M E M O R A N D U M

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 9

In the Matter of the Application of JAMAICA ACQUISITION, INC., successor by merger of Jamaica Central Railways, Inc., and In the Matter of the Application of GREEN ACQUISITION, INC., successor by merger of Green Bus Lines, Inc., and In the Matter of the Application of TRIBORO ACQUISITION, INC., successor by merger of Triboro Coach Corporation,

INDEX NO.: 009278/2007

Petitioners,

-against-

DECISION AFTER TRIAL

PETER SHEA, as Executor of the Estate of SYLVIA EISENBERG, CARIN ROSE GILBERT, LEONA MILLER, JERALD STEINBERG, JAMES MOLLE, THEA GAUSS, MELVIN SMITH and ROSEMARY PAVLICK,

Respondents.

To Determine the Fair Value, pursuant to New York Business Corporation Law § 623, of certain Shares of Common Stock of Jamaica Central Railways, Inc., and to determine the Fair Value, pursuant to New York Business Corporation Law § 623, of certain Shares of Common Stock of Green Bus Lines, Inc., and to Determine the Fair Value, pursuant to New York Business Corporation Law § 623, of certain Shares of Common Stock of Triboro Coach Corporation, Inc.

The names Green Bus Company, Jamaica Central and Triboro Coach bring back memories of comparatively small bus companies that traversed the streets of New York from the mid 1920's until late 2005 to early 2006 and were used by many of us.

In 1925, approximately 160 bus operators determined to organize themselves into one company and formed Green. Green obtained a bus franchise in Queens from New York City.

Triboro was formed in 1931 and began operating a bus line from Corona to Flushing, Queens. In 1936, Triboro received a 10-year franchise from New York City, incorporating nine routes in Queens.

In 1946, New York City offered the Triboro franchise to Green. Triboro's outstanding shares were purchased by majority shareholders of Green, who then offered the shares to the shareholders of Green. While some of the Green shareholders declined to purchase Triboro shares, a majority elected to purchase, resulting in a substantial commonality of ownership of Green and Triboro.

Jamaica evolved from the Long Island Electric Railway ("LIER") which was incorporated in 1894. LIER, which operated routes in Nassau and Queens, went bankrupt in 1926, and its routes in Nassau County were abandoned. The Queens routes continued to operate under Jamaica, the company that emerged from the reorganization of LIER.

Jamaica thereafter experienced financial difficulties and was taken over by Green, which offered the shares to the Green shareholders, the majority of whom purchased shares, resulting again in substantial commonality of ownership.

In the mid 1990's, the City of New York agreed to subsidize passenger fares, maintaining them at a reasonable level, while supplying the companies with sufficient funds to continue operations.

Somewhat later in the 1990's, New York City made public statements of its intention to terminate the franchises held by the Bus Companies and to incorporate their bus routes into the Metropolitan Transit Authority operations.

At that time, management of the companies determined that it would be in the best interest of the Bus Companies and their shareholders to develop other businesses.

Those new businesses were placed under GTJ Co., Inc. ("GTJ Co."). The new businesses include MetroClean Express Corp., Shelter Express Corp., Shelter Electric Maintenance Corp. and Transit Facility Management Corp. ("TFM"), and various subsidiaries.

TFM was a paratransit bus company that provided services under contract with the Metropolitan Transit Authority including door-to-door public transportation for people with disabilities.

GTJ Co. was owned as follows: Green Bus 40%; Triboro Coach 40% and Jamaica 20%. Green, Triboro and Jamaica shares were not publicly traded. The only transactions were intra-family transfers from the original shareholders and their descendants and a few purchases by the Bus Companies. As of mid 2006, Green had 214 shareholders, Triboro 209 and Jamaica 178. Many shareholders held shares in two or all three of the Bus Companies. Each of the shareholders of the Bus Companies was technically a minority shareholder.

For decades, the holders of a majority of the shares of each of Green, Triboro and Jamaica entered into and renewed voting trust agreements to effect a stable, common management of the Bus Companies.

In 1999, the franchise agreements, which had been renewed regularly for more than half a century, were not renewed by the City of New York. However, the Bus Companies continued to operate their bus operations.

Following litigation between the Bus Companies and the City of New York, on November 29, 2005 they entered into agreements pursuant to which the Bus Companies sold all of their bus assets including routes, tangible personal property related to bus operations and goodwill to the City for $25,000,000 and the City's assumption of many of the liabilities of the Bus Companies, including substantial pension obligations. The Bus Companies' real estate assets, the bus depots/maintenance facilities were not included in the sale.

Petitioners and their subsidiaries own a total of eight parcels of real property four of which are leased to New York City, and two of which are leased to commercial interests.[1]

The City of New York leased real property from Petitioners for use as bus depots/maintenance facilities as follows:

(a) 85-01 24th Avenue, East Elmhurst, New York, leased from Triboro for an initial term of 21 years, with a first year rent of $2,585,000 escalating to a 21st year rent of $3,785,000 with four renewal options of seven years each.

(b) 165-25 147th Avenue, Jamaica, New York, leased from Green for an initial term of 21 years with a first year rent of $2,795,000 escalating to a 21st year rent of $4,092,000 with four

[1] A seventh parcel is a small strip of land with minimal value and is not material to this matter. The eighth parcel was acquired in March 2008, and is not relevant to this proceeding.

renewal options of seven years each.

(c) 49-19 Rockaway Beach Boulevard, Arverne, New York, leased from Green for an initial term of 21 years with a first year rent of $605,000 escalating to a 21st year rent of $886,000 with four renewal options of seven years each.

(d) 114-15 Guy R. Brewer Boulevard, Jamaica, New York, leased from Jamaica for an initial term of 21 years with a first year rent of $1,515,000 escalating to a 21st year rent of $2,218,000 with four renewal options of seven years each.

Two parcels owned by GTJ Co. are leased as follows:

(a) 612 Wortman Avenue, Brooklyn, New York, leased to Varsity Bus Co., Inc. for an initial term of 7 years with first year rent of $231,000 and escalating by the cost of living index through 2010, with four renewal options of five years each. In addition, approximately 60% of that property was occupied by TFM, under an oral lease.

(b) 23-85 87th Street, East Elmhurst, New York, is leased to Avis Rent-A-Car for an initial term of 20 years, with an initial rent of $1,800,000 ($1,530,000 was the adjusted initial rent based upon pending zoning modifications), with increases based upon the cost of living index of between 105% and 115%.

The Bus Companies' real properties are essentially fully depreciated.

The remaining businesses of each of the Bus Companies were managed under the direction of a Board of Directors that was "maintained in place under voting trust agreements in which approximately 88% of the Green common stock, 89% of the Triboro common stock and 91% of the Jamaica common stock [were] voted by a single voting trustee, Jerome Cooper, who [was] also the Chief Executive Officer of the Bus Companies..." (Petitioners' Exhibit 14, p. 5).

The ongoing argument that there is no majority and that everyone is a minority shareholder is only accurate mathematically and not in reality.

Among the members of the Board hand picked by Jerome Cooper were his son, Paul Cooper, and his nephew, Douglas Cooper, who also serves as the co-managing partner of the Petitioners' law firm, Ruskin Moscou Faltischek. (Petitioners' Exhibit 14, p. 123). Jerome Cooper either owned or controlled Lighthouse Real Estate Management which received commissions from GTJ Co., Inc. ($2.3 million).

Subsequent to the sale of its bus routes, the principal source of revenue for each Bus

Company was derived from annual rental income in the approximate aggregate amount of $9,500,000.00. (Petitioners' Exhibit 14, p. 30).

The rental income was generated from the six rentable properties described above, five of which were the subject of long term triple net leases. (Petitioners' Exhibit 14, p. 6). As previously noted, of those five triple net leases, four were leased to the City of New York for use as bus depots with maximum terms of 49 years (Petitioners' Exhibit 14, p. 30), and the fifth was with Avis for a term of 20 years. (Petitioners' Exhibit 42; Petitioners' Exhibit 69 at p. 40).

Under the terms of the triple net leases, the tenants were responsible for payment of all expenses related to the leased property including real estate taxes, insurance and maintenance. (Petitioners' Exhibit 14, p. 30; Petitioners' Exhibit 42).

In order to avoid the substantial corporate taxes that would be assessed on its rental income so long as the Bus Companies remained Subchapter "C" corporations, management of the Bus Companies determined that there would be significant tax advantages in merging the Bus Companies into a REIT. (Petitioner's Exhibit 14, pp. 30-31). Furthermore, if the companies transferred their realty into a new corporation or sold it, it would result in a capital gains tax of $58 million (originally claimed to be $73 million by Petitioners). The BIG tax (Built In Gains) tax was originally miscalculated at $73 million and was used in early valuation attempts. The $58 million was then modified to $47 million after an additional review by Petitioners' expert during trial.

For those reasons, as well as other tax benefits, the Bus Companies proposed a merger into a REIT to its shareholders pursuant to a Proxy Statement filed with the SEC in February 2007. (Petitioners' Exhibit 14).

<u>Proxy Statement</u>

Management promoted the known income tax benefits of the proposed merger in the Proxy Statement:

> Because the Bus Companies were organized more than a half-century ago, their real property is still owned by "C" corporations. For tax purposes, these are corporations which are taxed on their income and do not "pass through" their tax liabilities to the shareholders, as would occur in, for example, a limited partnership or a limited liability company. Accordingly the substantial income being generated under the leases …is being taxed at the corporate level at a tax rate of approximately 45% and then, if distributed to the shareholders as

> dividends, would be taxed again at, for example, rates ranging from 15% to 25%, which would result, if such income were fully distributed in a combined tax rate on the income rates ranging from approximately 53% to 59%...
>
> The Board of Directors determined that the only tax efficient solution to the above situation is the creation of a REIT. Because of special tax rules applicable to REITs, all of the real property of the Bus Companies can be acquired by a REIT in…tax free reorganizations. Furthermore,
>
> the income earned by the REIT's real properties will not be taxed to the REIT provided there is compliance with the REIT rules.

