is no dispute of the value of the Merrill Lynch Account (07180) in the sum of **$6,289,197.00** (**FINDINGS OF FACT**, ¶ 369).

161. As to EGA's damage receivable for the 96 Street property, I find credible proof in the record that supports the conclusion the "damage claim receivable" for the 96 Street property at the time of the sale is **$950,000.00**, as there was a resolution before the valuation date that the matter could be settled for $950,000.00 (**FINDINGS OF FACT**, ¶ 301). I adopt Baliban's opinion that this claim receivable should be valued at $950,000.00 as that was the

[30] The parties make reference to Matter of LaSala (Feb., 6, 2003, NYLJ, 24 col 1), which is a Westchester County, Supreme Court case. In LaSala the court found zero allocation of the B.I.G. But, I do not find LaSala persuasive. The parties also cite Estate of Jelke v Commissioner of Internal Revenue (507 F3d 1317 [11th Cir 2007]), for several propositions (see, Px Post Trial Memo of Law, pp 18-20, 27, 40; Rx Post Trial Memo of Law, pp 25-26, 60-61, 65, etc.), one that in Jelke 100% of the B.I.G., was applied. But, Jelke is distinguishable as it involved "fair market value." It is noted the Murphy B.I.G. allocation falls between LaSala and Jelke.

sum reasonably ascertainable as of the valuation date.

162. It is of no real moment that the respondent may have rejected an offer of $950,000.00 as she never testified at the hearing and petitioner's counsel's query of the same on cross examination does not make it testimony (see, **FINDINGS OF FACT**, ¶ 302 [T, 1678-1690]).

163. However, I reject Baliban's opinion that $250,000.00 in fees should be attributed to collection of the claim receivable. There is insufficient proof that the cost of collection totaled such amounts; there was no documentation demonstrating that the costs were $250,000.00 (**FINDINGS OF FACT**, ¶ 303) and testimony that he "learned" of the number from an oral source (**FINDINGS OF FACT**, ¶ 304), is insufficient.

164. The petitioner's contention that this claim should be valued at $1,225,000.00, based on the actual settlement, which took place in March 2008, after the valuation date July 2007 (**FINDINGS OF FACT**, ¶ 300) and unknown to anyone at the relevant time, is rejected. As opined by Baliban, it was simply impossible to predict that the action would settle for $1,225,000.00 (**FINDINGS OF FACT**, ¶ 302). Accordingly, the EGA damage receivable reasonable value is $950,000.00. in the absence of any other proof and it is presumed this value is after attorneys' fees.

165. As to the EGA loan receivable attributable to the petitioner, the credible proof and testimony supports the finding that the receivable is valued at **$150,000.00**, and not at the value Baliban opined it was valued ($75,000.00) **(FINDINGS OF FACT**, ¶ 305), as of the valuation date. Baliban does not credibly show he arrived at the $75,000.00 figure - other than to suggest a 50% collectability factor, which I find as unreasonably high. The note was recorded as an asset in the sum of $150,000.00. Moreover, neither party testified at the hearing.

166. With respect to EGA cash, the parties have a difference in their total sums of $9,637.00. The evidence is evenly balanced as to the difference (see also, Rx65 and PxAU). Thus, the record supports the finding that the EGA cash is adjusted by adding 50% of the above difference. Thus, the item is adjusted to **$602,657.50**.

167. As to the EGA prepaid expenses, the credible proof reveals the $275,000.00 was recorded on the EGA balance sheet of a tax return for March-2007 (Px AP; **FINDINGS OF FACT**, ¶¶ 361, 368). The respondent has failed to rebut this proof (**CONCLUSIONS OF LAW,** ¶18). Accordingly, this item totals **$275,000.00**.

168. As to the found cash attributed to EGA, the parties have stipulated (Court Ex 1 and Court Ex 2 [Feb., 27, 2009-Stipulations];**FINDINGS OF FACT**, ¶ 419, at footnote 20), EGA had unreported income for six years prior to valuation date of $5,450,226.00, and that cash in the amount of $4,155,466.00 was found in envelopes bearing the name EGA. Accordingly, the sum of discovered cash is **$4,155,466.00.**

169. As to the EGA "chose in action" claim against the Estate of Edward P. Giaimo Jr., (**FINDINGS OF FACT**, ¶¶ 352-354, 356, 360-361), it is conceded that such a claim is considered to be a "contingent asset" (**FINDINGS OF FACT**, ¶¶ 306-307, 356), and experts will not include a contingent asset on the balance sheet unless there is something more than risk and costs associated with the contingent asset (**FINDINGS OF FACT**, ¶ 306). Where the existence or value is not assured, a "chose in action" should not be valued.

