

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application

THE VILLAGE OF PORT CHESTER TO ACQUIRE TITLE TO CERTAIN REAL PROPERTY LOCATED IN THE VILLAGE OF PORT CHESTER, WESTCHESTER COUNTY, STATE OF NEW YORK, AND DESIGNATED ON THE TAX MAPS OF THE VILLAGE OF PORT CHESTER AS SECTION 2, BLOCK 98, LOTS 10, 11, 11A, 12, 13, 13E2, 14A1, 14A2.1, 14A2.2, 15B, 15C, 16A1, 17, 18, 19, 20, 21, 22, 35, 36, 37, 38, 39 AND 42

**DECISION/
ORDER**

-----X
MEGAMAT LAUNDROMAT, INC.,

Claimant,

Index No:
6448/00

-against -

Motion Date:
12/07/10

THE VILLAGE OF PORT CHESTER,

Condemnor.

-----X
LaCAVA, J.

The following exhibits numbered 1 to 10 were considered in connection with this motion by claimant MEGAMAT LAUNDROMAT, INC. claimant or Megamat) for an Order directing additional allowances to claimant pursuant to EDPL §701:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/AFFIDAVITS/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBITS	2
REPLY/EXHIBITS	3
SUPPLEMENTAL AFFIDAVIT/EXHIBIT	4
AFFIRMATION/EXHIBITS	5
EXHIBIT J IN SUPPORT OF MOTION	6
AFFIRMATION IN FURTHER OPPOSITION	7
SUR-REPLY	8

The instant property was previously leased by Megamat, and known and designated on the Official Tax Map of the Village of Port Chester as Section 2, Block 98, lots 10, 11, 11A, 12, 13, 13E2, 14A1, 14A2.1, 14A2.2, 15V, 15C, 16A1, 17, 18, 19, 20, 21, 22, 35, 36, 37, 38, 39, and 42 commonly known as 35 South Main Street, Port Chester, New York. The premises has been described as a five-story, mixed commercial property measuring approximately 4,800 square feet, situated on a tax lot on South Main Street in the Village of Port Chester. By Order and Judgment of this Court, entered August 28, 2001, (Rosato, J.), the taking was effected.

The trade fixture claim in this matter was subsequently tried before this Court (Rosato, J.), on October 12, 15, 25, 27, and 29; on November 8, and on December 1 and 2, 2004. In a Decision and Order, dated October 17, 2005, and a Judgment, dated November 16, 2005, the Court found in favor of claimant in the principal sum of \$1,104,026.00, representing the current sound value of the trade fixtures found present in, and to be compensable for the taking of, the subject premises; less the sum of \$110,105.00, which represented the advance payment on the taking; for a total award of \$993,921.00. Upon appeal, the Judgment was reversed and remitted back to this Court for a recalculation of just compensation, the Appellate Division concluding that an award of approximately twice the cost of constructing and equipping the business just four years before the taking constituted a windfall (*see, Matter of Village of Port Chester [Megamat Laundromat, Inc.]*, 42 A.D.3d 465 [2nd Dept. 2007]). Upon remittur, this Court (Rosato, J.), in an Amended Judgment entered on April 3, 2008, determined just compensation to be \$539,993.99, which, after the deduction of the aforementioned advance payment of \$110,105.00, yielded a total net award after trial of \$429,888.99 together with interest.

Claimant now moves for additional allowances pursuant to EDPL §701, for the attorney's fees, appraisal fees, and other actual and necessary disbursements incurred to achieve just compensation from the taking.

EDPL §701 provides

§701. Additional allowance. In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application,

notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.

Award Exceeds Condemnor's Proof

It is conceded that the pre-taking offer by condemnor was \$110,105.00, and the Court's award was \$539,993.99. As claimant properly argues, the award exceeds the offer by in excess of \$400,000.00, and is well in excess of triple the pre-taking offer. Further, in its original October 17, 2005 Decision and Order, this Court (Rosato, J.) pointed out that the parties had been "incredibly" far apart at trial, noting that condemnor's compensable total was less than 5% of claimant's revised claim, although, when the rebuttal items were added to condemnor's values, the total rose to slightly over 40% of the claim. Indeed, the claimants initial appraisal valued the fixtures at issue at \$2,366,728.00, an amount which was **twenty times** the pre-taking offer.