(Petitioners' Exhibit 14 at pp. 5-6).

In the Proxy Statement, management also promoted the known benefit of eliminating any gains tax on the eventual sale of its real estate assets if such assets were held by the REIT for at least 10 years (Petitioners' Exhibit 14, p. 137). Management further stated its intention to retain all of its real estate for at least 10 years to realize this tax benefit:

> We do not plan to sell <u>any</u> of these properties for at least 10 years, for tax reasons, and view them as (a) a source of current earnings and (b) a source of financing…

(Petitioners' Exhibit 14 at p.72, emphasis supplied). Additional REIT rules include that (i) at least 90% of the REIT's net income, other than net capital gains, be distributed to the REIT shareholders each year; (ii) the REIT may not transfer its initial real property within ten years without incurring the BIG tax; and (iii) no single shareholder may own more than 9.9% of the outstanding shares of the REIT.

Based upon their respective shares outstanding, Green shareholders would receive 1,117.429975 shares of GTJ REIT for each share in Green; Triboro shareholders would received 2,997.964137 shares of GTJ REIT for each share of Triboro; and Jamaica shareholders would received 195.001987 shares of GTJ REIT for each share of Jamaica. (Exhibit 14, p. 5).

A duly noticed Special Joint Meeting of Shareholders of the Bus Companies was held on March 26, 2007 (the "Shareholder Meeting"). (Exhibits 1 ¶5, 2 ¶5 and 3 ¶5).

The Merger Agreement and Plan of Merger was duly adopted by an overwhelming vote, far more than the two-thirds required. (Exhibits 1 ¶5, 2 ¶5 and 3 ¶5).

The Merger Agreement and Plan of Merger specifically provided that if appraisal rights were perfected with respect to common stock of the Bus Companies aggregating 3% or more of the GTJ REIT shares to be issued, GTJ REIT could terminate the Merger Agreement and consummate with the Reorganization. (Exhibit 14, p. 8-9).

The Dissent

Respondents, whose Bus Company shares represented less than 2.5% of the potential REIT interests, and 8 out of over 300+ shareholders, objected to the adoption of the Merger Agreement and the Plan of Merger, and exercised their rights under BCL § 623 to an appraisal of their respective interests. (See letters dated 4/12/07, Exhibits C to Exhibits 1, 2 and 3).

Upon receipt of Respondents' elections to dissent from the Reorganization, Petitioners, through counsel, engaged Empire to advise them as to a range of good faith offers for shares in GTJ REIT, Inc. the day after the merger. This the Petitioner argues, was done in "recognizing that the Reorganization would only increase the value of the Bus Companies shares." Empire issued a report dated April 9, 2007 ("2007 Empire Report"). (Exhibit 5).

The Offer and Rejection

Empire valued GTJ REIT utilizing the guideline company method together with a capitalization of dividend paying capacity. (Exhibit 5, pp. 5-9).

In the 2007 Empire Report, Empire opined that the fair value of the shares of GTJ REIT subsequent to the merger, and assuming the formation and operation of the REIT was between $6.36 and $7.47 per share and that a reasonable range of good faith offers to the dissenting shareholders was $6.80 — $7.20 per share. (Exhibit 5, p. 11).

Empire confirmed its findings made in application of the guideline company and capitalization of dividend paying capacity methods by applying a reasonableness test, based upon as asset approach, utilizing the Adjusted Book Value (ABV) method. (Exhibit 5, p. 6).

On April 12, 2007, pursuant to BCL Sec.623 (g), GTJ REIT sent to each Respondent, by registered mail, a written offer of GTJ REIT (the "Good Faith Offer") to purchase the shares of Green, Triboro and Jamaica, as follows:

Green	7,822.01 per share

Triboro	20,985.75 per share
Jamaica	1,265.01 per share

The foregoing equates to $7.00 per share of GTJ REIT.

The Good Faith Offer made to the dissenting shareholders was based upon, *inter alia*, the 2007 Empire Report and advice of counsel. Each of the Respondents rejected the Good Faith Offer. This offer represented the value of the dissenter's shares in the REIT (The post merger entity). It **did not** represent the value of the dissenters shares in the bus companies immediately prior to the merger of the respective bus companies (BCL 623 (h) (4)).

Petitioner continually points out that the seven dollar per share offer in April, 2007 was for a share of the newly created REIT and not the respondents shares in the respective plus companies.

They were required to make an offer within 15 days of respondent's rejection of the merger (BCL 623 (g), and therefore did what they could in a short time.

BCL § 623

The court agrees that the petitioner was under a time constraint, but disagrees with the balance of petitioners statutory interpretation.

In BCL section 623(g), the relevant portion of the statute reads:

> Within 15 days after the expiration of the period in which shareholders may file their notices of election to dissent, or within 15 days after the proposed corporate action is consummated, whichever is later (but in no case later than 90 days from the shareholders authorization date), the Corporation or, in the case of a merger or consolidation, or surviving or new Corporation, shall make a written offer by registered mail to each shareholder who has filed such notice of election to pay for his shares at a specified price which the Corporation considers to be their fair value. Such offer shall be accompanied by a statement setting forth the aggregate number of shares with respect to which notices of election to dissent have been received and the aggregate number of holders of such shares.

Logically, the offer to pay for "his shares" must refer to the shares held by the dissenter which could only be the bus company shares, not shares in the REIT, which had yet to be distributed, and which the dissenter did not own because he had dissented from the merger.

BCL § 623(h)(4) states that the court shall "proceed to fix the value of the shares, which for the purposes of this section, shall be the fair value as of the close of business on the day prior to the shareholders authorization date."

Again this can only refer to the shares of the bus company, not the shares of the REIT.

In § 623 (h)(7), as it relates to the payment of each party's costs, fees and expenses of counsel and any experts, the court may apportion these costs (the costs to the Corporation) in its discretion if it finds the acts of any dissenting shareholder "was arbitrary, vexatious or otherwise not in good faith."

This issue, the arbitrariness of the shareholders action, was not addressed in any significant way by the respondents, and none of the respondents testified in this action. In Petitioners' Responsive Post Trial Brief, they essentially ask for a negative inference to be drawn for failure to call a witness. In that this was not requested during trial, when the respondents could have responded, such request is untimely and is rejected.

The court may award to the dissenting shareholders similar costs, expenses and fees, if the court finds any of the following: "A. That the fair value of the shares as determined materially exceeds the amount which the Corporation offered to pay"; Or [Paragraphs B and C. are not relevant]

"D. That the action of the Corporation in complying with its obligation as provided in this section was arbitrary, vexatious or otherwise not in good faith."

It is clear to the court and as repeatedly stressed by Petitioners, that the seven dollar offer was not made to represent the fair value of the Bus Company shares prior to the merger, but rather the fair value of a share of the newly formed REIT.

Does that mean that the offer was not made in "good faith", or that it should be compared to the fair value that is to be determined for the bus company shares immediately prior to the merger?

It is apparent that the seven dollar offer was not calculated using the normal factors that have become the norm/standard in Fair Value calculations. It is also clear that petitioners did not even consider a traditional fair value calculation until this case was well underway and then it was modified at least three times. On October 6, 2008, Petitioners commissioned Empire to prepare a valuation as of March 25, 2007. It was clear the earlier report was not correctly done. The new report was served on October 31, 2008, added Exhibits 47 — 72 to the trial record, and resulted in the court ordering depostion of Griswold, one of Petitioners' experts, due to this last minute change in position.

The court believes the offer was made in "good faith" but in error, a massive error. It also believes that it has no choice but to compare the seven dollar offer, no matter what it was supposed to represent, to the fair value calculation that will be reached by the court and determine whether the courts valuation "materially exceeds the amount which the Corporation offered to pay", either by "dollar amount or the percentage or both".

However, it also appears that the respondents "filed their election to dissent before they were aware of the seven dollar offer". The court can take that into consideration in determining whether the acts of the dissenting shareholders were "arbitrary, vexatious or otherwise not in good faith".

The Bus Companies sent to each Respondent a check or checks representing eighty (80%) percent of their Good Faith Offer for the value of Respondents' shares in the REIT in the amount of $7.00 per share.

Petitioners commenced these proceedings to determine the fair value of the Respondent shares of the Bus Companies pursuant to BCL § 623 on or about May 25, 2007.

The Determination of Value of the Bus Companies' Assets

The Appraisal of the Real Estate Assets

(Pre-Merger C&W Report)

In furtherance of its efforts to merge into a REIT, prior to the April 2007 merger vote, the Bus Companies were required "to determine the allocation of shares of the reorganized company among the Green, Triboro and Jamaica shareholders…" in advance of the proposed merger. (Petitioners' Exhibit 14 at p. 35). (Not because of the future § 623 dissent and unconnected to the subsequent valuation).

To that end, prior to the issuance of the Proxy Statement, the Bus Companies retained

Cushman Wakefield in January, 2006 to determine the value of all of its real estate. (See, Respondents' Exhibits V-1 through V-4).

Phil Cadorette, the Cushman Wakefield appraiser in charge of the appraisal process, was designated a Member of the Appraisal Institute ("MAI") in 1994. (Transcript of Cadorette's testimony, pp. 6, 14).