170. There is no dispute that the "chose in action" exist. Indeed, the respondent seeks to allocate 80% of the legal fees she incurred in paying an attorney to file tax returns on her personal behalf - and in doing that tasks also filed tax returns for EGA and FAV that acknowledges skimming of rent by Edward P. Giaimo Jr., before the valuation date and acknowledgment of the existence of the same before July 2007 (**FINDINGS OF FACT**, ¶¶ 400-430). The

tax filings arise from the unreported income of rents that were skimmed by the parties' decedent-brother.

171. Furthermore, the parties cannot dispute that certain amounts of rent monies were skimmed by Edward P. Giaimo, Jr., during his tenure and as far back as 1991 (Rx 68; Court Ex 1 and Court Ex 2 [Feb., 27, 2009-Stipulations];**FINDINGS OF FACT**, ¶ 419, at footnote 20). The parties have stipulated that the unreported income for EGA for six years prior to valuation date is $5,450,226.00, and the cash both undated and dated as far back as 1991 totaled the amount of $4,155,466.00 (several envelopes with cash bore no dates or other dates).

172. Moreover, (and ironically) although respondent press the contention that the "chose in action" is not assured, she nevertheless seeks to allocate unpaid tax interest from the unpaid income taxes as amplified in the respondent's tax returns. In addition, the respondent seeks to deduct the entire amount of found cash attributable to the skimming of rent and attributed as income to EGA (see, Rx Post Trial Mem of Law, p 6). Furthermore, the record demonstrates that both respondent and petitioner are the co-executors of their brother's estate - as well as beneficiaries and will have an active role in resolving the "chose in action." Finally, there is ample evidence in the record that the Estate of Edward P. Giaimo, Jr., is not judgment proof and has sufficient assets (**FINDINGS OF FACT**, ¶ 360; Rx 1 at exhibit 6).

173. Thus, the existence and value is ascertainable and likely assured. I find that in view of the credible expert testimony and the record the "chose in action" can be valued and therefore reasonable to value the "chose in action" as part of this valuation of EGA as of the date of July 31, 2010. Accordingly, the "chose in action" is valued at $5,450,226.00.

174. However, I reject petitioner's limited "clawback" of sums totaling $1,130,421.00

represented six-years prior to the date of the valuation as a set-off against the "chose in action." The sum of $1,771,539.00 (Rx 68) found in "blank envelopes" is also allocated as additional set-off as there is no proof demonstrated by the petitioner that the cash found in the "blank envelopes" represent cash collected more than six years from the date of valuation. Accordingly, the "blank envelopes" sum is also added as set-off.

175. Accordingly, the "chose in action" of $5,450,226.00, less the $2,901,960.00, should be valued and allocated as an asset to EGA. I therefore allocate **$2,548,266.00** as the "chose in action" asset to EGA. But, that portion of the percentage of the total value of equity awarded to the petitioner attributable to the "chose in action" shall be placed in escrow pending disposition of the separate action (**FINDINGS OF FACT**, ¶ 359).

176. Thus, the total "Current and Other Assets" attributed to EGA is **$14,970,586.00.** As noted above, the total real property value of EGA is $58,843,040.00, for a total asset value of **$73,813,626.00.**

177. I have reviewed the liabilities allocated to EGA and find ample proof to support the item of **$2,865.00 FINDINGS OF FACT**, ¶ 369). The difference calculated between the parties as to the EGA tenant security deposits is *di minimus* ($35.00), therefore the Court assigns the lower amount **$253,569.00** (Rx AU).

178. The parties do not dispute the potential federal tax liability of $1,619,409.00, which reflects three years of federal back taxes (see, Rx AU and Px 67). Accordingly, the sum of **$1,619,409.00** is allocated to EGA.

179. As to the potential New York State tax, the parties differ in the allocation by $318,672.00. The petitioner expert's testimony was that the higher amount is attributed to interest that accrued after the valuation date (**FINDINGS OF FACT**, ¶ 376). But, the respondent's proof is credible at it demonstrates the higher amount represents interest that "accrued" after

the valuation date; it was based on a tax that was "incurred" for the last three years prior to the valuation date (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 308). Accordingly, the sum of **<u>$968,297.00</u>** is allocated for potential New York State taxes.