As the Second Department has noted, in *Town of Islip v. Sikora*, 220 A.D.2d 434, (2nd Dept. 1995):

EDPL 701 "assures that a condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer" (*Hakes v State of New York*, 81 NY2d 392, 397; see also, *Matter of New York City Tr. Auth. [Superior Reed & Rattan Furniture Co.]*, 160 AD2d 705, 708, *supra*). It also vests the trial court with discretion, "in order to limit both the incentive for frivolous litigation and the cost of acquiring land through eminent domain" (*Hakes v State of New York*, *supra*, at 397). The Legislature's determination to allow such

fees and costs "merely allows a court in condemnation cases to ameliorate the condemnee's costs in cases it considers appropriate" (*Hakes v State of New York*, *supra*, at 398). We agree with the trial court that the actual value of the property which we have recomputed to be \$754,207 is substantially in excess of the condemnor's proof at trial of \$550,000, and the fees and disbursements were actual and necessary to obtain just compensation (see, *Matter of Town of Riverhead v Lobozzo*, 207 AD2d 790; *Zappavigna v State of New York*, 186 AD2d, *supra*, at 557; *Scuderi v State of New York*, 184 AD2d 1073; *Karas v State of New York*, 169 AD2d 816).

Notably, in *Islip*, the award exceeded the condemnor's proof at trial by only approximately 37%, yet that excess was found to be substantial, justifying an award of costs under EDPL §701 (see also, *E.D.J. Quality Realty Corporation v. Village of Massapequa Park*, 204 A.D.2d 321, [2nd Dept. 1994] -- 58% excess; *Scuderi v. State of New York*, 184 A.D.2d 1073 [2nd Dept. 1992] -- 41.4% excess; *Karas v. State of New York*, 169 A.D.2d 816 [2nd Dept. 1991] -- 41% excess; *Matter of Spring Valley*[*NBW Enterprises, LTD. - hereinafter NBW*], Supreme Court, Rockland County, LaCava, J., November 23, 2009 -- award approximately double pre-trial offer).

To be sure, the trial Court here also, initially, found just compensation to have been \$1,104,026.00, or substantially in line with the average of claimant's proof and condemnor's proof (the award was approximately 65% of the claimants values, while it was 1.64 times the condemnor's values without rebuttal items and soft costs [\$ 526,166.00], and 1.45 times the condemnor's values with such items [\$679,412.00]). However, upon appeal to the Appellate Division, Second Department, that Court stated:

The court's total CSV award to the claimant, which was nearly twice the original cost to the claimant for constructing and equipping the entire laundromat in November 1997, constituted a windfall. " '[T]he purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the 'highest rank' to determine the true value of the property at that time' (*Matter of Reckson Operating Partnership v.*

Assessor of Town of Greenburgh, 289 A.D.2d 248, 249, 734 N.Y.S.2d 478, quoting *Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y.2d 273, 277, 372 N.Y.S.2d 35, 333 N.E.2d 346).

[*In re Village of Port Chester*, 42 A.D.3d 465, 467-68].

Consequently, this Court (Rosato, J.), in its March 10, 2008 Decision and Order upon remand, took as a starting point for its calculations the contract price, which it had found after trial to have been \$663,730.34. From this amount it deducted amounts attributable to mathematical errors, and amounts for items conceded by the parties to be outside the contract or deemed non-compensable by the Appellate Division, to arrive at a value of \$538,193.99. To this amount was added the value of a single item, and from that total was deducted soft costs and construction costs, to reach a total amended award of \$539,993.99. Clearly, as condemnor argues, the award herein, as reduced after *remittur*, only barely exceeded the condemnor's proof **at trial** of \$419,939.00 sound value before soft costs. Nevertheless, even as reduced upon *remittur*, the award **is** several times the pre-vesting offer made by condemnor (see, *E.D.J. Quality Realty Corp. v. Village of Massapequa Park*, 204 A.D.2d 321 [2nd Dept. 1994]; *Malin v. State*, 183 A.D.2d 899 [2nd Dept. 1992]). Consequently, the first condition of EDPL §701 has been established.