In furtherance of his efforts to appraise the real estate, Mr. Cadorette worked with Paul Cooper of the Petitioner to obtain all relevant written documentation including all the leases for the respective properties. (Transcript of Cadorette's testimony on December 15, 2008, p. 14).

Following his review of the leases, his inspections of each of the properties and his analyses of the relevant markets, Mr. Cadorette prepared written appraisal reports for each of the properties, reflecting his conclusion of value for each of the properties as of February 2, 2006. (Transcript of Cadorette's Testimony, pp. 17-19; petitioners' Exhibits 30 through 36).

In his appraisal reports as of February 2, 2006, Mr. Cadorette relied on a discounted cash flow analysis, which analyzed rental income, to determine the value of the properties owned by the Bus Companies and leased to the City of New York and to Avis. (Petitioners' Exhibits 30 through 33 and 35).

A combination of a direct capitalization method and market approach was used to determine the value of the other properties, which were owned by GTJ Co., Inc., the operating subsidiary of the Bus Companies. (Petitioners' Exhibits 34 and 36).

The conclusion of values for each of the properties in the Cushman Wakefield Appraisal Reports as of February 2, 2006 was disclosed in the Proxy Statement (Petitioners' Exhibit 14, pp. 36-40) and is set forth below:

Property	**Value**
1. 165-25 147th Avenue Jamaica, N.Y.	$42,600,000.00
2. 42-19 Rockaway Beach Boulevard Arverna, N.Y.	$ 9,200,000.00
3. 85-01 24th Avenue East Elmhurst, N.Y.	$39,400,000.00
4. 114-15 Guy Brewer Boulevard	$23,100,000.00

Jamaica, N.Y.

5. 23-85 87th Street East Elmhurst, N.Y.	$24,000,000.00
6. 612 Wortman Avenue Brooklyn, N.Y.	$15,000,000.00
7. Vacant land	$ 95,000.00
	$153,395,000.00

Petitioners' Appraisal Post-Merger (Empire Report)

The three aforementioned Bus Companies were succeeded by three new corporations after the merger, Jamaica Acquisition, Inc., Green Acquisition, Inc. and Triboro Acquisition, Inc. As noted, when the merger/reorganization was approved, these shareholders chose not to participate in it. (BCL § 623). Thus, the Petitioners had 15 days to provide to those shareholders what they would offer to pay them per share. As previously noted the offer made then was $7.00 per share. Petitioners point out, repeatedly, that this was not supposed to represent a Fair Value offer pursuant to BCL § 623 (h)(4) of the value of a share in the Bus Companies, but rather a "Good Faith Offer" of the value of Respondents' shares of the post-Reorganization REIT. It is this offer, $7.00 versus the amount claimed by Respondents, $18.37, that becomes very important.

Pursuant to BCL §623(h)(7), as the court has noted, if such an offer is deemed by the court not to be a Good Faith Offer, then the Respondents could be entitled to attorney's fees as well as costs.

Factors which were considered in valuing the property and the corporations included the fact, not surprisingly, that environmental issues existed, or still exist, at six of these properties. Remediation in one form or another has taken place at these properties including the removal of approximately 3,000 tons of soil from four of the properties and over 5,000 tons from a fifth.

Each of the Bus Companies' properties is monitored by New York State Department of Environmental Conservation. (Exhibit 14, pp. 68-69).

For the purposes of determining the range of good faith offers to be made to the Respondents in the 2007 Empire Report, Empire utilized "GTJ REIT, Inc. Projected 12 Months Revenue and Expenses," (the "Kessman Projections") a document prepared by Michael

Kessman, Chief Accounting Officer of Green, Triboro and Jamaica, and subsequently GTJ REIT, for Jerome Cooper, CEO, which was prepared for the purpose of determining the REIT's dividend paying capacity for the period July 2007 through June 2008.

What the Petitioners offered in April 2007 was the fair value of the REIT. It was not the Fair value of the Bus Companies as of the day prior to the merger. The Petitioners brought this action to determine the Respondents' fair value of their shares in the Bus Companies pursuant to BCL § 623(h)(4). Thus, immediately we have or will have two different numbers, one created in the spring of 2007 for the value of the REIT shares, and one, the value of the bus companies shares, right before the merger. How was this done and how do the parties differ?

To perform its valuation of the Bus Companies as of the day immediately prior to the Reorganization (the "Valuation Date"), Empire elected to utilize an income approach (the capitalization of income method)(capitalization of adjusted debt free cash flow method). and an asset approach (the net asset value method). Empire rejected the market approach because Empire did not locate sufficient comparable companies or transactions.

GTJ Co. is an asset jointly-owned by the Bus Companies. Thus, it also had to be valued and included in the pre-merger date valuation. Empire valued GTJ Co. as of the Valuation Date based upon an income approach, utilizing the capitalization of debt free income method.

Empire also valued GTJ Co. as of the Valuation Date based upon an asset approach, utilizing the net asset value method. In determining its opinion of the fair value of the Bus Companies as of the Valuation Date under the asset approach, Empire applied a minority interest discount of 20% to each Bus Company's minority ownership interest in GTJ Co.

In calculating its opinion of the fair value of the Bus Companies, Empire utilized the Cushman & Wakefield appraisal reports dated as of March 29, 2007 (the "2007 C&W Appraisals") (which were delivered to the Bus Companies May 7, 2007) to ascertain the value of the Bus Companies' and GTJ Co.'s real estate assets.

In its asset valuations of the Bus Companies and GTJ Co., Empire made certain adjustments to the 2007 C&W Appraisals. C&W had appraised the four properties leased to the City of New York based upon an income approach, utilizing the discounted cash flow method. In explaining why Mr. Griswold (Empire's main man on this assignment and Petitioners key witness) changed or "recast" the C&W Appraisals of the four City-leased properties, Petitioners note that he adjusted the discount rate.

Petitioners further explain Empire's modifications of the 2007 C&W Appraisals were based upon the determination that the effective growth rate for the leases with the City of New York was approximately 1.9%, which Empire opined was a lower than average return than what a willing buyer would deem acceptable in the willing buyer/willing seller fair value determination. It was this, as well as the environmental conditions, that resulted in a dramatic change in the capitalization rate on the properties.

C&W had appraised the property located at 23-85 87th Street, East Elmhurst, leased to Avis, utilizing only an income capitalization approach.

Empire "recast" the appraisal of the Avis property to adjust the capitalization rate by increasing the growth rate 1.3% resulting in an implied growth rate of 2.8%, and added a company specific risk adjustment of .25% for condemnation and environmental risk factors.

C&W appraised the Wortman property owned by GTJ Co., as a fee simple estate, and valued a substantial portion of the premises as vacant land, ignoring the actual use of the property. In reality, the building was shared by Varsity Bus pursuant to a written lease and Transit Facility Management, a related entity, pursuant to an oral lease and the surrounding land was utilized by both Varsity and TFM to store vehicles.

Empire did not adjust the 2007 C&W Appraisal of the Wortman property, but its inaccuracies were considered by Empire in weighting its income and asset approaches to the valuation of GTJ Co. as 60% asset and 40% income.

Mr. Griswold explains, in his testimony, these multiple changes to the C&W Appraisal as noted above. Respondents point out, from Griswold's testimony, that:

Mr. Griswold was directed by Petitioners' counsel to disregard all the known benefits of the REIT in preparing the new schedules.

The NAV approach utilized by Mr. Griswold presumed the immediate sales of all the real estate owned by each of the Bus Companies and made downward adjustments in value by subtracting for a BIG tax and transaction costs (7%) based upon such hypothetical sales.

Mr. Griswold acknowledged that the utilization of a NAV approach was not in accord with valuation of the Bus Companies as going concerns (2006 C&W report had used the ABV approach).

Mr. Griswold admittedly had no expertise as a real estate appraiser and had neither read any of the leases for the properties nor conducted a physical inspection of the properties.

Mr. Griswold recalculated the values of all the real property other than 612 Wortman Avenue by using a capitalization rate that was substantially higher than the capitalization rate used by Cushman Wakefield in its appraisals, and concluded that those properties were worth $27,195,000 less than the values established by the second Cushman Wakefield appraisals.

Mr. Griswold sought to justify his alteration of the Cushman Wakefield capitalization rate by claiming that the Cushman appraisals did not sufficiently consider an investor's expectation of growth in the REIT markets and further contending that there were environmental risks and a condemnation risk that were not sufficiently considered in the Cushman appraisals though Mr. Cadoret testified no one asked him about these issues. As to the alleged increased environmental risks, Mr. Griswold relied on statements made to him by Stuart Sieger, an attorney for the Petitioners. In total, Mr. Griswold reduced the value of the corporations previously appraised by Cushman Wakefield as of March 29, 2007 by more than $84 million. This includes the $27 million from above as well as the BIG tax and the corporate income tax.

Mr. Griswold also valued the Bus Companies using a capitalization of earnings approach. To arrive at a net income amount to capitalize, he made the following adjustments to the annualized income figures for each of the Bus Companies: (a) he subtracted investment income from annualized rental income of the Bus companies on the [erroneous] premise that the annualized rental income figures included a component for investment income; (b) he reduced gross income by a sum representing depreciation, which he later admitted was not a cash expense; (c) he further reduced gross income by a sum representing environmental expense, which was an expense that was largely non-recurring; but which Petitioners continue to argue would be a major factor in what a willing buyer would pay a willing seller, and (d) he further adjusted income for an income tax liability, calculated at a rate of 45% based on the presumed continued existence of the Bus Companies as Subchapter "C" corporations.

The application of the 45% tax rate was made at the direction of Petitioners' counsel.

After calculating net income to capitalize, Griswold applied a 9% capitalization rate that was markedly higher than the capitalization rate used by Cushman Wakefield. (6.5% for 4 properties and 7.5% for 1 property).

