

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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In the Matter of the Application of  
MIDWAY SHOPPING CENTER, by Burlington  
Coat Factory Warehouse of Scarsdale, Inc.  
and BURLINGTON COAT FACTORY WAREHOUSE OF  
SCARSDALE, INC.,

Petitioners,

**-against-**

THE TOWN OF GREENBURGH, A Municipal  
Corporation, its Assessor and Board  
of Review,

Respondents,

**-and-**

THE EDMONTON UNION FREE SCHOOL DISTRICT.

Intervenor-Respondent.

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DICKERSON, J.

**THE RELUCTANT TAXPAYER**

The Petitioner, Midway Shopping Center [ " Midway " ] owns and operates " a multi-tenanted community shopping center erected in 1958 and located at 1001 Central Park Avenue in the Town of Greenburgh " <sup>1</sup>. The Petitioner, Burlington Coat Factory Warehouse of Scarsdale, Inc.

**FILED  
AND ENTERED  
ON  
MARCH 29, 2006  
WESTCHESTER  
COUNTY CLERK**

Index Nos:  
16209/98  
16237/99  
15919/00  
16354/01  
17636/02

**DECISION & ORDER**

[ " Burlington " ] is a former tenant of Midway. The Petitioners Midway and Burlington challenge the tax assessments imposed by the Town of Greenburgh [ " Respondent Town " ], its Board of Assessment Review [ " BAR " ] and its Assessor [ " the Respondents " ] on Midway for the years 1998, 1999, 2000, 2001 and 2002 in five Real Property Tax Law [ " RPTL " ] Article 7 Petitions<sup>2</sup> filed by Burlington.

### **The Issues: Authority, Standing & Compliance**

The three motions before this Court address the following subjects; (1) authority, i.e., prior to April 28, 2005 did Burlington have authority to represent Midway before the BAR and this Court in challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed upon Midway by the Respondent Town? (2) authority, i.e., to the extent that Burlington had no such authority do the April 28, 2005 Authorizations executed by Midway retroactively empower Burlington to act as Midway's agent and transform Burlington's filings before the BAR and RPTL Article 7 petitions into Midway's filings before the BAR and RPTL Article 7 petitions? (3) standing, i.e., did Burlington have standing to represent itself before the BAR and this Court in challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed upon Midway by the Respondent Town? and (4) compliance, i.e., did Midway and Burlington comply with the filing and service requirements for verified or certified income and expense statements pursuant in 22 NYCRR §§ 202.59(b),(d)(1)?

### The School District's Motion

The Edgemont Union Free School District [ " Respondent Edgemont " ] brought a motion pursuant to CPLR § 3212 seeking to dismiss the 1998, 1999, 2000, 2001 and 2002 RPTL Article 7 Petitions herein for a lack of standing in that Burlington is not an " ` aggrieved person ` under § 704 of the RPTL " <sup>3</sup>. In addition, the Respondent Edgemont seeks a determination that both Midway and Burlington have violated Judiciary Law § 489.

### The Town's Motion

The Respondent Town has brought a motion (1) pursuant to 22 NYCRR § 202.21(e) seeking to vacate the filed Notes of Issue for a failure to comply with the filing and service requirements of 22 NYCRR § 202.59(b),(d)(1) and (2) pursuant to RPTL § 718(2)(d) dismissing the 1998, 1999, 2000, 2001 and 2002 Petitions " for failure...to file verified income and expense statements with the County Clerk prior to issuance of the...Notes of Issue for these years under review ". Specifically, the Respondent Town asserts<sup>4</sup> that the Notes of Issue [ all of which were filed with the Westchester County Clerk on July 3, 2003 ] should be vacated because with respect to (1) the 1998 Note of Issue, " No income and expense statements ( were ) filed, or served on...Town ", (2) the 1999 Note of Issue, " No income and expense statements ( were ) filed, or served on...Town ", (3) the 2000 Note of Issue, " Income and expense statements

filed on September 17, 2004 ( 14 months late ) and not served on...Town, nor Proof of Service filed with the Court ", (4) the 2001 Note of Issue, " Income and expense statements filed on September 17, 2004 ( 14 months late ) and not serviced on...Town, nor Proof of Service filed with the Court ", and (5), the 2002 Note of Issue, " Income and expense statements filed on September 17, 2004 ( 14 months late ) and not served on...Town, nor Proof of Service filed with the Court ".

The Respondent Town also asserts that its Office of Town Attorney received by mail on July 7, 2003 " unverified Independent Auditor's Report(s) " for Midway's activities for the " 1999 and 2000 fiscal years ", " the 2001 and 2002 fiscal years ", and " An unverified IRS Form 8825 of income and expenses for the 1998 fiscal year "<sup>5</sup>.

In addition, the Respondent Town enumerates various deficiencies<sup>6</sup> in the financial documents including absence of a proper verification or certification, missing " Note 1 " attachments, a paucity of financial information when compared to a 2005 filing, a failure to serve any of the financial documents in triplicate and the admitted failure<sup>7</sup> to serve and file verified or certified income and expense statements with the Westchester County Clerk before filing the Notes of Issue for each of the instant RPTL Article 7 proceedings.