Necessary to Achieve Just and Adequate Compensation

Claimant details the following costs for which it seeks payment under RPTL §701:

Benchmark Consulting Appraisers, Inc.	\$ 52,500.00
Goldstein, Goldstein, Rikon, & Gottlieb P.C.	\$165,101.50
Disbursements	<u>20,202.36</u>
	\$237,803.86

and asserts that their expenditure was necessary for claimant to achieve just and adequate compensation.

Appraiser's Fees

Claimant lists \$52,500.00 in fees for Benchmark Consulting Appraisers (Anthony Rusciano), as follows:

Appraisal Report	\$ 30,500.00
Consultation and Testimony	<u>\$ 22,000.00</u>

\$ 52,500.00

Claimant has submitted billing records for this expense, and an affidavit from Rusciano with regard to his invoices. Condemnor argues that an award should not be made for these fees because, *inter alia*, Rusciano elected not to inquire about the contract of sale and installation of the fixtures into the subject premises. As condemnor properly points out, the Second Department remanded for a re-calculation based **solely** on this contract price, as evidence of the first rank of value, and the trial court then relied on that price in its amended award for just compensation. Claimant asserts, however, that reliance at trial on evidence other than the contract price by Rusciano was proper, given the "novel expansion" by the Appellate Division of its value analysis to include the contract price in a fixtures claim as evidence of the highest value.

This Court is not persuaded, however, that the use of the recent sale of the fixtures herein (via the contract price,) as the best evidence of value, was in fact such a novel expansion by the Second Department. That Court relied, to be sure, on a tax certiorari decision (*Matter of Reckson Operating Partnership v. Assessor of Town of Greenburgh*, 289 A.D.2d 249 [2nd Dept. 2001]), but also on a non-tax certiorari matter, *Plaza Hotel Assoc. v. Wellington Assoc.*, 37 N.Y.2d 273 [1975]), that such evidence -- a recent, arms-length transaction -- is of prime importance in setting value. Further, since *Plaza Hotel* was decided, at least a dozen condemnation cases have employed the recent sales price as the best evidence of value, or at least acknowledge that the rule dictates use of such a sale price absent abnormalities, to value real property taken by eminent domain (see, *City of Newburgh v. Kirchner*, 234 A.D.2d 364 [2nd Dept. 1996]; *Gold-Mark Associates v. State of New York*, 210 A.D.2d 377 [2nd Dept. 1994]; *Hardele Realty v. State of New York*, 125 A.D.2d 543 [2nd Dept. 1986]; *Matter of New York Convention Center Development Corporation*, 169 A.D.2d 543 [1st Dept. 1991]).

While the instant matter is, admittedly, not just a condemnation matter, but one involving a fixture claim within a condemnation matter, this Court is hard-pressed to see a distinction between the use of a recent sale of real property as the best evidence of value, and the use of a recent sale of a fixture attached to real property as the best evidence of value, much less that the assertion of the latter rule is a novel expansion of the former. For example, in *Ley v. State of New York*, 28 A.D.2d 943 [3rd Dept. 1967], aff'd no op. 25 N.Y.2d 876 (1969), the Third Department accepted the August 1954 contract of sale, of a completely outfitted Carvel Store, to determine (by depreciation

of the sale price) the fixtures value for the April 1958 taking, rejecting the use of reproduction cost new less depreciation. Similarly, in *McDonald v. State of New York*, 52 A.D.2d 721 [4th Dept. 1976], aff'd 42 N.Y.2d 900 (1977), the property taken was an animal hospital. Claimant's tenants, veterinarians, moved after the taking to a new premises which they then outfit as an animal hospital, which property was then employed by condemnor's appraiser as one of his comparable properties in his sales analysis. The Third Department concluded that the proper value of the fixtures taken by condemnor was disclosed by the construction and installation cost of the same fixtures, soon thereafter the taking, in the new animal hospital. The Court of Appeals affirmed this award; although they questioned the Third Department's analysis generally (to the extent that the latter's use of 10% of the value of the newly-constructed hospital appeared to the former to have been an arbitrary percentage), the Court of Appeals did not dispute that the calculation of the cost of the taken fixtures, based as it was on a recent sale (and installation elsewhere) of the same fixtures, was proper. They also noted that, in any event, the value arrived-at was within the range of testimony as to value of the fixtures.