180. As to the accrued tax expense attributed to EGA, the petitioner failed to rebut with credible proof the evidence presented by respondent's expert of the tax liability of $73,123.00 as evidence in respondent's proof (Rx 94 and Rx 95) (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 376). Accordingly, the tax liability of **<u>$73,123.00</u>** is added to EGA.

181. Finally, there is the issue of allocating the sum of $280,502.00 by respondent to EGA for "legal fees" and "accounting" expenses claimed to be attributed to EGA in connection with the preparation and negotiation of amended corporate tax returns. The testimony by Skarlato is that he allocates $162,651.24 to EGA for legal services based on an 80% allocation formula (**<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶ 422).

182. As to Skarlato's testimony, I do not give much credit to his method of allocation. The entire billings were not marked in evidence to support his testimony that the bulk of the services were attributed to work directly for EGA and FAV. Though he testified EGA and FAV benefitted the most from his services, that is without more, insufficient. The better course is to allocate the $162,651.24 five ways (<u>see</u>, **<u>FINDINGS</u> <u>OF</u> <u>FACT</u>**, ¶¶ 429-430). Accordingly, the above legal fee is allocated five ways and EGA is assigned **<u>$32,530.25</u>**.

183. Subtracting the $162,651.24 from the professional fees of $280,502.00, leaves a balance of $117,850.76, which is attributed to accounting work on behalf of EGA. There is no dispute that accounting was had on behalf of EGA and petitioner's contention against this allocation is not persuasive and rejected. Accordingly, the sum of **$117,850.76** is allocated to EGA.

184. Accordingly, the liabilities total the sum of **<u>$3,067,644.00</u>**, which does not include B.I.G., at its present value. The B.I.G., awarded herein is to be calculated in accordance with the

above conclusions (**CONCLUSIONS OF LAW**,¶¶ 152-157).

Merrill Lynch Account	$6,289,197.00
Damage Receivable	$950,000.00
Loan Receivable	$150,000.00
Cash	$602,657.50
Prepaid Expenses	$275,000.00
Discovered Cash	$4,155,466.00
Chose of Action	$2,548,266.00
Total Current and Other Assets	$14,970,586.00
Real Property Value of EGA	$58,843,040.00
TOTAL ASSETS	**$73,813,626.00**
Liabilities	
Accrued Expenses	$2,865.00
Tenant Security Deposits	$253,569.00
Potential Tax Fed	$1,619,409.00
Potential Tax State	$968,297.00
Accrued Tax Expense	$73,123.00
Professional Fees Legal	$32,530.25
Professional Fees Acct	$117,850.76
Murphy Discount B.I.G.,	(To Be Calculated at Present Value Per Conclusions of Law ¶¶ 157-159)
Subtract Total Liabilities	**$3,067,644.00 + B.I.G. (Present Value)**
From Total Assets of	**$73,813,626.00**
Net Balance	X
No DLOM	Zero
TOTAL VALUE OF EQUITY	X (Net Balance after Total Liabilities + B.I.G. at present value)
Percent Being Valued	50% of Total Value of Equity To Be Awarded[31] Re: *Giaimo v EGA Associates Inc.*, 68 AD3d 523

185. As to FAV, there is no dispute of the value of the FAV Merrill Lynch Account (07437) in the sum of $2,438,983.00. Thus, the **$2,438,983.00** is allocated to FAV.

186. The parties do not dispute the values of the FAV discovered cash and other cash on hand

[31] That portion of the percentage of the total value of equity awarded to the petitioner attributable to the "chose in action" shall be placed in escrow pending disposition of the same (**FINDINGS OF FACT**, ¶ 359).

($1,164,456.00 and $138,673.00) (see also, Px AV). Thus, the **$1,164,456.00** and **$138,673.00** is allocated to FAV.

187. FAV's allocation of $20,884.00 in federal tax payable is supported by the record, based on an accounting entry that such sum reflects such tax as of October 31, 2006. The **$20,884.00** is allocated to FAV.

188. As to the "chose in action" asset, for the reasons noted above (**CONCLUSIONS OF LAW**, ¶¶ 169-174), the sum of $3,893,982.00 is recognized as an asset subject to set-off of cash both by the $385,363.00 petitioner allocates for the last six years (Rx 68), and the sum of $368,250.00 found in undated envelopes, for total set-off of $753,613.00.