### **The Petitioners' Cross Motion**

Midway and Burlington oppose the Respondents' Motions and have brought a Cross Motion seeking an order " (2) Granting Petitioner(s) request *nunc pro tunc* to amend the name of Petitioners in the 2001 Notice of Petition and Petition to read ' Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale, Inc. ' and (3) Alternatively, (a) Deeming that the income and expense statements for the years 1998-2001 were filed with the Westchester County Clerk *nunc pro tunc* prior to the service of Notes of Issue on the Town, or (b) Granting a 90 day extension of time to file amended Notes of Issue of 1998, 1999, 2000, and 2001 "8.

### **Oral Argument**

On March 23, 2006, counsel for the parties appeared at oral argument and made excellent presentations of their respective positions on the many issues raised herein. Particularly helpful was the admission of counsel for the Petitioners that the two pages from Midway's 1998 Rental Real Estate Income and Expenses of a Partnership or an S Corporation I.R.S. Form 8825 served on the Respondent Town on or about July 3, 2003<sup>9</sup> and filed with the Westchester County Clerk on December 5, 2005<sup>10</sup> as a verified or certified income and expense statement for 1998 in compliance with 22 NYCRR §§ 202.59(b),(d)(1) was incomplete.

### The Reluctant Taxpayer

Stated, simply, Midway, the owner of the subject property and solely responsible for paying real property taxes to the Respondent Town for the tax years 1998, 1999, 2000, 2001 and 2002, never filed a complaint before the BAR, never filed a Property Appearance Form before the BAR, never filed an RPTL Article 7 Petition, never served and filed verified or certified income and expense statements pursuant to 22 NYCRR §§ 202.59(b),(d)(1) and never served and filed Notes of Issue herein. For all of these reasons Midway has no RPTL Article 7 claim against the Respondents for the tax assessments imposed in 1998, 1999, 2000, 2001 and 2002. Furthermore, Burlington never had any authority to act on behalf of Midway to do any of the aforesaid acts which Midway, acting in its own best interest, chose not to do for itself. In addition, Burlington as a fractional lessee not responsible for the payment of any real property taxes to the Respondent Town never had any standing to perform the aforesaid acts on behalf of itself [ See e.g., Matter of Waldbaums, Inc. v. Finance Administrator of the City of New York, 74 N.Y. 2d 128, 542 N.E. 2d 1078, 544 N.Y.S. 2d 561 ( 1989 )], let alone on behalf of Midway. Nor was such standing conferred upon Burlington because Midway may have refused to respond to a request in October of 1997 from Burlington " to contest or review the amount or validity of any such Tax by appropriate legal proceedings ". Such a refusal did not create " an implied contractual right to protect ( Burlington's ) interest and file suit on behalf of itself and/or on behalf of ( Midway )"

but, at best, created a right arising from the breach of paragraph 31(g) of the Lease Addendum to sue Midway for damages or specific performance. Further, the April 28, 2005 Authorizations, issued two and one half years after the termination of the Lease on December 1, 2002, do not cure the numerous failures of Midway to challenge before the BAR and this Court the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed by the Respondent Town and do not retroactively empower Burlington to act as Midway's agent and transform Burlington's filings before the BAR and RPTL Article 7 petitions into Midway's filings before the BAR and RPTL Article 7 petitions, particularly, where Burlington's rights under paragraph 31(g) of the Lease Addendum did not survive the termination of the Lease. The rights of Midway and Burlington, if any, to challenge the 1998, 1999, 2000, 2001 and 2002 tax assessments ceased to exist long ago and were not resurrected on April 28, 2005 or thereafter. And, further, assuming *arguendo* that Burlington did have authority to represent Midway and/or did have standing to represent itself, both Burlington and Midway have failed to comply with the service and filing provisions of 22 NYCRR § 202.59(b),(d)(1) [ See e.g., Matter of Rose Mount Vernon Corp. v. Assessor of the City of Mount Vernon, 1 Misc. 3d 906(A), 781 N.Y.S. 2d 628 ( 2003 ), aff'd 15 AD, 3d 585, 791 N.Y.S. 2d 572 ( 2d Dept. 2005 )].

### FACTUAL BACKGROUND

On September 20, 1982 Midway entered into a twenty year lease with Burlington for the rental of 24.48% of the Midway Shopping Center located at 1001 Central Park Avenue in the Town of Greenburgh [ " the Lease " ]. The Lease term commenced on December 1, 1982 and terminated on November 30, 2002. The relevant terms of the Lease are as follows:

#### Lease<sup>11</sup>

**Para. 10** " Reports: (a) Tenant agrees to submit to Landlord on or before the thirtieth ( 30<sup>th</sup> ) day following the end of each calendar month during the Lease Term ( including the thirtieth ( 30<sup>th</sup> ) day of the month following the end of the Lease Term, as to which the *Tenant's obligation shall survive the expiration of the Lease Term* ( emphasis added ) ) a written statement... showing the amount of Gross Sales..."