Thus, the Court cannot agree that the Second Department applied a rule common in tax certiorari matters -- that evidence of a recent sale of the same property, in an arms-length transaction, between willing parties, absent any abnormality, is evidence of the highest rank -- in a novel way to the valuation of the fixtures herein, namely by holding that the purchase price of the instant fixtures, set forth in a contract several years before the taking, was to be determinative on the issue of value. Thus, given the radically higher values (at first, four or more, and then, at trial, three or more times the contract price) asserted by claimant and Rusciano before and at trial, the Court determines that claimant and its appraiser, in order to claim a substantially higher fixture value, deliberately chose to employ a valuation method other than consideration of the recent sale of the property as the best evidence of its value.

This Court also has previously found that claimants in general, and in fact the claimants herein, would have had to engage an appraiser, and pay for an appraisal, whether the offer and/or proof presented at trial by condemnor was exceeded by the award or not (see, e.g. *NBW, supra*). Further, as condemnor properly argues, the ultimate award by the Court (*i.e.*, after remittur) was largely based not on the appraisal submitted by Benchmark, but rather by the trial Court relying, essentially to the exclusion of all other factors, upon the recent purchase price of the premises, which it was directed to consider by the Appellate Division, in determining

the value of the fixtures at issue herein. In fact, Rusciano conceded at trial that he not only had no knowledge whatsoever of the initial sales price of the fixtures, but, in fact, never even inquired about the initial price of the fixtures. The items to be valued, though, were indeed those very fixtures which Benchmark's appraisal, and claimant, argued were compensable. In essence, then, the appraisal submitted by Benchmark, for which an additional allowance is sought, did have a bearing on the ultimate award to claimant, but only insofar as it found that certain of the items were compensable. Since, therefore, at least some portion of the ultimate award to claimant, based as it was on the compensability of the fixtures, was due to the detailed field work and inventory performed by the appraiser prior to, and in preparation of, the appraisal, as a matter of discretion, the Court awards 50% of the cost therefor, or \$15,250.00.

Similarly, claimants would have had to consult with their appraiser, and pay for such consultation and testimony at trial, regardless of whether the offer and/or proof presented at trial by condemnor was exceeded by the award or not. As set forth above, Rusciano not only chose a valuation methodology which was rejected by the Appellate Division and which, after remittur, was not utilized as a basis to determine the value of the fixtures herein, but he also elected not to question claimant **at all** about the cost of the fixtures which had been installed just two and one-half years prior to the taking. The methodology employed, especially with the appraiser's failure to pose questions relating to prior sales of the property, purchase or refurbishment of the fixtures, etc., appears not to have constituted sound appraisal practice (*Cf.*, The Appraisal of Real Estate, 12th edition, pp 189-192, 337-339, 418-428, 434-435). Consequently, as a matter of discretion, the only amount in appraisal consultation and testimony fees for which the Court makes an allowance, as necessary to achieve just and adequate compensation, is 50% of the said fee, or \$11,000.00. The amounts awarded for Benchmark's work as appraisers thus total \$26,250.00.

Goldstein, Goldstein, Rikon, & Gottlieb P.C.

Claimant lists fees of \$165,101.50 for Goldstein, Goldstein, Rikon, & Gottlieb P.C., its trial counsel. Claimant has submitted billing records in the form of closing statements for this expense, and an affirmation from trial counsel Michael Rikon Esq. with regard to his invoices. The expenses appear to be directly related to the litigation, and are billed at the rate of a 20% contingency fee assessed upon the total award including interest. They include \$23,773.02 in fees attributable to work conducted prior to the advance payment; \$126,328.48 in fees attributable to the trial and

appellate litigation of the case in chief; and \$15,000.00 in fees attributable to the litigation and appeal (abandoned) of the Writ of Assistance portion of the matter (which fee claimant paid separately to counsel since it was not part of the contingency fee arrangement).