189. Accordingly, the "chose in action" of $3,893,982.00, less the $753,613.00, should be valued and allocated as an asset to FVA. I therefore allocate **$3,140,369.00** as the "chose in action" asset to FVA. Thus, the total "Current and Other Assets" attributed to FVA is **$6,903,365.00.**

190. As to the claim of FAV "disputed properties, the respondent's contention that the four disputed properties should be subtracted from the valuations of assets of that corporate entity (see, **FINDINGS OF FACT**, ¶ 319), is of no real moment. There was no credible proof that on the valuation date (July 31, 2007), there was an actual dispute over the ownership of the properties. No legal papers were filed or any notice placed that materially raised the issue of a dispute of the ownership interest held by FAV in the Spring Street and First Avenue properties.

191. In fact, the matter that raises the issue of ownership over the properties (Antoinette Giaimo v FAV Corp., et al., Index No., 102750/2008), was not filed with the Court until February 2008. I take judicial notice of the filing of that complaint (*Sam and Mary Housing Corp. v Jo/Sal Market Corp.*, 100 AD2d 901, 903, *affd.* 64 NY2d 1107; *Rossbach v Rosenblum*,

260 App Div 206, *affd*. 284 NY 745; see also, Px Reply Post Trial Memo of Law, p 5).

192. Furthermore, Baliban's testimony that the information in the petition was sufficient reason for him to opine the exclusion of the properties is seriously flawed as the petition is deemed not to be in existence on or before the hypothetic sale/transaction (the July 31, 2007-date is selected as the valuation date because the filing of the petition in this action selects that date by default under a BCL 1118 [a] election) (see, *Levitt v Toobey*, 109 AD2d 502). Respondent's post-trial contention referencing the petition as proof of the existence of the dispute as of the valuation date (Rx Reply Post Trial Memo of Law, p 19) is self-serving rather than credible evidence.

193. I also reject Baliban's reasoning that regardless of the information in the petition, the tax returns that predate the commencement of this action revealed the dispute (**FINDINGS OF FACT, ¶** 320). The tax returns Baliban speaks of do not indicate any "ownership dispute." Indeed, the relevant tax return for 2004 or 2006 reveal no "depreciation" was taken by the named decedent. In addition certified renovation forms for certain properties reveal that there was a "net lease" involved (**FINDINGS OF FACT, ¶¶** 417-418).

194. However, I do credit the testimony that at the time of the valuation, a willing seller would have disclosed to the willing buyer that there was a dispute over the property. Moreover, the better alternative in view of the disclosure is that the buyer would offer full price, but place the same in escrow pending disposition and should the properties revert to a predecessor owner, the purchase monies - with interest - would be returned to the buyer. This is one of the recommendations made by an expert with respect to the "chose in action" (**FINDINGS OF FACT, ¶¶** 358-359).

195. In short, all four properties are included in this valuation and the best approach is the recommendation that the portion of the percentage of the total value of equity awarded to

the petitioner attributable to the value of the "disputed properties" shall be placed in escrow pending disposition of the separate action (**FINDINGS OF FACT**, ¶ 359; Antoinette Giaimo v FAV Corp., et al., Index No., 102750/2008; see also, Px Reply Post Trial Memo of Law, pp 4-6).

196. Accordingly, the total real property value of FVA is **$26,642,500.00** , and the total value of the FVA assets is **$33,545,865.00.**

197. As to the liabilities, the professional expenses claimed by respondent ($130,512.00) for the reasons noted above (**CONCLUSIONS OF LAW**, ¶¶ 180-182) are adjusted. These "legals fees" and "accounting" expenses claimed to be attributed to FAV in connection with the preparation and negotiation of amended corporate tax returns are adjusted to reflect the allocation made with respect to EGA's legal fees, that is, allocating that portion assigned by Skarlato to FAV, fees $49,543.00 (**FINDINGS OF FACT**, ¶¶ 422, 429-430) five ways. Therefore, the sum of assigned to FAV is **$9,909.00**

198. Subtracting the $49,543.00 from the professional fees of $130,512.00, leaves a balance of $80,969.00, which is attributed to accounting work on behalf of FAV. As also noted relating to EGA, here, too, there is no dispute that accounting was had on behalf of FAV, and petitioner's contention against this allocation of $80,969.00 is not persuasive and rejected. Accordingly, the sum for these professional expenses of **$80,969.00** is allocated to EGA.