Griswold derived his cap rate by reference to a group of companies that he admitted was not a sufficient peer group to allow a market approach to be used for valuation purposes. (See Exhibit 5B).

In its third valuation analysis (produced October 31, 2008), Empire also replaced its prior valuation analysis for GTJ Co., Inc. with a new one. Although Empire had concluded in its April 2006 analysis of GTJ Co., Inc. that the use of an earnings approach was an unreliable method to value that entity, Empire's subsequent valuation of GTJ Co., Inc. used an earnings approach to conclude that GTJ Co., Inc. was worth $2,690,000. Updated C&W reports as of March 29, 2007 were also produced.

By using an alternative NAV approach that presumed the sale of all of GTJ Co., Inc.'s real estate and applying a BIG tax and sale transaction costs, Empire calculated a value of $18,510,000.00 for GTJ Co., Inc.

Griswold's fair value conclusion of $12,182,000.00 for GTJ Co., Inc. was calculated by giving the earnings valuation approach a 40% weight and the NAV approach a 60% weight.

The resulting fair value conclusion was then allocated among Green, Triboro and Jamaica and included a minority discount, despite Mr. Orth's (from Empire) earlier testimony that a minority discount was inappropriate.

During trial there were a variety of errors noted by Mr. Griswold in his calculations which had been raised by the Respondents above.

Perhaps what is most disturbing is that Griswold was aware of these errors before he testified and did not bring them to the Court's attention or that of his adversary.

What eventually became known as Petitioners' fourth set of valuation schedules made no changes to the earlier asset valuation analyses' presumption of the immediate sale of all of the real estate assets of the Bus Companies and the application of a BIG tax and transaction costs on the basis of the immediate occurrence of such sales.

As noted earlier, both the asset based analyses and earnings based analyses in Petitioners' fourth set of valuation schedules employed a different capitalization rate than that utilized by Cushman Wakefield.

As the trial proceeded an additional set of valuation schedules was prepared by Griswold. These took into consideration Griswold's calculations of the present value of the tax shield provided by the depreciation of each of the Bus Companies.

Petitioners' Final "Fair Value" Valuations

What then were the final conclusions reached by Petitioners' expert? After considering:

(a) Built in capital gains (BIG tax of $58,000,000) (At trial this was the number testified to in Petitioner's Responsive Post Trial Brief, at FN 11 petitioner states the actual BIG tax that "Petitioner adjusted for was $47,560,239.00", not $58 million nor" $55 Million used earlier in the litigation"; Re: Exs 49, 51, 53, 55) [nor the original $73 million used in the REIT share valuation in April 2007];

(b) Transaction costs reflecting the estimated costs and expenses of a sale (brokerage and attorneys' fees) of the property as contemplated by the fair value analysis and the C&W appraisals of the real property performed in 2006 and modified specifically for the Fair Value calculation in May, 2007, for the Valuation date;

(c) Income tax liabilities of the Bus Companies as C-Corporations; Empire applied a lack of marketability discount of 25%.

Both Petitioners' and Respondents' experts asset based valuations were substantially the same. The material differences in the respective experts' asset based valuations were:

(i) Value of land and buildings;

(ii) Transaction costs;

(iii) BIG Tax Liability;

(iv) Lack of marketability discount; and

(v) Application of minority discount to each Bus Companies' interest in GTJ Co.

Empire's opinion of the value of the Bus Companies as at the Valuation Date based upon an <u>income approach</u> utilizing the capitalization of adjusted debt free cash flow method was:

Green	$27,580,000
Triboro	$21,310,000
Jamaica	$10,185,000

Based upon an <u>asset approach</u> utilizing the net asset value method (going concern) was:

Green	$28,500,000
Triboro	$25,370,000
Jamaica	$12,600,000

For the purposes of formulating its opinion of the fair value of Respondents' shares in the Bus Companies, Empire weighted the income and asset approaches equally.

Empire's opinion of the total value of each of the Bus Companies on the day immediately prior to the Reorganization was:

Green	$28,040,000
Triboro	$23,340,000
Jamaica	$11,392,500

Based upon the pre-Reorganization outstanding shares of Green of 3,766.50, Empire opined that the fair value per share of Green as at the Valuation Date was $7,444.58.

The fair value per share of Triboro (1,277.10 shares) as of the Valuation Date was $18,275.78.

Finally, the fair value per share of Jamaica (10,064 shares) as of the Valuation Date was $1,132.01.

<u>Respondents' Valuation</u>

Terry Korn, the Respondents' expert, testified with respect to what he called the series of errors made in the various valuation analyses presented by Petitioners and presented his own conclusion of fair value of the Bus Companies. (Respondents' Exhibits N through S).

Mr. Korn's experience as a business valuation expert spanned more than 30 years. (Transcript of Korn's testimony on December 18, 2008, p. 4). Mr. Korn had served as a business valuation expert at Arthur Anderson for 2 years, at Coopers and Lybrand for 21 years and at Berdon LLP for 13 years. (Transcript of Korn's testimony on December 18, 2004, p. 5).

His accreditation included licensure as a CPA in New York and membership in the American Institute of Certified Public Accountants.

While at Coopers and Lybrand, Mr. Korn started the real estate appraisal group in his capacity as national director of valuation services, and was personally responsible for the review and approval of every real estate appraisal issued by Coopers & Lybrand in the United States.

Mr. Korn found that Empire made the same errors in each of the proffered Empire valuations. More specifically:

(a) Empire's use of NAV in its asset based valuation was in error since it presumed the sale of the assets, rather than using a going concern analysis, which the ABV method does contemplate.

(b) Empire's use of a capitalization rate in both its earnings and asset based valuations which differed from the capitalization rate selected by Cushman Wakefield in its real estate appraisals was in error because, in Mr. Korn's opinion, the business valuation standards of the American Society of Appraisers ("ASA") and the Uniform Standards of Professional Appraisal Practice ("USPAP") preclude a business valuation appraiser who lacked real estate expertise, such as Mr. Griswold, from appraising assets outside his area of expertise or accreditation (Transcript of Korn's testimony on January 15, 2009, pp. 154-159). Instead, it was common practice for a business valuation appraiser to defer to a real estate specialized appraiser in matters relating to his expertise including decisions dealing with discount rates and capitalization rates. [It does not appear Empire had such a person or staff.]

(c) Empire's modification of the appraised values of the real estate, as determined by Cushman Wakefield's MAI appraiser, was in violation of the aforesaid ASA and USPAP standards.

(d) Empire's alleged failure to reconcile the large discrepancies in its valuations performed under an earnings analysis and an asset based analysis precluded it, so opined Mr. Korn, from providing a valuation opinion. (Transcript of Korn's testimony on January 15, 2009, p. 207). Empire's conclusion of value for GTJ Co., Inc. using an asset approach was almost seven times larger than its conclusion of value using an earnings approach (Petitioners Exhibits 54 and 55; Transcript of Korn's testimony on January 15, 2009, p. 207). Nevertheless, Empire made no effort to reconcile the difference and simply weighted the approaches, assigning weights of 60% to the asset based approach and 40% to the income approach. Substantial disparities also existed between Empire's two conclusions of value for the Bus Companies using an earnings analysis and a NAV analysis but Empire simply weighted the approaches equally. (Petitioners' Exhibit 47).

Of course, none of the above precludes the court from considering the position taken by Mr. Griswold and Empire but may effect the weight the court will give it.

(e) Mr. Korn further found that Empire should not have applied a minority discount in its valuation of GTJ Co., Inc. since "in a fair value determination there is no provision for a lack of control or a minority interest discount." Additionally, GTJ Co., Inc. was owned by the

Bus Companies, which were controlled by a single group.

(f) Respondents further argue that Empire's application of a marketability discount of 25% was improper. If a marketability discount were to be applied at all, it should have ranged between 0% and 20%. (Korn – January 15, 2009, pp. 223 to 224) because no goodwill existed in the Bus Companies and substantial Second Department precedent precludes the application of a marketability discount in the absence of goodwill. (Transcript of Korn's testimony on January 15, 2009, p. 224). (Trial testimony and evidence indicates that all goodwill of the companies was conveyed to the City of New York upon the transfer of the bus routes and buses some years earlier.)

Korn reached his own conclusion of the fair value of the Bus Companies by utilizing both an earnings approach and an ABV approach, which unlike the NAV approach employed by Empire, did not presume the sale of assets and was based on the existence of a going concern. (Respondents' Exhibits N, O, P, Q, R, and S; Transcript of Korn's testimony on January 15, 2009, pp. 197-198; p. 227).

Korn considered the known and knowable future benefits of the authorized merger into a REIT. (Transcript of Korn's testimony on January 15, 2009, p. 199). He neither applied the income tax rate applicable to a "C" corporation in his earnings analysis nor applied a BIG tax or transaction costs in his asset based analysis. (Respondents' Exhibits O, P, Q, R and S). However, he did not consider the known or knowable expenses that would/were needed for the REIT conversion.

Korn deferred to the Judgment of Cushman Wakefield in both the determination of the value of the real estate assets and the appropriate capitalization rate to be applied to the rental income. Unlike Empire's analyses, Korn's valuations under both approaches were comparable. (Respondents' Exhibit N).

Ultimately, Korn's conclusion was to rely on the ABV approach as the appropriate method of valuation and his conclusion was that the Bus Companies were properly valued at \$18.32 for each share of the merged entity without a minority discount, and \$14.66 per share if a maximum non-marketability discount of 20% were to be applied. (Respondents' Exhibit N, Transcript of Korn's testimony on January 15, 2009, pp. 239-240).