The Village opposes the award of counsel fees, arguing, *inter alia*, that such an award is not appropriate for fees and expenses incurred in pursuit of just compensation by means of a valuation theory rejected by the Court, or where the just compensation figure sought actually exceeds the final award for compensation by a substantial amount. Condemnor cites to *In the Matter of the Acquisition of Real Property by the Village of Johnson City*, 277 A.D.2d 773 (3rd Dept 2000), where claimant sought compensation based on an appraised value of \$1,000,000.00, against an condemnor's appraisal at trial of \$444,675.00 and an advance payment of \$429,675.00. The Court found that litigation by the claimant there, to secure a claimed just compensation value which was twice that sustained by the court, could not be the basis of an award of additional allowances, holding that since

a substantial part of claimant's counsel and appraisal fees were expended in an effort to achieve an inflated value and propounding valuation theories that were totally rejected by Supreme Court, the record supports a finding that the claimed expenses were not necessarily incurred "to achieve just and adequate compensation." (277 A.D.2d, 775).

Condemnor cites also to *Matter of City of New York (China Plaza Co. v. City of New York)*, 254 A.D.2d 210 [1st Dept 1998], which affirmed denial of an additional allowance where

a significant portion of claimant's efforts and costs were expended to develop and present valuation theories to support a claim for compensation substantially in excess of what the court awarded.

(see also, *In re New York City Transit Authority*, 150 Misc. 2d 917, 920 [Supreme Court, Queens County, 1991], which stated

A review of the record also reveals, however, that the city's inadequate offer was not the sole basis for the high cost of litigation in this case. Specifically, a significant segment of the trial revolved around the attempt by

claimants to establish that numerous items of realty and personalty were compensable as trade fixtures. Whereas the amount awarded for fixtures was 246% greater than the initial offer, the amount sought by claimants was 331% greater than the award. Many of the items alleged by the claimants to be compensable were rejected by this court. The Appellate Division, Second Department, similarly found claimants' arguments to be without merit and affirmed this court's award. Thus, with respect to fixtures, much of the time and expense incurred by claimants were brought about not simply to prove the inadequacy of the city's offer, but were incurred in the hope of recovering a far greater award than was actually realized.

Claimant cites, *inter alia*, in support of its application, *Matter of City of New York (Powell's Cove Environmental Waterfront Park)*, 24 Misc. 3d 1251A [Supreme Court, Queens County, 2009], where, in fact, an award for an additional allowance for attorneys fees and expenses (of 6 % of the total award) was made by the trial court. However, the Court therein (citing to *Johnson City* and *China Plaza*, *supra*) recognized that

[i]t is also well settled, however, that where costs are expended to develop and present valuation theories to support a claim for compensation substantially in excess of what the court awarded, the court should exercise its discretion and award additional amounts substantially less than what claimant asks...

Further, as the Court in *Powell's Cove* noted regarding contingency fee arrangements

As is also relevant herein and as was recognized by this court in a previous decision, *In re City of New York* (1 Misc 3d 911A [2003]):

"however 'reasonable' the contingent fee may be from the client's standpoint or enforceable between the parties under contract law, a fee sought by means of § 701 is one to be paid by

the condemnor from public funds without any input into the terms of the retainer. Condemnees may not set the standard of reasonableness."

(*In re New York State Urban Dev.*, 183 Misc 2d 900, 904, 707 N.Y.S.2d 593; accord *Application of New York City Transit Auth.*, *id.*).

(*In re City of New York*, 1 Misc 3d 911A, 4-5....;

On the issue of grant of an allowance related to the advance payment, or for the inclusion of interest paid by the condemnor in the calculation, the *Powell's Cove Court* stated

Similarly, it has been recognized that "[s]ince the advance payments...were essentially self-generated by the condemnor it cannot be seriously contended that the costs...incurred by such condemnee' were necessary' for the production of the [award received]" (*In re New York State Urban Dev. Corp.*, 183 Misc 2d at 905; accord, *In re City of New York*, 2003 NY Slip Op 51645U at 6).