199. With respect to the security deposits, I find Mercer's testimony of his "adjustment" for security deposits unpersuasive (**FINDINGS OF FACT**, ¶374), and adopt as credible Baliban's calculation of security deposits totaling **$107,991.00**, which is allocated to FAV.

200. Upon review of the record and weighing the testimony by both Mercer and Baliban on the allocation of potential federal tax liability (the parties differ in the allocation by

$444,486.00), I find that respondent's proof is credible (Rx 66), and therefore potential federal tax liability of **<u>$926,396.00</u>**, which reflects three years of federal back taxes with interest (no penalties).

201. As to the potential New York State tax, the parties differ in the allocation by $115,260.00. The respondent's expert's testimony was that the higher amount is attributed to interest that accrued after the valuation date. The proof is credible at it demonstrates the higher amount represents interest that "accrued" after the valuation date based on a tax that was "incurred" for the last three years prior to the valuation date. Accordingly, the sum of **<u>$305,115.00</u>** is allocated for potential New York State taxes.

202. Accordingly, the liabilities total the sum of **<u>$1,430,380.00</u>**, which does not include B.I.G., at its present value. The B.I.G., awarded is to be calculated in accordance with the above conclusions (**<u>CONCLUSIONS</u> <u>OF</u> <u>LAW</u>**,¶¶ 152-157).

Merrill Lynch Account	$2,438,983.00
Cash	$138,673.00
Discovered Cash	$1,164,456.00
Federal Tax Payable	$20,884.00
Chose of Action	$3,140,369.00
Total Current and Other Assets	$6,903,365.00.
Real Property Value of FAV	$26,642,500.00
<u>TOTAL</u> <u>ASSETS</u>	**$<u>33,545,865.00.</u>**
<u>Liabilities</u>	
Tenant Security Deposits	$107,991.00
Potential Tax Fed	$926,396.00
Potential Tax State	$305,115.00
Professional Fees Legal	$9,909.00
Professional Fees Acct	$80,969.00
Murphy Discount B.I.G.,	(To Be Calculated at Present Value Per Conclusions of Law ¶¶ 157-159)
Subtract Total Liabilities	**<u>$1,430,380.00</u> + B.I.G. (Present Value)**
From Total Assets of	**$<u>33,545,865.00</u>**
Net Balance	X

No DLOM	Zero	
TOTAL VALUE OF EQUITY	X	(Net Balance after Total Liabilities + B.I.G. at present value)
Percent Being Valued	50% of Total Value of Equity To Be Awarded[32] Re: *Giaimo v EGA Associates Inc.*, 68 AD3d 523	

203. BCL § 1118(b) provides for the discretionary award of interest on value from the valuation date to the date of payment. It has been held that a petitioner is "entitled" to such interest "unless a determination is made that petitioner has acted in bad faith" (*Matter of Blake v Blake Agency,* Inc., 107 AD2d 139, 150; *Schneiderman v Luv-A-Cup Coffee Service, Ltd.*, 204 AD2d 173). Occasionally, courts have awarded interest at a rate less than the 9 percent statutory rate (*Whalen v Whalen's Moving & Storage Co.*, 234 AD2d 552 [4 % interest award]).

204. This valuation ensues from the respondent's election under the legal construct of BCL § 8111 [a] and not from any misconduct of the withdrawing shareholder in causing dissolution (*Vick v Albert*, 47 AD3d 482, 483).

205. Here, there was no showing of bad faith by the petitioner and therefore, statutory interest is recommended. As equity is applicable and in view of the absence of any credible evidence of bad faith by the respondent, the award of interest at the statutory rate is not reasonable nor supported by the evidence.

206. Here, there was no testimony or evidence that demonstrates oppressive conduct. There was no proof of being frozen out of the business or frivolous litigation, and the absence of material circumstances that sanction an award of interest at the statutory rate, I report and recommend interest be awarded at 4% (BCL §1118 [b]; *Matter of Fleischer,* 107 AD2d 97,

[32] That portion of the percentage of the total value of equity awarded to the petitioner attributable to the "chose in action" and the "disputed properties" shall be placed in escrow pending disposition of the same (**FINDINGS OF FACT**, ¶ 359).

101; Rx Post Trial Memo of Law, pp 185-191) . Petitioner's contentions to the contrary (Px Post Trial Memo of Law, p 72; Px Reply Post Trial Memo of Law, p 29) are rejected.