**Para. 51** " Surrender Of Premises: Upon the expiration or sooner of the Lease Term, Tenant agrees to quit and surrender the Demised Premises, broom-clean...Tenant shall indemnify Landlord against all loss or liability resulting from the delay by Tenant in so surrendering the same...*Tenant's obligations under this Paragraph shall survive the expiration or sooner termination of the Lease Term* ( emphasis added ) ".



**Para. 53** " Relationship Of Parties: *Nothing contained in this Lease shall be deemed to constitute or be construed or implied to create the relationship of principal and agent ( emphasis added ), partnership, joint venture or any other relationship between the parties hereto, other than the relationship of Landlord and Tenant "*.

**Lease Addendum**<sup>12</sup>

**Para. 31(a)**"...Tenant agrees that it will pay...as rent hereunder, its share, computed and payable...in section (b), of all real estate taxes ...which, at any time during the Demised Term hereof shall be or become due and payable and which shall be levied...against the Shopping Center...Upon payment by Tenant of its proportionate share of Taxes...Landlord shall remit the Taxes ( emphasis added )...as may be required by the appropriate taxing authorities..."

**Para. 31(b)**" Tenant's proportionate share of said Taxes shall be the full amount of said Taxes multiplied by the percentage derived by dividing the number of square feet of Tenant's Gross Leasable Area by the number of square feet of Landlord's Gross Leaseable Area...Landlord and Tenant acknowledge that such percentage, as the Demised Premises and the Shopping Center currently constituted is 27.48% ( emphasis added )..."

**Para. 31(g)** " Tenant, upon notice to Landlord, shall have the right to require Landlord to contest or review the amount or validity of any such Tax by appropriate legal proceedings ( emphasis added ). Such right shall

not be deemed or construed in any way as relieving, modifying or extending Tenant's covenants to pay its proportionate share of any such Tax at the time and in the manner as in this Paragraph provided. "

**Para. 31(h)** " *Any contest requested by Tenant pursuant to section (g) above as to the validity or amount of any Tax, or assessed valuation upon which such Tax was computed or based, whether before or after payment, shall be undertaken by Landlord, at the cost of Tenant, and by counsel selected by Landlord ( emphasis added )*. Tenant and Landlord agree that they will, at Tenant's expense, cooperate with each other in any such contest, it being understood, however, that Landlord shall not be subject to any liability for the payment of any costs or expenses in connection with any such proceeding, and Tenant covenants to indemnify and save harmless Landlord from any such costs and expenses. Tenant shall be entitled to its proportionate share of any refund of any such Tax and penalties or interest thereon which have been paid by Tenant, or by Landlord and reimbursed to Landlord by Tenant, after such refund has first been used to reimburse Tenant for all costs and expenses incurred and paid by Tenant in such proceedings. The balance of such refund shall be to the sole property of Landlord. "

**Para. 31(k)(2)** " *Tenant's percentage of the Gross Leaseable Area of the Shopping Center is 27.48% ( emphasis added )...*".

**Para. 61** "...Landlord agrees that Landlord shall look solely to the letter of credit for the collection of any judgment...requiring the payment of money by Tenant in the event of any default or breach by Tenant with

respect to any of the terms...of this Lease to be observed and/or performed by Tenant; and no other assets of the Tenant shall be subject to levy, execution or other judicial process for the satisfaction of the Landlord's claims "13.

## **BURLINGTON CHALLENGES MIDWAY'S TAX ASSESSMENTS**

### **The 1997 Tax Assessment**

In June of 1997 Burlington " filed a protest for the 1997 assessment with the ( BAR ) "14 which it later withdrew " Following ( Midway's ) objection ( in ) a letter dated July 10, 1997 "15. Evidently, the BAR ignored the request to withdraw and informed Burlington " that the application for reduction had been denied. Said notice...further advised that judicial review of such denial was available by the filing of an Article 7 RPTL petition on or before October 15 "16. Burlington filed an RPTL Article 7 Petition in " 1997 ( but ) the matter was allowed to lapse in 2001 by operation of RPTL § 718 and that year is not part of these proceedings "17.

### **Burlington Exercises Its " Right To Require "**

On October 14, 1997 Burlington advised Midway that it was

" exercis(ing) its right ( pursuant to paragraph 31(g) of the Lease ) to require Midway Shopping Center to contest or review by appropriate legal proceeding the amount or validity of the real property tax and special assessments imposed by the various governmental jurisdictions upon the leased premises Burlington occupies..."<sup>18</sup>. Midway replied inquiring " as to the tax and/or special assessment that ( Burlington ) seeks to contest..."<sup>19</sup> On October 23, 1997 Burlington advised Midway that it " seeks to contest and review...the assessment imposed on ( Midway ) for the 1997 assessment year...as well as for any subsequent year during which the level of assessment continues at the same level as that which was imposed on the property by the Town of Greenburgh for the 1997 assessment year "<sup>20</sup>. In addition, Burlington advised Midway that " in order to protect ( Burlington's ) right to protest the 1997 assessment ( it had ) " filed on ( Burlington's ) behalf an Article 7 petition "<sup>21</sup>.