[A]n award of a contingency fee in the amount of 33% of the difference between the court's award, with accrued interest, and the defendant's advance payment, was proper and reasonable, given the amount of time and labor required, the difficulty of the issues presented, the level of skill required of this matter, the benefit resulting to claimant from the attorney's skill and the results obtained (*Carbone v State of New York*, 13 Misc 3d 1246A, 831 N.Y.S.2d 358, 2006 NY Slip Op 52364U [2006]; see also *In re Edgecombe Road*, 128 AppDiv 432, 436, 112 N.Y.S. 845 [1908], *affd* 194 NY 545, 87 N.E. 1118 [1909] [since petitioner was entitled to one-half of the award, he was entitled to it as of the date when the property was taken, so that he was entitled to interest on it until the same was paid]).

On the general issue of calculation a proper attorney fee award, the Court of Appeals noted, in *In re Estate of Freeman*, 34 N.Y.2d 1 (1974), that it is a long and universal tradition in American practice

for attorneys' fees to be determined on the following factors: the time and labor required; the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and the benefit resulting to the client from the services; the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved. (*Citations omitted*)

Fees Relating to the Advance Payment

Counsel for claimant asserts that "From October 1, 2002 to January 3, 2003 we labored to obtain Megamat's advance payment". However, neither Counsel in his affirmation, nor claimant in his affidavit, details precisely what "labor" took place by Counsel and/or his firm during this brief, three month period to expedite the advance payment. Consequently, claimant has failed to demonstrate that the advance payment was not self-generated by the Village, but was instead the product of Counsel's efforts on Megamat's behalf. As a matter of discretion, the Court finds that award of an allowance for fees related to the advance payment (\$23,773.02) would not be necessary to achieve just and adequate compensation, and declines to award an allowance for such fees.

Fees Attributable to the Writ of Assistance

As properly argued by condemnor, claimant was not only unsuccessful in its litigation relating to the Writ of Assistance at the trial level, but also abandoned it entirely before the appeal was heard by the Second Department. As a matter of discretion, the Court finds that award of an allowance for fees related to the Writ of Assistance (\$15,000.00) would not be necessary to achieve just and adequate compensation, and declines to award an allowance for such fees.

Fees Attributable to the Case in Chief

As set forth in greater detail above, claimant seeks an allowance for \$126,328.48 related to counsel fees for the case in chief, determined by the application of the 20% contingency fee to the final award including interest as provided-for in the retainer agreement. As properly argued by condemnor, however, claimant clearly pursued a valuation theory to support its claim for just compensation which was squarely rejected by the Second Department on appeal, which claim constituted an amount substantially in excess of what the court awarded upon *remittur*, and which theory played essentially no role in the final value calculation by the trial court upon *remittur*. Consequently, as a matter of discretion, the Court finds that award of an allowance for fees related to the case in chief in the amount sought by claimant would not be necessary to achieve just and adequate compensation, and the Court thus declines to award an allowance for such fees in the amounts sought by claimant.

Allowance for Legal Fees

In *Matter of City of New York v. Jamaica Arms Hotel, Inc.*, 44 A.D.3d 1040 [2nd Dept. 2007], the Second Department affirmed an award of allowances amounting to well less than 10% of the final award, due to the prosecution of an appeal based on arguments rejected by the trial court. In *Powell's Cove*, *supra*, Justice Gerges analyzed cases where awards were made without reference to contingency fee agreements (*see, inter alia, City of Yonkers v. Celwyn Company*, 221 AD2d 437 [2nd Dept. 1995] -- award of 6.7%, which was one half of the amount sought pursuant to the sliding-scale contingency retainer agreement; *In re New York State Urban Dev.*, 183 Misc 2d 900 [Supreme Court, New York County, 2000] -- allowance of 10% of the final award, one-half of the 20% contingency provided in retainer agreement). Justice Gerges himself had also previously awarded allowances for counsel fees in this range (*see, In re City of New York*, 1 Misc.3d 911A [Supreme Court, Kings County, 2003] -- attorneys' fees amounting to 10% of final award less advance payment approved), and in *Powell's Cove* itself, Justice Gerges awarded an allowance of only 6% of the final award (*see also, In re New York City Transit Authority, supra*, where the court granted an allowance of approximately 5% for counsel fees, well below the 22% retainer fee, based on excessive fixture claim).