207. With respect to terms and condition of a buy out, BCL § 1118 [a] provides for an election to purchase subject to "such terms and conditions as may be approved by the court." In Taines v Gene Barry One Hour Photo Process, Inc., (123 Misc2d 529, 534-35, *aff'd*, 108 AD2d 630) after noting the absence of any guiding case law, the court interpreted the statutory language as giving the court "discretion in a proper case and upon good cause shown to fix terms of payment in order to permit the corporation to continue as a viable business without undue disruption." The electing corporation in that case sought a deferred payment schedule for the fair value award, which the court refused to grant based on its finding that the petitioner had "already been the victim of oppressive conduct" and that "to allow lenient terms of payment to the corporation would be to lay another stripe on him."

208. Here, there is no such circumstance and, hence, I report and recommend that a deferred payment schedule for the fair value be ordered (BCL § 1118[a]; *Matter of Taines v Gene Barry One Hour Photo Process,* 123 Misc2d 529, 538, *aff'd* 108 AD2d 63, *lv. denied* 67 NY2d 602).

209. In view of the large sum of payment and the likely need to obtain financing as representing by respondent in her post-trial papers, the respondent should be directed to complete all payment to the petitioner within six months of service of notice of entry of the judgment herein (see Rx Post Trial Memo of Law, pp 193-195). However, as the record reveals millions in cash assets and securities (Rx 65 and 66), it is recommend that the Court direct the respondent to pay approximately 1/3 of the Judgment within 60-days of the service and entry of the judgment and another 1/3 within 120-days of the service and entry of the judgment and to complete the payment of the balance of 1/3 (all with interest) no later than

six months from the date of the service of the entry of judgment (see also, Px Reply Post Trial Memo of Law, p 28). .

210. Lastly, BCL § 1118 [c] [1] provides for an award of attorneys' fees at the discretion of the court. Here, there is no nothing in the record to support such an award. It is reported no fees or costs be awarded.

211. The remaining contentions of the parties have been considered and are found to be without moment.

CONCLUSION

Accordingly, upon presentment of the referenced issue, on a motion pursuant to CPLR § 4430, I report and recommend that the court confirm this report and direct the relief as set forth above. The parties are directed to collect their respective exhibits (except the reports of the experts) at the Offices of Chief Court Clerk, Room 200, 71 Thomas Street, New York, New York.

Dated: **June 30, 2010**

Respectfully submitted,

LOUIS CRESPO
SPECIAL REFEREE

Respondent Exhibits

Rx 1	United State Estate Tax Return re: Edward P. Giaimo Estate (Redacted)
Rx 2	Esposito Curriculum Vitae
Rx 3	Partial List Clients re: All Island Valuation Services, LLC
Rx 4	List of Appraised Properties of FAV and EGA
Rx 5	43-49 First Avenue Appraisal
Rx 6	6 Spring Street Appraisal
Rx 7	8 Spring Street Appraisal
Rx 8	1057 First Avenue Appraisal
Rx 9	1063 First Avenue Appraisal
Rx 10	278 Mott Street Appraisal
Rx 11	356 East 57 Street Appraisal
Rx 12	440 East 58 Street Appraisal
Rx 13	209 East 59 Street Appraisal
Rx 14	314 East 62 Street Appraisal
Rx 15	1144 First Avenue Appraisal
Rx 16	324-326 East 66 Street Appraisal
Rx 17	328-330 East 66 Street Appraisal
Rx 18	341 East 76 Street Appraisal
Rx 19	223 East 96 Street Appraisal