Mr. Korn also provided us with a pre-merger fair value per share of the three companies found on Exhibit N — Green $16,938.80; Triboro $42,988.02; Jamaica $2,772.26.

The BIG Tax and its Treatment by the Parties

In a well-written brief, the Petitioners attempt to convince the court why the Built-In Gains Tax must be considered by the court when valuing the three Bus Companies. He argues that a willing buyer would take into account the tax that would have to be paid when these fully depreciated properties are sold. He further argues that in order to value the real property of the Bus Companies (its market value) as we move toward valuing the shares, you presume the sale of the real estate and, thus, the BIG tax.

The Cushman Wakefield reports defined market value as:

> The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

The definition continues with the following which is bolded by Petitioners:

> Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer.

(Exhibit 66, p. 13).

This argument is also made in response to Respondents' claim that Griswold used a liquidation scenario in contrast to that required by statute of an "ongoing concern."

The Petitioners ignore completely the language of the statute, BCL § 623(h)(4), "in fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders." Cawley v. SCM Corp., 72 N.Y.2d 465 (1988); Alpert v. 28 Williams St. Corp., 63 N.Y.2d 558 (1984). In this case it would be that of the authorized merger transaction.

It is crystal clear from the proxy statement that these "C" corporations were to become a REIT. That in order to avoid the BIG tax, the real property held by the companies would not be sold for at least 10 years and that a willing buyer would have taken these facts into consideration in offering to buy the property. The court will exclude the BIG tax as a liability in valuing the companies pre-merger. The Petitioners' valuation also fails to consider the elimination of the

45% corporate income tax when the companies would become a REIT. To ignore the fact that willing buyers knew the "C" corporation would change and no longer be paying the 45% tax would disregard the statute as well as Cawley, supra. The 45% corporate tax will be struck from the valuation of the stock, pre-merger.

Discount for Lack of Marketability (DLOM)

The "International Glossary of Business Valuation Terms" defines DLOM as an amount or percentage deducted from the value of ownership interest to reflect the relative absence of marketability.

In reaching its final fair value valuation, the Petitioners reduce the Net Asset Value (NAV) determination by 25% for lack of marketability. Respondents, who disagree with NAV as a valid methodology and support an ABV valuation, have argued that (a) even if a lack of Marketability Discount (DLOM) was appropriate, it should only be 20%; and (b) that in the Second Department it is well settled "that LOM is applicable only to intangibles such as goodwill not to other assets." Respondents cite to Matter of Cinque v. Largo Enterprises of Suffolk County, Inc., 212 A.D.2d 608 (2d Dept. 1995) (Appellate court affirmed referee who refused to apply discount for lack of marketability. It stated "such a discount should only be applied to the portion of the value of the corporation that is attributable to goodwill." The court then refers to Whalen, infra, and Blake, supra. Whalen itself does not give a reason for applying the discount to goodwill only, but cites to Blake; Matter of Blake, 107 A.D.2d 139, 146 (2d Dept. 1985) (LOM on goodwill only); Matter of Whalen v. Whalen's Moving & Storage Co., 234 A.D.2d 552 (2d Dept. 1996) (directing that lack of marketability discount should only be taken on goodwill citing (no reason given) to Blake).

In that there is no goodwill being conveyed or to be conveyed in this case (previously sold to the City of New York), Respondent argues there can be no marketability discount under our facts in the Second Department, relying on Blake..

They argue the doctrine of stare decisis requires this court to follow cases decided by the Appellate Division, Second Department, which have only granted a LOM (Lack of Marketability Discount) where there was a conveyance of "goodwill."

In Cohen v. Cohen, 279 A.D.2d 599 (2d Dept. 2001), the Appellate Division upheld the determination of the trial court not to apply a LOM discount to value assets consisting solely of real property.

This court applied a lack of marketability discount in Murphy v. United States Dredging [Supreme Court, Nassau County, May 19, 2008] where the assets consisted of income producing real property with long term leases similar to the instant case (though nothing can really duplicate this case).

Whatever method of valuation is used in reaching a fair value determination, the court should take into consideration the inhibitions on transfer resulting from a limited market. Amodio v. Amodio, 70 N.Y.2d 5, 7 (1987); see also Matter of Seagroat Floral Co., 78 N.Y.2d 439 (1991).

The courts of this state have commonly applied a LOM to net asset valuation. Matter of Friedman v. Beway Realty Corp., 87 N.Y.2d 161, 170-71 (1995) (This matter was sent back to the trial term to set a DLOM which was then set at 26%.) Matter of Blake v. Blake Agency, Inc., 107 A.D.2d 139 (2d Dept. 1985) (reduced from 40% to 25%) (goodwill); In Re Brooklyn Home Dialysis Training Center, Inc., 293 A.D.2d 747 (2d Dept. 2002) (which approved 22.5% LOM) (no indicia if it covered tangible and/or non-tangible assets); Matter of Joy Wholesale Sundries, Inc., 125 A.D.2d 310 (2d Dept. 1986) (failure to apply LOM discount — reversed).

The LOM discount is designed "to reflect the illiquidity of [a company's] shares, i.e., that a potential investor would pay less for shares in a close corporation because they could not readily be liquidated for cash." Matter of Friedman v. Beway Realty Corp., supra, at 165.

The DLOM is not designed to discount the value of the corporation or any particular asset (i.e. goodwill), but to reflect the lack of marketability of the shares of the corporation. The DLOM is, thus, applied to the aggregate net asset value or to whatever method was used to obtain fair value.

The aforementioned Second Department cases, Cinque, Whalen and Blake do not support this position and on their face appear inconsistent with the cases of the Court of Appeals. See Hall v. King, 177 Misc.2d 126, 134 (Sup. Ct., New York Cty); see also Hall v. King, 265 A.D.2d 244 (1st Dept. 1999) (affirming a 25% lack of marketability discount to all corporate assets). Obviously Hall is a First Department case and not a controlling authority of this court. However, its logic is not easily tossed aside.

Upon a fair reading of Whalen and Cinque, the court is left without a reason for the rulings, vis-a-vis goodwill versus other assets of an enterprise.

In Blake, which applied the DLOM only to goodwill, there was no basis given for the limitation. In fact, as pointed out in Hall (trial term), Blake cited to Lyons & Whitman, Valuing Closely Held Corporations and Publicly Traded Securities with Limited Marketability; Approaches to Allowable Discount for Gross Values, 33 Bus. Law 2215-16, which did not refer to imposing a DLOM on "goodwill" of the corporation, but on the shares.

To argue that the Second Department has limited a DLOM to goodwill or other intangible assets flies in the face of other Second Department cases. Brooklyn Home Dialysis Training Center, Inc., supra; Matter of Joy Wholesale Sundries, Inc., supra; Matter of Dissolution of Bambu Sales, Inc., 177 Misc.2d 459, 465-66 (Sup. Ct., Nassau Cty. 1997, O'Brien, J.) (allowed 25% LOM on shares of corporation).

It is not up to this court to say that any decision of the Second Department was incorrectly decided, that would be inappropriate for trial term. However, it appears to this court illogical to only allow DLOM to a non-tangible asset of a corporation when we are (a) valuing the corporation and (b) valuing the shares of the dissenters. It is to these shares that the DLOM should be applied.

Blake is considered the seminal New York case in upholding the use of DLOM and rejecting the DLOC (Discount for Lack of Control a/k/a Minority Discount). This court believes Blake must be read in the context of the decision. The clear goal of the court in Blake was to prevent the abuse of the minority in a section 1118 valuation. "A discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold in a public market. Such a discount bears no relation to the fact that the petitioner's shares in the corporation represent a minority interest."

In fact, the Blake court reduced the referee's 40% DLOM to 25% saying"

> ... [W]e believe that the discount should be reduced from 40% to 25%. Said discount should only reflect the lack of marketability of petitioner's shares in the closely held corporation. No discount should be applied simply because the interest to be valued represents a minority interest in the corporation.
>
> . . . .
>
> [A] discount recognizing the lack of marketability of the shares of Blake Agency,

> Inc. is appropriate and under the circumstances of the case the amount of the discount should be 25%.

When reaching the corporation's argument that the discount should be applied to net tangible assets as well as goodwill, the court stated that it was "unnecessary to apply a discount to net tangible value (cf Haynsworth, Valuation of Business Interests, 33 Mercer L Rev 457, 488) because the corporation admittedly has never paid any dividends, and because the corporation's June 30, 1981 balance sheet shows that it has more than $70,000 in cash savings [the referee's valuation was $64,000] and over $48,000 in marketable securities."

In other words, as long as the company would not be stripped of its assets by a fair value determination, the Blake court found it "unnecessary to apply a discount to net tangible value." Note that the court did not say you do not apply a DLOM to net tangible value, but that it was "unnecessary." Though this ruling appears to have been a reaction to Respondents' argument that the referee had failed to account for the working capital needs of the corporation, the ruling just does not add up. It is inconsistent with the Blake court's own definition of DLOM.

This court finds that a Lack of Marketability discount should be applied to the value of the dissenting minority's shares as determined by the court, when the court determines Fair Value pursuant to BCL § 623. That the net value of the shares as determined by the court should include tangible as well as intangible assets; in other words, the "entire enterprise", and that the Lack of Marketability discount should be applied to that amount. Said discount must be of a reasonable nature and not a minority discount in disguise.

Minority Discounts

A minority discount, a discount for lack of control, is an amount or percentage deducted from the pro rata share of value of 100% of an equity interest in a business to reflect the absence of some or all of the powers of control. International Glossary of Business Valuation Terms.