Based on all of the above and in its discretion, the Court awards, as necessary to achieve just and adequate compensation, an allowance for attorneys fees which is 50% of the amount sought by counsel (*i.e.* 10% of the final award plus interest), from which amount the advance payment plus interest must be deducted,

calculated as follows:

Final Award	\$ 539,993.00,
<u>Interest</u>	<u>\$ 210,513.51</u>
Total Award	\$ 750,507.50
Advance Payment	\$ 110,105.00
<u>Interest</u>	<u>\$ 8,760.13</u>
	\$ 118,865.13
Total Award	\$ 750,507.50
<u>Total Advance</u>	<u>\$ 118,865.13</u>
Final Net Award	\$ 631,642.37
10% of Final Net Award	\$ 63,164.24
(additional allowance for counsel fees)	

Expenses

Claimant finally seeks an allowance for expenses incurred in the matter, other than those related to the appraisal (Benchmark, as set forth above) amounting to \$20,202.36. As an initial matter, the Court notes that the moving papers have failed to substantiate the necessity for the travel expense of \$499.22. Further, as Justice Gerges pointed out in *Powell's Cove, supra*, legal research (here \$917.43) is merely an attorney's research time, hence it is recoverable solely as counsel fees and not as a taxable cost. In addition, several fees, including

Filing fees	\$ 419.50
Court Transcripts	5,494.00
Counsel Press	9,698.42

are taxable as costs and/or additional allowances in a Bill of Costs pursuant to CPLR Articles 82 and 83.

Finally, the court here too cannot escape the conclusion that a significant portion of the costs which are claimed, were expended in support of a valuation theory which was soundly rejected by the Second Department upon appeal, and which played in essence no role in the final valuation on remand. Nevertheless, the Court is largely unable to come to a definitive conclusion with regard to the balance of the expenses, since claimant has only made a bare-bones rendering of those expenses. For example, in examining claimant's Exhibit J, pages 92 to 101, 102 to 104, and 191, contain invoices for copying and photographs, yet nowhere is the specific reason for said copying and photographic services disclosed.

Similarly, pages 123 to 127 set forth messenger services, yet the specific subject of those services is absent. Page 129, pages 131 to 147, and pages 149 to 164, contain postage charges (US Postal Service; Federal Express; and US Postal Service Express Mail, respectively), yet again the purpose of the postal expenses are not specified. To be sure, most of these expenses might be characterized as "overhead", and a grant of allowances for overhead expenses is expressly disfavored (see *Matter of City of New York [Newtown Cr. Water Pollution Control Plant Upgrade]*, 2010 NY Slip Op 20498 [Supreme Court, Kings County, December 9, 2010] -- court denies allowance for overhead expenses, both due to nature of the expenses and the failure of claimant to detail the reason for the expenses). However, the Court is simply unable, upon the papers presented in support of the claim for allowances for said expenses, to properly determine their compensability.

Consequently, as a matter of discretion, the Court declines to find as necessary to achieve just and adequate compensation an award for allowances for non-appraisal disbursements, with leave for counsel to seek recovery of items such as filing fees, court transcripts, and printing costs, as are commonly claimed in a proper Bill of Costs, in such a Bill of Costs, and otherwise with leave to re-submit for the remaining non-appraisal, non-counsel fee disbursements, upon proper papers.

Conclusion

The Court thus finds, as a matter of discretion, that the following expenses were necessary to achieve just and adequate compensation in the instant matter, and thus makes an allowance for them pursuant to EDPL § 701, as follows:

Benchmark Consulting Appraisers, Inc.	\$ 26,250.00
Goldstein, Goldstein, Rikon, & Gottlieb P.C.	<u>\$ 63,164.24</u>
	\$ 89,414.24

Upon the foregoing papers, it is hereby

ORDERED, that the claim by claimant for an allowance for actual costs necessary to achieve just and adequate compensation in the instant matter, pursuant to EDPL § 701, is hereby granted, to the extent that it is further

ORDERED, that condemnor Village of Port Chester shall pay as an EDPL § 701 allowance to claimant Megamat Laundromat Inc. the amount of \$ 89,414.24, with interest thereon from the date of June 23, 2009; and it is further

ORDERED, that claimant shall have leave to seek recovery of appropriate costs and disbursements in a proper Bill of Costs, and/or to re-submit regarding the remaining non-appraisal, non-counsel fee disbursements on proper papers.

Settle Order.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
January 10, 2011

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