### **The 1998 Tax Assessment**

On March 2, 1998 Burlington advised Midway that it " would like to press ahead with its appeal of the real property taxes on the Midway Shopping Center "<sup>22</sup> suggesting that " it would be advisable for a meaningful discussion of the issues pertaining to a 1998 assessment challenge...take place well in advance of the June 1-16 ( BAR ) filing period ". On March 20, 1998 Midway responded noting that Burlington's counsel " Mr. Moller filed a Article 7 petition...challenging the 1997 assessment ( and ) since

Burlington is seeking to continue with ( the 1997 challenge ) as well as considering a challenge of the anticipated 1998 tax assessment ( Midway ) pursuant to ( paragraph 31(h) of the Lease Addendum ) selects as counsel in place of Mr. Moller, Mark Tulis..."<sup>23</sup>. Thereafter, Burlington's counsel was advised by Mr. Tulis that he was not retained by Midway and " didn't expect to be in time for the filing of the 1998 protest ( and gratuitously ) recommended that in order to fully protect ( Burlington's ) interest in reducing the tax assessment at the shopping center ( Burlington ) should file a complaint with ( the BAR ) "<sup>24</sup>.

#### **Burlington Challenges The 1998 Assessment Before The BAR**

Thereafter, Burlington filed a complaint before the BAR challenging the 1998 tax assessment for " Midway Shopping Center By Burlington Coat Factory Warehouse Corp. "<sup>25</sup> identifying the " Mailing address of owner(s) " as " Burlington Coat Factory Warehouse Corp. 1830 Route 130 North Burlington, NJ 08016-3020 " and Allan S. Moller, Esq. as " representative of owner ". In addition the BAR complaint contained a Certification [ " I certify that all statements made on this application are true and correct to the best of my knowledge and belief " ] signed by Allan S. Moller as " owner or representative ".

Burlington also filed a Property Appearance Form with the BAR for " Midway Shopping Center " identifying Allan S. Moller, Esq. and signed by " Richard G. Mandell, Asst. Sec'y of Burlington Coat Factory Warehouse, Inc.,

parent corp. of Burlington Coat Factory Warehouse of Scarsdale, Inc., fractional leasee of premises ". The BAR denied " your application for reduction of the 1998 tentative assessed valuation of ( Midway Shopping Center ) " in a letter addressed to Allan S. Moller, Esq. and advised that " you may seek judicial review of the assessment pursuant to Article 7 of the ( RPTL ) "<sup>26</sup>.

#### **Burlington Files An Article 7 Petition For 1998**

On October 13, 1998 Burlington filed an RPTL Article 7 petition with the Westchester County Clerk which identified the Petitioner as " Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale, Inc. " [ " Please Take Notice, that upon the annexed Petition of Midway Shopping Center by Burlington Coat Factory of Scarsdale, Inc. " ]. The petition was signed by Allan S. Moller, identified as " the duly authorized representative and attorney for the aforementioned petitioner "<sup>27</sup>. The attached " Authorization " was not from Midway, however, but from Richard Mandell, Assistant Secretary of Burlington Coat Factory Warehouse, Inc.

#### **Burlington Challenges 1999, 2000, 2001 & 2002 Tax Assessments**

Subsequently, Burlington filed complaints and Property Appearance Forms before the BAR challenging the 1999, 2000, 2001 and 2002 tax assessments imposed upon Midway, all of which were denied<sup>28</sup>. After each BAR

denial Burlington filed an RPTL Article 7 petition for the tax years 1999, 2000, 2001 and 2002<sup>29</sup>. The 1999, 2000 and 2002 RPTL Article 7 petitions identified the petitioner as " Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale. Inc. " while the 2001 petition " was mistakenly filed under the name of Burlington Coat Factory Warehouse of Scarsdale, Inc., without including the name of Midway Shopping Center as petitioner "<sup>30</sup>. This explains why Petitioners now request this Court to order a *nunc pro tunc* amendment of the 2001 Petition to read " Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale, Inc. ".

#### **Notes Of Issue And Income & Expense Statements**

Having chosen to file complaints and Property Appearance Forms with the BAR and RPTL Article 7 petitions with the Westchester County Clerk for the tax years 1998, 1999, 2000, 2001 and 2002, Burlington then sought to comply with the four year statute of limitations set forth in RPTL § 718(2)(d) and the income and expense statement filing requirements of 22 NYCRR § 202.59(b) and 22 NYCRR § 202.59(d)(1). This later requirement which Petitioners admit was not complied with<sup>31</sup> **explains why Petitioners** now request this Court to deem " the income and expense statements for the years 1998-2001...filed with the Westchester County Clerk *nunc pro tunc* to the service of Notes of Issue on the Town ".