The Petitioners argue for the court to apply a minority (lack of control) discount to the Respondents' shares of the Bus Companies and to the Bus Companies' shares of GTJ Co., Inc. (wholly owned by the three Bus Companies).

Petitioners contend that such a discount is necessary to prevent unjust enrichment "of the Dissenters, at the expense of other (minority) shareholders." (Petitioners' Post-Trial Brief, p. 34). Petitioners' expert, David Ortho, testified it was inappropriate in determining fair value to use a minority discount, yet, another Empire expert, Terrence Griswold, at the direction of Petitioners' counsel, used it.

The Petitioners cannot cite to any New York case to support its position in a situation such as ours. However, there are several out of state cases that support a minority discount in appraisal cases. The court rejects those cases. See Anthony & Boraas, Betrayed, Belittled ... But Triumphant: Claims of Shareholders in Closely Held Corporations, 22 Wm Mitchell L Rev 1173, n. 89.

Petitioners argue that two factors make this case different than a normal appraisal case (where a minority discount would be precluded): (1) no Bus Company shareholders were excluded from the Reorganization (i.e., this was not a squeeze out merger); and (2) all shareholders of the Bus Companies, as well as the REIT, were and are minority shareholders.

Petitioners further argue that if any of the Bus Companies had attempted to sell its shares in GTJ Co., Inc., those shares would have been subject to a minority discount (lack of control discount) and, thus, Griswold applied a 20% minority discount in his valuation of each Bus Company's interest in GTJ Co., Inc.

The Respondents argue that the current path chosen by Petitioners disregards their pre-trial and trial positions in reaching a fair value determination.

The Respondents correctly argue that petitioners now ask the court to value Respondents' shares as minority interests without regard to their proportionate interest in the value of the Bus Companies as a whole. More particularly, we have the aforementioned minority discount issues. The result of imposing the discounts is to treat the minorities' shares as less valuable than the shareholders of the other Bus Companies' shares. The Petitioners insist this balances the playing field. To do otherwise, would devalue the REIT shareholders' interests.

The Petitioners clearly and plainly state at page 13 of their memo that there is no fair value standard. The court disagrees. It may not be as clear as a geometric design, but there is a standard, or at least well-established guidelines, for the determination of fair value. One of those guidelines is that Respondents' interests are to be valued on the basis of the Bus Companies as a whole, not as a minority interest with concomitant minority discounts for lack of control.

In 1982, when BCL § 623 was amended, there was an accompanying "Legislative declaration." It reads in pertinent part as quoted by the Petitioner:

> The case law interpretation of fair value has not always reflected the reality of corporate business combinations. These transactions involve the sale of the corporation as a whole, and the corporation's value as an entirety may be substantially in excess of the actual or hypothetical market price for shares trading among investors. Thus, experience has demonstrated that large premiums over market price are commonplace in mergers and in asset acquisitions. In cases where the transaction involves a restructuring of the shareholders' relative interests in the corporation by amendment of the certificate of incorporation, courts may find it appropriate to determine only the fair value of the dissenters' shares, rather than the value of the corporation as a whole, employing traditional valuation concepts.

L. 1982 c. 202 §1.

Petitioners argue that a "Reorganization" falls within the legislative language of "involves a restructuring of the shareholder' relative interests in the corporation" and that this court should determine only the fair value of the dissenters' shares not the fair value of the corporation as a whole, and then the dissenters' proportionate interest therein. See Friedman v. Beway Realty Corp., 87 N.Y.2d 161, 168 (1995); Murphy v. United States Dredging, [Supreme Court, Nassau County, May 19, 2008].

Respondents argue the Petitioners have misread the "Legislative declaration" which accompanied the amendment of BCL § 623, which required courts to "consider the nature of the transaction giving rise to the shareholders' right to receive payment for shares and its effect on the corporation and its shareholders..."

As pointed out above, the Petitioners chose to concentrate on the final sentence "by amendment of the certificate of incorporation courts may find it appropriate to determine only the fair value of the dissenters' shares, rather than the value of the corporation as a whole ..."

In the 27 years since that amendment, the parties could not point out a single case where such a theory has been adopted. The Petitioners believe that the time has come.

Initially, our multi-corporate merger situation is not merely the amendment of a certificate of incorporation. This could not be done by a mere amendment of one or more certificates of incorporation. The well-known results of the merger were the elimination of the BIG tax (if property held for 10 years or more) and the elimination of the 45% corporate tax. These future benefits were to be considered in valuing the Bus Company shares pursuant to BCL

§ 623(h)(4). See also Matter of Cawley, 72 N.Y.2d 465, 473-74 (1988) (Cawley court reversed lower court that had ignored/disregarded post-merger tax benefits which were "not the product of speculation" at the time of the merger.)

In the instant case, the prospective tax benefits (BIG tax avoidance and elimination of corporate taxation) were both clearly known the day prior to the merger (see Prospectus) and the likelihood of them coming into fruition.

An additional argument of Petitioners, raised to support the taking of minority discounts, is that the Respondents are not an abused minority in the traditional sense. Petitioners contend they did not act in a manner "inimical" to the Respondents' interests. They contend the Respondents', minority shareholders, should not be entitled to the benefits of the merger because (a) they opted out of the merger and its advantages, and (b) they were not mistreated by those in control of the companies. The Respondents were not a traditional minority, however, the Bus Companies were controlled by Jerome Cooper through a voting trust agreement which gave him the power to elect, remove and replace the directors. They apparently received substantial salaries.

The Petitioners look to Friedman v. Beway Realty Corp., supra, to support its position, while the Respondents do as well, arguing that the Petitioners have misread Beway. The Petitioners argue that the court should not permit the Respondents "to have their cake and eat it, too." (Petitioners' Brief, p. 57). Petitioners cite to Beway at 167:

> Mandating the imposition of a "minority discount" in fixing the fair value of the stockholdings of dissenting minority shareholders in a close corporation is inconsistent with the equitable principles developed in New York decisional law on dissenting stockholder statutory appraisal rights ... and the policies underlying the statutory reforms giving minority stockholders the right to withdraw from a corporation and be compensated for the value of their interests when the corporate majority takes significant action deemed inimical to the position of the minority.

87 N.Y.2d at 167 (emphasis added).

Thus, Petitioners argue that this means that "minority discounts are not required in all appraisal cases, not that a minority discount would never be appropriate." (Petitioners' Brief, p. 30). Again, Petitioners stress the absence of "inimical" conduct toward our Respondents as a basis to assess the Respondents' shares with a minority discount. Respondents argue Petitioners' position as to Beway is untenable.

By comparing a buy out under BCL § 1118 to a situation under BCL § 623, the Court of Appeals stated in Beway:

> There is no difference in analysis between stock fair value determination under BCL 623, and a fair value determination under BCL 1118 ... once the corporation has elected to buy the petitioning stockholders' shares at fair value, the issue of [majority] wrongdoing [is] superfluous ... [f]ixing blame is material under § 1104-a, but not under [BCL 1118].

Friedman v. Beway, 87 N.Y.2d at 168, quoting Matter of Pace Photographers, 71 N.Y.2d 737, 746.

In other words, no matter how we got here, no matter what road was taken, the process of determining fair value is not impacted by the path the parties followed. A minority discount is not applicable to a section 623(h)(4) determination. Such treatment of the dissenting or withdrawing shareholders belied by equitable principles runs counter to the statutory reforms that gave minority shareholders the right to withdraw from a corporation and be compensated for the value of their interests where the corporate majority takes significant action deemed inimical to the position of the minority. See Beway at 167.

The Respondents argue, and the court agrees, that the Beway court never intended to graft on to BCL § 623 an additional burden of proof to show some type of corporate wrongdoing by the majority; and, yes, the court considers everyone else the majority.

The dissenters have the right to dissent whenever they conclude that the majority acted in a manner they perceive to be to their detriment. Whether the actions of the shareholders, the dissenters, would fall within section 623(h)(7) as vexations arbitrary conduct is another issue which will be discussed when the court addresses the assessment of fees and costs under section 623(h)(7).

The court, therefore, finds it inappropriate to reduce a fair value determination in a BCL § 623 matter by imposing a minority discount on the dissenting shareholders of the respective corporations or upon the Bus Companies as minority shareholders of GTJ Co., Inc.

A minority discount would result in treating the dissenters' shares of the Bus Companies in an unequal fashion, valuing them less than the balance of the shares in the respective companies. See Friedman v Beway, 87 N.Y.2d 161 at 169.

The Valuations, How and Why They Differ

From the lengthy testimony and the exhibits submitted to support it, there were numerous points on which the experts disagreed. They have been set forth previously in this decision. The issues of the BIG tax, the corporate income tax, the minority discount, and the discount for lack of marketability have been previously discussed.

No matter which methodology was used to value the three Bus Companies, our experts disagreed on the capitalization rate.

Mr. Korn used the same rates as used by C&W in their appraising the real estate. The real estate was the sole asset of the Bus Companies. The court finds it was improper for Mr. Griswold to increase the cap rate, an increase which he contended would cover, in part, the environmental problems not otherwise addressed by C&W's appraisal. He also stated it would cover the possibility of the city taking the Bus Companies' property by eminent domain. Griswold used Kessman's expenses that were not normalized. Furthermore, he failed to realize triple net leases with the city cover all future environmental issues and he failed to consider/realize that the companies were entitled to a 25% increase in value of the properties if the city took them. It is interesting to note that while Empire rejected the market approach in valuing the Bus Companies due to the inability to find comparables, Griswold used a comparison of companies to find a new capitalization number. C&W's, Cadorette, testified at trial that he was never asked about environmental issues and their effect on the appraisals. The cap rate used by Griswold is rejected. The cap rate used by C&W shall be used in the fair value calculations where applicable.