Rx 20	155 East 99 Street Appraisal
Rx 21	157 East 99 Street Appraisal
Rx 22	159 East 99 Street Appraisal
Rx 23	161 East 99 Street Appraisal
Rx 24	Id., Only Scope of Work Rule
Rx 25	Example of Income Cap., Rate Formula
Rx 26	Nakrosis Curriculum Vitae
Rx 27	Nakrosis Memo., June 2, 2008
Rx 28	New York City permit re: comparable 115,220 square feet
Rx 29	New York City recorded sale price re: comparable $43,004,662.00
Rx 30	Id., Only News Article
Rx 31	Id., Only
Rx 32	Id., Only, NY Post Article, Oct., 7, 2007
Rx 33	NYC Building Dept., Permit re: comparable square feet
Rx 34	NYC Building Dept., Permit re: comparable square feet
Rx 35	September 17, 2008-Letter re 43-49 First Avenue
Rx 36	Sample of Rent Stabilize Lease
Rx 37	Id., Only, Letter re: correction on tax payments
Rx 38	Real Estate Taxes
Rx 39	Id., Only, Email 12/31/08 Attorney for Petitioner re: 328 East 66 Street
Rx 40	Adjustment grids re: 4 subject properties
Rx 41	Adjustment grids re: 14 subject properties
Rx 42	Id., Only [1 -page Massey Knakal Sales]
Rx 43	NYC Record re: $26,200,000.00
Rx 44	Id., Only re: 308 East 66 Street
Rx 45	Massey Knakal Document re: 176-182 West 82 Street
Rx 46	Id., Only re: real estate journal March 5, 2007
Rx 47	Leitner documents re: 176-182 West 82 Street
Rx 48	NYC record re: 209 East 25 Street
Rx 49	NYC record re: 290 West 12 Street.
Rx 50	Id., Only re: assemblage of lots
Rx 51	Id., Only Long Term Ownership
Rx 52	Id., Only Grid
Rx 53	Updated appraisal for 328-330 East 66 Street
Rx 54	New York City certified document re: 200 Eleventh Avenue
Rx 55	New York City certified document re: 305 East 85 Street
Rx 56	Id., Only
Rx 57	NYCHA Project Location Id., Only
Rx 58	Id Only, Rent Records from Janet Giaimo Vitale
Rx 59	Lipton Curriculum Vitae
Rx 60	Lipton Report
Rx 61	Id., Only, Diagram re: Lipton Hypothetical
Rx 62	Baliban Curriculum Vitae
Rx 63	Report re: FAV/EGA Valuation
Rx 64	Report re: FAV/EGA Supplemental Valuation
Rx 65	EGA Latest Balance Sheet
Rx 66	Baliban Valuation of FAV Chart
Rx 67	Baliban Market Values for EGA and FAV applying 3 scenarios of valuation
Rx 68	Summary of envelopes of August 28, 2008 -Cash in Envelopes
Rx 69	Id. Only re: Mercer article "Embedded Capital Gains In Post- 1986 C-Corporation Asset Companies[33]
Rx 70	Mercer Article re: 100% B.I.G. allocation to "fair market value" (not "fair value").
Rx 71	Mercer Capital Website Article "Fair Market Value v the Real World" 1999
Rx 72	Skarlato Curriculum Vitae
Rx 73	Skarlato Nov., 21, 2008-Letter to IRS re: tax liabilities
Rx 74	Nonparty Antoinette Giaimo 2004-Tax Return
Rx 75	Nonparty Antoinette Giaimo 2006-Tax Return
Rx 76	Schedule of "tax liabilities" for EGA and

	FAV federal and state taxes Years 2005, 2006 and 2007 with Interest as of Feb., 2009)
Rx 77	Id Only Skarlatos Summary-Schedule of allocation of law firm fees among various individuals, estates and corporate entities [demonstrative exhibit]
Rx 78	ACRIS re: 20-22 Prince Street
Rx 79	ACRIS re: 232-234 Elizabeth Street
Rx 80	ACRIS report re: 413 East 12 Street
Rx 81	ACRIS report re: 520 East 14 Street
Rx 82	ACRIS report re: 413 East 12 Street and 520 East 14 Street properties
Rx 83	ACRIS report re: 147 East 90 Street
Rx 84	ACRIS report re: 130 East 93 Street
Rx 85	Id., Only, Costar Report re: 234 East 70 Street
Rx 86	Id., Only [Levy Notes re: Broome Street re: cap rate calculation]
Rx 87	Rent Guidelines Board re: rent control deregulation upon vacancy
Rx 88	Gelbtuch Curriculum Vitae
Rx 89	Id Only re: Gelbtuch Opinion trend rents absence trend expenses calculation
Rx 90	Id Only Gelbtuch notes re: appreciation rates
Rx 91	Gelbtuch notes re: appreciation rates
Rx 92	Gelbtuch notes re: building sales 6 month period
Rx 93	Demonstrative Chart [Final Reconciliation of Adjustment to Leitner's Values
Rx 94	Id Only, data on appreciation of properties Spring Street[34]
Rx 94	S&B Document May 27, 2008 re: CPA material
Rx 95	May 6, 2008 Letter re: IRS to EGA on owed taxes
Rx 96	Excerpt Merrill Lynch Bank Statements November 2008 re EGA and FAV and tax liabilities
Rx 97	January 14, 2009-Bill of S&B re: compilation of expenses for amended tax returns EGA
Rx 98	January 14, 2009-Bill 2009-Bill of S&B re: compilation of expenses for amended tax returns FAV
Rx 99	Id Only Redacted Portions of affidavit
Rx 100	Id Only Redacted Portions of Affidavit