### **Filing The Notes Of Issue**

Burlington filed Notes of Issue and Requests of Judicial Intervention [ " RJI " ] for the tax years 1998, 1999, 2000, 2001 and 2002 with the Westchester County Clerk on July 3, 2003<sup>32</sup>, all of which were filed within the four year statute of limitations in RPTL § 718(2)(d) with the exception of the 1998 Note of Issue, the time for filing of which was extended one year to October 12, 2003 by a Court ordered Stipulation<sup>33</sup>. The Notes of Issue and RJI forms identify Allan S. Moller, Esq. as " Attorney for Petitioner(s) " " Midway Shopping Center by Burlington Coat Factory Warehouse of Scarsdale, Inc. ". As noted above no income and expenses statements were filed with the Westchester County Clerk prior to filing the aforementioned Notes of Issue and RJIs.

### **Service Of Income & Expense Statements**

On July 3, 2003 Burlington mailed the 1998, 1999, 2000, 2001 and 2002 Notes Of Issue and RJIs to the Town Attorney, Susan Mancuso, along with three financial documents [ but did not mail them to the Assessor<sup>34</sup> ] which Burlington described as " Pursuant to the provisions of 22 NYCRR § 202.59(b), enclosed herewith please find in triplicate copies of certified income and expense statements of the petitioner ( Midway )...for 1998-2002 "<sup>35</sup>. The three financial documents which appear to have been received by the Town Attorney on July 7, 2003<sup>36</sup> [ although there is a dispute as to whether



they were served and filed in triplicate<sup>37</sup> ] consist of (1) two pages from an *uncertified and unverified* " Independent Auditor's Report " dated February 21, 2003 and described as containing information regarding " assets, liabilities and partners' capital of Midway...as of December 31, 2002 and 2001 and its revenues, expenses and changes in partners' capital and cash flows for the years then ended, on the basis of accounting described in Note 1 [ emphasis added ] "<sup>38</sup>, (2) two pages from an *uncertified and unverified* " Independent Auditor's Report " dated February 12, 2001 and described as containing information regarding " the assets, liabilities and partners' capital of Midway...as of December 31, 2000 and 1999 and its revenues and expenses and changes in partners' capital and cash flows for the years then ended, on the basis of accounting described in Note 1 [ emphasis added ] "<sup>39</sup> and (3) two pages, both *uncertified and unverified*, of what appears to be part of an I.R.S. Form 8825<sup>40</sup> filing in 1998. The first page is entitled " Rental Real Estate Income and Expenses of a Partnership or an S Corporation...Midway Shopping Center " and the second page contains only a listing of some expenses [ e.g. utilities, wages and salaries and depreciation are not listed or discussed ].

#### **Subsequently Filed Financial Documents**

On September 17, 2004 Burlington filed a " Statement Of Income & Expense " and a " Certification " from Midway with the Westchester County Clerk for the tax years 2000, 2001 and 2002<sup>41</sup> which Petitioners describe as

a mere " technical violation " of 22 NYCRR § 202.59(d)(1) since these certified financial documents were filed fourteen months after the Notes of Issue for 2000, 2001 and 2002 were filed with the Westchester County Clerk. On December 5, 2005 Burlington filed " income and expense statements with the Westchester County Clerk for 1998 and 1999 " <sup>42</sup>.

#### **The 2002 Amended Note Of Issue**

On December 5, 2005, the Petitioners filed an Amended Note of Issue and RJI for the tax year 2002 " falling within the four-year limitations' cut-off by over ten months " <sup>43</sup>.

#### **The Midway Authorizations**

On April 28, 2005 Midway filed with the Westchester County Clerk " Authorizations " for the tax years 1998, 1999, 2000, 2001 and 2002 [ " I, the undersigned being an aggrieved person within the meaning of the Real Property Tax Law...as complainant hereby designate and authorize Burlington Coat Factory Warehouse of Scarsdale, Inc., and/or Alan S. Moller, Esq.....(2) act as my representative in any and all proceedings before the Board of Assessment Review...for purposes of reviewing the assessment of the following real property...(3) act as my agent to verify, serve and file a petition for review of said real property assessment..." <sup>44</sup> ].

## **DISCUSSION**

### **Burlington's Authority To Represent Midway**

There is no credible evidence<sup>45</sup> that before April 28, 2005 Midway ever authorized Burlington or Allan S. Moller, Esq. to represent its interests in challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments by filing complaints and Property Appearance Forms before the BAR, filing RPTL Article 7 Petitions with this Court, serving and filing verified or certified income and expense statements pursuant to 22 NYCRR § 202.59(b),(d)(1) and filing and serving Notes of Issue herein.