In relying on the real estate valuations of C&W, Mr. Korn rejected the inclusion of the costs of sale as an expense. The court agrees. The appraiser included said costs as part of the appraisal process which Griswold adopted because C&W included it and concluded that property would be sold within a year. Apparently, Mr. Griswold viewed C&W's reports as a menu, choosing different items as it suited his goals. However, it is not necessary to deduct costs of sale when determining the value of the property, especially when it was very clear as a "going concern" under our facts, that the properties would not be sold. Mr. Cadorette, of C&W, stated that the "exposure and marketing" time had little to do with value of the property. Value is valid as long as the leases are in place.

Mr. Korn concluded that the value of the Bus Companies should be the same as the value of their real estate as part of a going concern, thus, he used the adjusted book value (ABV) in valuing the Companies (and the same cap rate used by C&W).

The ABV approach according to the Empire Report, Exhibit 4, is that used in valuing a company whose main assets are investment assets such as real estate. ABV is distinguished from traditional NAV method in that it does not consider the transaction or liquidation costs necessary to realize the cash value of the holding company's underlying assets. That fits our facts.

One of the problems faced by the court was the method used by the parties in reaching the annual expenses of GTJ Co., Inc. going forward. Petitioners relied, as noted, on a list of expenses that have been called the Kessman projections, and they were projections of the REIT for one year (2007– 2008). These projections were prepared for Jerome Cooper, CEO, to determine the REIT's dividend paying capacity from July 2007 to June 2008. The Kessman projections were:

Miscellaneous Building Expenses:	$ 165,000.00
Insurance Expenses:	$ 200,000.00
Administrative and General Expenses:	$1,477,000.00
Operating Expenses:	$ 144,000.00
Interest Expenses:	$1,710,000.00 (changed to $1.3 million to represent interest expense related to borrowing $20 million needed for distribution to shareholders to qualify as a REIT)

Mr. Korn testified as to the Kessman projections and his use of them. Korn completely removed Miscellaneous Building Expenses from the list and reduced other numbers as well. Kessman testified he used this line item to list all expenses related to the clean up of environmental issues. Clearly, not "normalization" numbers that would be used in reaching a fair value conclusion. In fact, from the testimony of Kessman (p. 86), it cannot be determined where some of these numbers came from (professional fees) or where they were used. He denies supplying numbers in Exhibit 54. He seemed to have no idea why his report was used in the manner it was in the Empire report. He gave it to their lawyer who gave it to Empire (Orth).

Mr. Korn also struck the interest expense of $1.71 million as a normalized operating expense. This was supposed to be the interest on the money borrowed to fund the dividend that had to be paid for the new entity to qualify as a REIT. (Kessman testified that this amount was an error and the actual amount was $1.3 million.)

He rejected said amount as a loan not being appropriate for ABV valuation. The court disagrees, not as to accounting principles, but as to the impact of 623(h)(4) on this issue. The Respondents have used the mantra of (h)(4), "In fixing the value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder's right to received payment for shares and its effects on the corporation and its shareholders... and all other relevant factors."

One cannot ignore the cost to the new entity of the future interest it needs to pay on the loan it took out in order to qualify as a REIT, that is to pay the dividend within its first year of operation ($20 million). The court believes that the "going concern" costs, as reflected in Exhibit N-2 ($482,000), more appropriately reflect normalized "going concern" costs, balancing operating revenues, and revenues from rental operations. These are, of course, estimates, but appear to be rational considering the entirety of the evidence and testimony in this case.

If you then add to that interest of $1.3 million, you now have "going concern" costs of $1,782,000. When capitalized at 6.5%, we have $27,415,383. This amount is allocated based on the properties held by each of the Bus Companies (see Note 2 on Exhibit N-2), $6,396,009 as to Jamaica Central, $8,224,615 as to Triboro Bus, and $12,794,759 as to Green Bus, thus, reducing ABV of each company. (Allocation: 23.33% – Jamaica; 30% – Triboro; and 46.67% – Green.)

Respondents' Exhibit "O" provides a good picture of how the two experts differed, and, to some extend, why, in reaching adjusted debt free cash flow leading to an earnings approach valuation.

Lines 1 – 3 are identical for each. However, on line 4, Griswold has used a dramatically higher amount of General and Administrative Expenses than Korn. These were to have been "normalized" expenses created by Mr. Kessman (though Mr. Kessman did not seem to know it), but included non-recurring expenses. Mr. Griswold deducted from the pre-tax income 90% of investment income. Mr. Korn found that total revenues excludes investment income, therefore, he did not deduct any of it.

Mr. Griswold reduced his adjusted EBIT by the 45% corporate tax rate. The court has previously ruled this was inappropriate under our facts.

Using the Korn modifications of Griswold's valuation, we reach specific amounts of debt free cash flow to analyze. Korn has added back "Depreciation and Amortization" arguing that is necessary to achieve a "debt free cash flow" to capitalize.

Mr. Griswold applied a 9.0% capitalization rate and Mr. Korn 6.5%. In the balance of Exhibit "O", both experts, side by side, have identical numbers in valuing non-operating assets until line 26 – Investment in GTJ Co., Inc. Here, there is a monumental difference in value. Each Bus Company owns a fixed percentage of GTJ Co., Inc., therefore, the issue is what is the value of GTJ Co., Inc. on the valuation date. The Griswold charts reflecting the value of GTJ Co., Inc. and Korn's modification as of March 25, 2007 are found side by side on Exhibit S. Griswold uses Net Asset Value (NAV) and Korn uses Adjusted Book Value (ABV). As previously noted, ABV is better suited (in the court's opinion) to a "going concern" valuation. Both sides use nearly identical numbers until we reach line 11, "Land and Buildings." In this instance Korn's valuation is $5,195,000 higher than Griswold's. Korn bases his value on the C&W appraisal of March 29, 2007 (pp. 68 and 69), and C&W's February 2, 2006 appraisal of vacant land (p. 36).

Similar modifications were made by Korn in valuing the Land and Buildings of Green (Exhibit P) (Exhibit 51), Triboro (Exhibit Q) (Exhibit 53), and Jamaica (Exhibit R) (Exhibit 49); again, Korn relying on C&W's appraisals of 2007 and 2006 while Griswold reduced same.

As noted earlier, Mr. Griswold, not a real estate appraiser (and apparently Empire does not employ such a person), modified the C&W reports by changing the capitalization rate to reflect environmental problems which he believed were not considered by C&W's evaluation (Cadorette (C&W) stated environmental problems were beyond the scope of their expertise and no one mentioned such problems to him), as well as the fact that the effective growth rates from the leases with the City of New York was approximately 1.9% which Empire opined was lower than the average return a willing buyer would deem acceptable in the willing buyer/willing seller fair value determination.

C&W was originally employed for corporate planning purposes to value all the assets and determine what percentage of whole each Bus Company held. Eventually they determined (2006 report) that Green held 40%, Triboro held 40%, and Jamaica held 20%. They were brought back in April 2007 to determine fair value of the dissenters' shares (David Orth of

Empire). He testified that he ultimately utilized the prior report. The change from the first to the second report was to use fair value not fair market value and not to use a minority discount. Exhibit 5 became the fair value report which was worked on by Orth, Griswold and their research department.

He stated that GTJ Co., Inc. REIT was the subject of this valuation.

Orth testified you can only get to ABV by assuming sale of assets. Thus, BIG and transaction costs. He used the income/market approach in Exhibit 5 (rental income).

They (Empire) used the NAV as to test their income/market approach, but Griswold used it in October 2008 as the penultimate valuation method.

Orth testified he never saw C&W's appraisal, but stated he was justified in subtracting the BIG tax from it because C&W assumed a one year turnover of the properties. This, he said he assumed they did because it was the nature of these reports.

Orth's testimony can only be considered as "inconsistent" at best. He considered the future outlook of the REIT, but ignored it for purposes of fair value determination because, in his opinion, a willing buyer would have to consider that the REIT would have to pay or might have to pay the BIG tax in the next ten years. In the court's opinion that is absolutely amazing in the light of the proxy statement. Either Mr. Orth is a greatly mistaken witness or he has been told to include the BIG tax, no matter what, by counsel. The same goes for the minority discount. He further testified that three weeks before his testimony he received an updated BIG tax number (reducing it), but did not change the report.

As pointed out, the major dollar difference between Griswold and Korn is in the value of GTJ Co., Inc. A $5 million difference is found on line 11 of Exhibit S. (The left side of the exhibit is Petitioners' 55, the right side is Korn's modification). This is based upon Korn using the C&W report and Griswold modifying it mainly by changing the capitalization rate. On lines 23 and 24 Griswold has included $2.646 million in transaction costs, and $12.067 million in BIG taxes as liabilities of GTJ Co., Inc.

Finally, on line 47 of Exhibit S, the Petitioners have reduced the value of GTJ Co., Inc. by taking a minority interest discount of $4,627,076. The court has previously discussed the issues of transaction costs, the BIG tax and the minority interest discount and had found all to be inapplicable to our facts.

Thus, the court accepts Mr. Korn's fair value finding of GTJ Co., Inc. of $43,040,000. (See Exhibit S – compare to $18,510,000 on line 40 which is then reduced to $12,182,000 after weighing the earnings approach with NAV.) Said value is divided amongst the shareholders of Green, Triboro and Jamaica as 40%, 40% and 20% respectively ($17,216,000, $17,216,000 and $8,808,000). These are the same found on line 26 of Exhibit O and lines 15, 16 and 17 of Exhibits P, Q and R.