Petitioner Exhibits

Px A	278 Mott Street Appraisal for Edward P. Giaimo Estate
Px B	356 East 57 Street Appraisal for Edward P. Giaimo Estate
Px C	223 East 96 Street Appraisal for Edward P. Giaimo Estate Edward P. Giaimo Estate
Px D	Condo Sales Report
Px E	Google Map re 2023 First Avenue
Px F	Rent Roll- 45 First Avenue)
Px G	Leitner 2005 Proposal re: FAV and EGA Properties
Px H	Leitner Licenses
Px I	43-49 First Avenue Retainer Letter
Px J	Spring Street properties, 1057 First Avenue and 1063 First Avenue properties Retainer Letter
Px K	43-49 First Avenue Appraisal
Px L	6 Spring Street Appraisal
Px M	8 Spring Street Appraisal
Px N	1057 First Avenue Appraisal
Px O	1063 First Avenue Appraisal
Px P	278 Mott Street Appraisal
Px Q	356 East 57 Street Appraisal
Px R	328-330 East 66 Street Appraisal
Px S	324-326 East 66 Street Appraisal
Px T	314 East 62 Street Appraisal
Px U	1144 First Avenue Appraisal

Px V	209 East 59 Street Appraisal
Px W	440 East 58 Street Appraisal
Px X	341 East 76 Street Appraisal
Px Y	223 East 96 Street Appraisal
Px Z	155 East 99 Street Appraisal
Px AA	157 East 99 Street Appraisal
Px AB	159 East 99 Street Appraisal
Px AC	161 East 99 Street Appraisal
Px AD	June 25, 2008-Letter Request to Update Appraisals [35]
Px AE	Id Only Citi-habitat Rental Market Update, 3d Qtr.
Px AF	Id Only Prudential Douglas Elliman Market Overview 3d Qtr., 2007
Px AG	Sanborn Tax Map
Px AH	Px AH [Demonstrative Exhibit]-Corrected Version
Px AI	Knakal Document re: lead
Px AJ	130-138 West 93 Street data source
Px AK	Rent Roles 8/1/07 Subject Properties
Px AL	Id., Only [Massey Knakal Sales]
Px AM	Associate Appraisers Credentials
Px AN	James Levy Curriculum Vitae
Px AO	Mercer Curriculum Vitae
Px AP	Mercer Expert Report re: valuation of FAV and EGA Common Stock
Px AQ	Document re: valuation of EGA as of August 1, 2007 and updated January 2009
Px AR	Document re: valuation of FAV as of August 1, 2007 and updated January 2009
Px AS	Id., Only [Slide Presentation]
Px AT	Restricted Stock Study of Baliban
Px AU	Mercer - Baliban Chart Comparison Market Values of EGA
Px AV	Mercer - Baliban Chart Comparison Market Values of FAV
Px AW	Id Only Demonstrative Exhibit
Px AX	Certified Property Renovation Forms-6 Spring Street
Px AY	Certified Property Renovation Forms-8 Spring Street
Px AZ	Certified Property Renovation Forms- 350 East 58th Street
Px BA	Two Settlement Checks re: tort litigation by EGA and related companies as to 223 East 96 Street
Px BB	Summary Sheet Post Valuation Date Expenses re: 96 Street litigation
Px BC	Id Only, Gelbtuch's Notes Feb. 18, 2009-Cross Examination
Px BD	Photo of One Carnegie Tower with Garage rear.
Px BE	ACRIS Document re: 176 and 178 West 82d Street Nov., 16, 2006
Px BF	ACRIS Document re: 176 and 178 West 82d Street Feb., 28, 2008
Px BG	ACRIS Document re: 2006 for 240 E. 27th Street
Px BH	ACRIS Document re: 2007 for 240 E. 27th Street
Px BI	145 Spring Street -2007 Sale
Px BJ	145 Spring Street -2003 Sale
Px BK	2005 Federal Amended Tax A. Giaimo
Px BL	Supplemental Schedule Tax re: Rx 76 with interest calculations through Oct., 31, 2008
Px BM	Micah Officer Article

Court Exhibits

Court Ex 1	Feb., 27, 2009-Stipulation
Court Ex 2	Feb., 27, 2009-Stipulation