### **Misleading Statements Of Authority**

There is, however, plenty of evidence in the complaints<sup>46</sup> and Property Appearance Forms<sup>47</sup> filed with the BAR and the RPTL Article 7 Notices of Petition and Petitions<sup>48</sup> and Notes of Issue<sup>49</sup> filed with this Court by Burlington and Allan S. Moller, Esq. of misleading language<sup>50</sup> asserting explicitly or implicitly that they are authorized representatives of Midway and are empowered to challenge the 1998, 1999, 2000, 2001 and 2002 tax assessments on Midway's behalf. In the face of such a determined effort to misrepresent the authority of Burlington and its attorney to represent Midway it is not surprising that the BAR did not dispute<sup>51</sup> Burlington's standing<sup>52</sup> in challenging the 1998, 1999, 2000, 2001 and 2002 tax

assessments imposed on Midway or that the Greenburgh Town Attorney, Susan Mancuso, in 2002 would enter into a Stipulation to give Allan S. Moller, Esq, a former Greenburgh Town Attorney<sup>53</sup>, " the time needed to work out the issue of who ( Midway or Burlington, or both ) will be representing the property in this proceeding. These issues will most probably be resolved through the court in separate proceedings ancillary to the subject petition, they will take time to work out "<sup>54</sup>. The Stipulation was an appropriate response to the uncertainty of Burlington's status and, by no means, serves as an " act of consent and waiver "<sup>55</sup> or an " imprimatur to Burlington's right to file on behalf of the shopping center "<sup>56</sup>.

#### **The April 28, 2005 Authorizations**

The Lease and Burlington's rights, if any, to represent itself or Midway in challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed upon Midway terminated on December 1, 2002 [ no survival provisions<sup>57</sup> in paragraphs 31(g),(h) of the Lease Addendum as in paragraphs 10 and 51 of the Lease ] and were not resurrected on April 28, 2005 or thereafter<sup>58</sup>.

On April 28, 2005 Midway filed with the Westchester County Clerk " Authorizations " for the tax years 1998, 1999, 2000, 2001 and 2002 [ " I, the undersigned being an aggrieved person within the meaning of the Real Property Tax Law...as complainant hereby designate and authorize Burlington Coat Factory Warehouse of Scarsdale, Inc. and/or Alan S. Moller, Esq...(2)

act as my representative in any and all proceedings before the Board of Assessment Review...for purposes of reviewing the assessment of the following real property...(3) act as my agent to verify, serve and file a petition for review of said real property assessment..."<sup>59</sup> ]. These 2005 Midway Authorizations are not " supplements " to nor do they legitimize or retroactively transform Burlington's " Authorizations "<sup>60</sup> and RPTL Article 7 petitions into " original Midway petitions "<sup>61</sup>.

### **Burlington's Standing To Represent Itself**

Burlington as a fractional lessee [ 24.78% ] not responsible for the payment of any real property taxes [ Lease Addendum at paragraphs 31(a),(b),(k)(2) ] to the Respondent Town and having little, if any, pecuniary interest<sup>62</sup>, never had any standing to file complaints and Property Appearance Forms before the BAR, file RPTL Article 7 Petitions with this Court, serve and file verified or certified income and expense statements pursuant to 22 NYCRR § 202.59(b),(d)(1) and file and serve Notes of Issue on behalf of itself regarding the real estate taxes imposed upon Midway for the tax years 1998, 1999, 2000, 2001 and 2002 [ See e.g., Matter of Waldbaums, Inc. v. Finance Administrator of the City of New York, 74 N.Y. 2d 128, 542 N.E. 2d 1078, 544 N.Y.S. 2d 561 ( 1989 ) ( " A fractional lessee lacks standing to maintain a tax certiorari proceeding unless the lease expressly confers the right to assert the lessor's undivided property interest in a challenge of the assessment, or unless the lessee is required

to pay directly the taxes levied against the lessor's undivided parcel. In either instance, the assessment must also have a direct adverse affect on the challenger's pecuniary interests " ); Matter of EFCO Products v. Assessor of City of Poughkeepsie, 161 A.D. 2d 44, 560 N.Y.S. 2d 158 ( 2d Dept. 1990 )( " EFCO clearly does have standing to maintain these proceedings...As a nonfractional lessee contractually obligated to directly pay the ' taxes ' levied against the lessor's undivided parcel, and whose pecuniary interests are directly affected, EFCO may maintain these proceedings " ); 919 Third Avenue Associates v. P.J. Clarke's Inc., 166 A.D. 2d 382, 561 N.Y.S. 2d 187 ( 1<sup>st</sup> Dept. 1990 )( " Pursuant to its lease with the plaintiff, defendant ( tenant ) is to pay 11% of the real estate tax attributed to the land portion as additional rent...While the tenant's pecuniary interests were certainly affected by the unusual rent escalation provision in the lease, this factor alone does not entitle the tenant to bring its own protest " ); Matter of Ames Department Stores, Inc. v. Assessor of the Town of Greece, 261 A.D. 2d 835, 689 N.Y.S. 2d 791 ( 4<sup>th</sup> Dept. 1999 )( " a fractional tenant ( 43% )...is obligated under its lease to pay a proportionate share of the real property taxes...has standing to maintain tax certiorari proceedings because its pecuniary interests are directly affected by the tax assessment and because the lease grants it the right to contest the taxes in its own name or in the name of the lessor " ); Matter of K-Mart Corp. v. Board of Assessors of the County of Tompkins, 176 A.D. 2d 1034, 575 N.Y.S. 2d 185 ( 3d Dept. 1991 )( " The lease also allowed ( a fractional lessee ) to assert the lessor's undivided property