Mr. Griswold used the NAV and earnings approach as found in Exhibit 55 and Exhibit S (left side). The two approaches differed dramatically, but Griswold used both, giving the NAV method a 60% weight and the earnings approach 40% weight. Korn testified that when two methods differ so widely, that it is improper to use a weighted value method. Rather, you should reject the lower number which was 1/7 of the Net Asset Value approach.

In a prior matter, the court has used a weighted value approach when dealing with two different valuation methods. Under the circumstances of this case, it is far more logical to reject the earnings approach in that it differs too dramatically from the NAV approach as suggested by Korn, who proceeded to use only the ABV approach.

If the court was to use the combination of the earnings approach and the NAV approach based upon all the evidence, it would weigh the earnings approach at 14.5% and the NAV method at 85.5%.

SUMMARY OF PRE-MERGER VALUES

Entity	ABV With No DLOM	DLOM 20%	NET	DLOM 25%	NET
Green Bus Lines, Inc. Source Exhibit P	$79,732,927	$15,946,586	$63,786,341	$19,933,232	$59,799,695
Triboro Coach Source Exhibit Q	$68,645,422	$13,729,084	$54,916,337 (Rounded)	$17,161,355	$51,484,066
Jamaica Bus Source Exhibit R	$34,934,912	$6,986,983	$27,947,930	$8,733,728	$26,201,184
TOTALS:	$183,313,261	$36,662,653	$146,650,608	$45,828,315	$137,484,945

The ABV values as seen in Exhibits P, Q and R are transferred to Exhibit N-2 and reduced by capitalized "going concern" costs which are developed on the bottom of N-2 and in

Korn's testimony. The numbers in the above tables differ slightly due to no rounding off.

The court has modified "going concern" costs to include interest on the loan which financed the dividend payments to shareholders to allow the entity to qualify as a REIT with tax benefits (no corporate tax, no BIG tax). Thus, the total "going concern" costs become $27,415,383.

The total ABV of the three Bus Companies without a lack of marketability discount is $183,313,261. After deduction of "going concern" costs of $27,415,383, the pre-merger value for all three companies is $155,897,878, before a LOM discount.

The court believes, based upon the testimony of the witnesses, that a lack of marketability discount of 25% should be applied in the case. Therefore, the value of the three companies, after applying the DLOM of 25% is:

	ABV Approach	Capitalized "Going Concern" Costs	Value	Pre-Merger Shares Outstanding	Fair Value Per Share
Green	$ 59,799,695	$ 9,596,069[1]	$ 50,203,620	3,766.50	$13,329.00
Triboro	$ 51,484,066	$ 6,168,461[2]	$ 45,315,605	1,277.10	$35,483.00
Jamaica	$ 26,201,184	$ 4,797,006[3]	$21,404,178	10,064.00	$ 2,127.00
TOTAL:	$137,484,945	$20,561,536	$116,923,409		

If the court was to merely use Petitioners' Exhibit C to Exhibit 5, remove the previously used BIG tax (which was mathematically incorrect), the per share price of a share of the REIT would be $12.60 per share, $5.00 (or 80%) more than the April 2007 offer of $7.00 per share, and this included a 20% lack of marketability discount — a discount used by petitioners up until and including the trial. For comparison purposes, if you take the total of the above Value column, $116,923,409, and divide it by the 10 million shares of the REIT, which came into existence the following day, the per share price of the REIT would be $11.69. This number excluded the BIG tax and the corporate tax, but included a 25% lack of marketability discount.

[1] Capitalized going concern costs: Green – $12,794,759 less 25% ($3,198,690) = $9,596,069.

[2] Capitalized going concern costs: Triboro – $8,224,615 less 25% DLOM ($2,056,154) = $6,168,461.

[3] Capitalized going concern costs: Jamaica – $6,396,009 less 25% DLOM ($1,599,002) = $4,797,006.

It is 67% higher than the $7.00 offer of April 2007, a materially higher amount.

In Exhibit O, line 28, Korn subtracts as a non-operating expense, a dollar amount representing the average between a low end and a high end of the range of non-recurring environmental clean up costs. It may be recalled Griswold had raised the cap rate to 9.0% to cover environmental issues (amongst others) which he had determined would be recurring costs from the Kessman submission to the CFO, Cooper. The court accepts Korn's numbers for non-operating liabilities. (See Exhibit 72 — which is GTJ Co., Inc./REIT 8-K/A statements reflecting General and Administrative Expenses. Exhibit 72 contains a detailed analysis on environmental concerns, i.e. Petitioners' F-32 "Note of Consolidate Financial Statements Green Bus Lines, Inc.").

Assessment of Fees and Costs

Pursuant to BCL § 623(h)(7), the court may award fees and costs to either side under certain circumstances.

Pursuant to (h)(7), each party to the proceeding shall pay his own costs and expenses of its counsel and any experts it employed. However, the court may apportion the costs (of the petitioner) if the "court finds their [dissenters] refusal to accept the corporate offer was arbitrary, vexatious or otherwise not in good faith." On the other hand, the court may apportion the costs of the dissenting shareholders, "if the court finds any of the following: A. That the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay; B. and C. are not applicable to our facts; and D. That the action of the corporation in complying with its obligations as provided in this section was arbitrary, vexatious or otherwise not in good faith."

Despite the fact that none of the dissenters testified to explain the position they took in dissenting, dissenting actually prior to receiving the offer of Petitioners, no negative inference may be drawn from their failure to testify.

What of the Petitioners? Do their actions rise to those set forth in BCL § 623(h)(7)(D) (arbitrary, vexatious or otherwise not in good faith), or did the fair value price as determined by the court so <u>materially exceed</u> the corporation's $7.00 per share offer (which was really for a share of the REIT and not a pre-merger Bus Company share price) as to require the court to apportion costs?

Were the actions of the Petitioners "arbitrary or vexatious or not in good faith"? The court believes that the acts of the Petitioners were in good faith. However, the ever changing fair value determinations of the Petitioners complicated the trial beyond what even an average "fair value" case might expect to experience.

The fact that the $7.00 offer made in April 2007 was not that required by statute and not equivalent to the fair value of the Bus Companies' shares on the date prior to the merger reflect either a lack of understanding of section 623(g) or a misunderstanding of it when read with section 623(h)(4) (fair value to be that of the shares on the date prior to the authorization date). The court has been unable to come up with any case law that would support a theory that the offer made pursuant to section 623(g) was supposed to be for the value of a share of the new corporation, rather than that of a share of one or more of the old corporations on the date prior to the merger.

Did this mislead our dissenters? Apparently not, because they dissented prior to receiving the offer. They argue that the proxy statement presented the corporations as having $173,431,797.00 in assets while the offer reflected a $70 million value of the companies' assets. Could the court call this rejection arbitrary or vexatious or not in good faith on the part of the Respondents? From the testimony of the Petitioners, it would appear that the rejection could be found to be so, but the court disagrees.

The court still must consider the large discrepancy between the $7.00 offer and the fair value determination by the court. Did it materially exceed the April 2007 offer? The court finds that its fair value determination materially exceeded the Petitioners offer of $7.00 per share pursuant to section 623(g). Further, the ongoing changing fair value calculations proffered by the Petitioners, even during trial, was vexatious to the Respondents.

The court directs that a hearing be held before Court Attorney/Referee Frank Schellace, Esq., who shall determine the costs and legal fees expended by the Respondents. The court will then award the Respondents 50% of said amount pursuant to the power vested in it by BCL § 623(h)(7).

Award of Interest

Respondents have requested that the court award them interest at the statutory rate of 9%

(CPLR 5004) on the fair value determination of their shares (the balance due after subtracting the payment previously made by Petitioners to Respondents in 2007) from March 26, 2007 (valuation date) to the present. BCL § 623(h)(6) allows for such an award. Interest would be precluded only if the court was to find that the shareholders' refusal to accept the offer (April 2007) was "arbitrary, vexatious or not in good faith." (See Miller Bros. Ind., Inc. v. Lazy River, 272 A.D.2d 166 (1st Dept. 2000).

If the court rejects the statutory rate (which is in its discretion), Respondents suggest the rate of 6.59%, which was payable under the Bus Company's line of credit at the time of the merger, and from the date of merger until the date of payment (BCL § 623(h)(6), court to consider rate of interest corporation would have to pay to borrow money during the pendency of the proceeding).

Respondents have also requested that the court award it interest on its costs, attorney fees and expert fees including court costs, which it argues were "largely engendered as a consequence of the Petitioners' improper conduct" and is "appropriate and equitable." In Matter of Quill, 659 NYS2d 919, 921 (3d Dept. 1997), the court approved the award of interest from the date of decision to entry of Judgment and from docketing of Judgment until payment. The court does not believe such is appropriate in this case.

Petitioners, as noted above, have strenuously objected to costs being awarded against them and have argued costs should be awarded against Respondents because of their "arbitrary, vexatious and otherwise not in good faith" actions. Petitioners have argued that the Respondents had no legitimate basis to dissent to the Reorganization (though the court must point out they did not need one), nor did Respondents have a basis to reject to what petitioners call its "good faith offer."

The court awards the Respondents interest at the rate of 6.5% on the amount owed from the valuation date to the decision of the court. The court awards statutory interest of 9% on the award from the date of the decision to entry of Judgment. The court awards post-Judgment interest from the entry of Judgment to date of payment on the total amount due as of that day, including the aforementioned interest amounts.

The court rejects Respondents' application for an award of interest on the award of attorney fees and costs.

This constitutes the decision and order of the court.

Submit Judgement on Notice for the fair value determination portion of this decision. A separate Judgment will be entered on the issue of costs and legal fees after their determination by the Court Attorney/Referee.

Dated: September 29, 2009

____

J.S.C.