interest in a RPTL article 7 proceeding " ); Matter of Ames Department Stores v. Assessor of the Town of Concord, 102 A.D. 2d 9, 476 N.Y.S. 2d 222 ( 4<sup>th</sup> Dept. 1984 )( " Paragraph 9.01 of the agreement provides that petitioner is responsible for ' all taxes, assessments and other governmental charges of any kind ', Paragraph 9.02 provides that in the event the stores are not separately assessed petitioner is liable for its pro rata share of the taxes based on the percentage of gross leasable space of the plaza that it occupies. Lastly paragraph 9.03 grants petitioner the right to contest tax assessments in its own name, ' the name of [ the ] LESSOR or both ' " ); Matter of Reckson FS Limited v. Assessor of Town of Smithtown, Index No. 1999-03111, Suffolk Sup. May 5, 1999 ( " Therefore, a nonfractional lessee that pays the entire tax assessment on a property has standing to commence a proceeding challenging the tax assessment even though it is not the owner of the property " )], let alone on behalf of Midway.

#### **Midways's Refusal To " Contest Or Review "**

Nor was such standing conferred upon Burlington because Midway refused to respond to a request in October of 1997<sup>63</sup> from Burlington " to contest or review the amount or validity of any such Tax by appropriate legal proceedings "<sup>64</sup>. Such a refusal did not create " an implied contractual right to protect ( Burlington's ) interest and file suit on behalf of itself and/or on behalf of ( Midway )" <sup>65</sup> but, at best, created a right

arising from the breach of paragraph 31(g) of the Lease Addendum to sue Midway for damages or specific performance<sup>66</sup>. It is clear the Burlington considered suing Midway for breach of the lease agreement but chose not to do so [ " These issues will most probably be resolved through the court in separate proceedings ancillary to the subject petition, they will take time to work out "<sup>67</sup> ].

### **Burlington Could Have Negotiated For A Better Remedy**

The genesis of this litigation can be found in the failure of a sophisticated<sup>68</sup> commercial tenant, Burlington, to anticipate the reluctance of the landlord, Midway, to " contest or review " its tax assessments after Burlington exercised its " right to require Landlord " to do so as provided for in the Lease Addendum at paragraph 31(g). Burlington's misleading and legally unsupportable attempt to step into the shoes of Midway and challenge the 1998, 1999, 2000, 2001 and 2002 tax assessments on Midway's behalf is little more than a belated attempt to create a remedy in the Lease Addendum which does not exist. For example, Burlington could have negotiated for a meaningful remedy and demanded explicit language in the Lease Addendum giving it the right to contest the tax assessments on Midway's behalf or its own behalf [ See e.g., Matter of Ames Department Stores v. Assessor of the Town of Concord, 102 A.D. 2d 9, 476 N.Y.S. 2d 222 ( 4<sup>th</sup> Dept. 1984 ) ( " Lastly paragraph 9.03 grants petitioner the right to contest tax assessments in its own name, ' the name of [ the ] LESSOR or



both ' " ); Broad Properties, Inc. v. Wheels Inc., 43 A.D. 2d 276, 351 N.Y.S. 2d 15 ( 2d Dept. 1974 )( " When a tenant negotiates for the leasehold of new improved property...and agrees to pay the tax increases on his portion, it is understandable that he would exact a promise from the landlord that his portion would be assessed separately for taxes, for what better way can the parties liquidate the future increases " ); City Banks Farmers Trust Co. v. J & J Slater, Inc., 101 N.Y.S. 2d ( N.Y. Sup. 1950 )( " ( Tenant ) further contends that it is a condition precedent to its liability for one-half the excess taxes...that the landlord seek a reduction of the...assessment...the court cannot read into the agreement an obligation by way of condition precedent or otherwise for the landlord to initiate any proceeding to reduce the assessment...Had the parties intended to create such an obligation, it would have been simple to have expressed it in language " )]. Evidently, Midway decided to maintain control<sup>69</sup> over any challenge to its tax assessments [ " Any contest requested by Tenant...shall be undertaken by Landlord "<sup>70</sup> ] and, in fact, never challenged the subject tax assessments for reasons best known to itself.

#### **Failure To Comply With 22 NYCRR § 202.59(b),(d)(1)**

The Petitioners<sup>71</sup> and the Respondent Town<sup>72</sup> discuss whether or not the July 3, 2003 financial documents, all six pages of them, meet the requirements of 22 NYCRR § 202.29(b)[ " Before the note of issue...may be filed, the petitioner shall have served on the respondent, in

triplicate...a copy of a verified or certified statement of the income and expenses on the property for each tax year under review.. " ] and 22 NYCRR § 202.59(d)(1) [ " A note of issue...shall not be filed unless...the statement of income and expenses has been served and filed " ].

### **The July 3, 2003 Financial Documents**

The July 3, 2003 financial documents do not meet the requirements of 22 NYCRR § 202.59(b) because (1) they are not certified or verified<sup>73</sup>, (2) they were not served and filed in triplicate<sup>74</sup>, (3) they were not served before the filing of the Notes of Issue nor was an affidavit of service of same filed with the Westchester County Clerk, (4) they are not complete with only two pages of each of the three documents being provided [ e.g., Note 1 explaining " the basis of accounting " was not provided regarding the 1999, 2000, 2001, 2002 tax years and at oral argument counsel for Petitioners admitted that the 1998 I.R.S. 8825 Form is not complete ], (5) they provide insufficient information regarding income and expenses [ see e.g., the November 22, 2005 Verification submitted by Midway<sup>75</sup> ( " the most recent 2005 filing by Midway with no fewer than one hundred (100) line entries...illustrates the type of verified or certified income and expense statements required in such proceedings " <sup>76</sup> )] and (6) the Assessor was not served with the financial documents [ See e.g., Matter of Pyramid Crossgrates Company v. Board of Assessors, 302 A.D. 2d 826, 756 N.Y.S. 2d 316 ( 3d Dept. 2003 )( " An income and expense statement is critical to

valuating property under the income approach to value method...and is a condition precedent to investigating and auditing a petitioner's books and records...Thus we find that PCC's failure over a period exceeding four years-to file and serve a statement of income and expenses constituted a substantive defect which may have dramatically hindered respondents' ability to prepare for trial, preparation which generally includes-but is not limited to-the time consuming auditing or testing of the figures reported in income and expense statement " ); Matter of Rose Mount Vernon, Corp., 1 Misc. 3d 906(A), 781 N.Y.S. 2d 628 ( West. Sup. ) ( " 22 N.Y.C.R.R. § 202.59(b) provides that ' Before the note of issue...may be filed, the petitioner shall have served on the respondent, in triplicate...a copy of a verified or certified statement of the income and expenses on the property for each tax year under review ' ...In addition, the Court finds that Petitioner has failed to timely serve Respondents or their counsel with triplicate and verified or certified copies of...income and expenses statements...it is clear that some of the statements were never received and/or some were not verified or certified and/or some were not in triplicate and/or some were not served before the filing of their respective Notes of Issue " ), aff'd 15 A.D. 3d 585, 791 N.Y.S. 2d 572 ( 2d Dept. 2005 )( " the petitioner failed to comply with the requirements for the proper and timely service and filing of the requisite income and expense statements pursuant to 22 NYCRR 202.59 " ); c.f. Matter of Syms Corp v. Assessor of Town of Clarence, 5 A.D. 3d 984, 773 N.Y.S. 2d 314 ( 4<sup>th</sup>

Dept. 2004 ); Matter of Eastern Housing Associates v. City Assessor of City of Watertown, 12 A.D. 3d 1035, 784 N.Y.S. 2d 783 ( 4<sup>th</sup> Dept. 2004 )]].

As far as complying with 22 NYCRR § 202.59(d)(1) the " Petitioner concedes that the income and expense statements were not filed with the Westchester County Clerk before the filing of the Notes of Issue and concedes that this does not satisfy 22 N.Y.C.R.R. § 202.59(d)(1) "<sup>77</sup> [ See e.g., Matter of Rose Mount Vernon Corp, 1 Misc. 3d 906(A), 781 N.Y.S. 2d 628 ( West. Sup. ) ( " It is clear that Petitioners failed to file the property's income and expenses statements...with the Westchester County Clerk prior to... issuance of all seven Notes of Issue. This failure constitutes a violation of the filing requirements of 22 N.Y.C.R.R. § 202.59(d)(1) and as a consequence the filed Notes of Issue...must be vacated pursuant to 22 N.Y.C.R.R. § 202.21(e) " ), aff'd 15 A.D. 3d 585, 791 N.Y.S. 2d 572 ( 2d Dept. 2005 )( " the petitioner failed to comply with the requirements for the proper and timely service and filing of the requisite income and expense statements pursuant to 22 NYCRR 202.59 " ) ].

#### **Subsequent Filings Of Financial Documents**

On September 17, 2004 Burlington filed a " Statement Of Income & Expense " and a " Certification " from Midway with the Westchester County Clerk for the tax years 2000, 2001 and 2002<sup>78</sup> which Petitioners describe as a mere " technical violation " of 22 NYCRR § 202.59(d)(1) since these

certified financial documents were filed fourteen months after the Notes of Issue for 2000, 2001 and 2002 were filed with the Westchester County Clerk. On December 5, 2005 Burlington filed " income and expense statements with the Westchester County Clerk for 1998 and 1999 "79. In addition to untimeliness, the September 17, 2004 and December 5, 2005 financial documents, like the identical July 3, 2003 versions thereof, are not complete, are insufficient as income and expense statements and, further, no affidavit of service on the Respondent Town was filed with the Westchester County Clerk.

### **Prejudice To Respondents**

The Court finds that Respondents have been prejudiced by the Petitioners' failure to comply with the requirements of 22 NYCRR § 202.59(b),(d)(1) and serve timely and complete verified or certified income and expense statements for the tax years 1998, 1999, 2000, 2001 and 2002 on the Respondents and with the Westchester County Clerk before the issuance of the Notes of Issue in the following respects. First, Respondents have been unable to adequately prepare for trial including, not limited to, conducting an audit and preparing a trial ready appraisal. Second, the Respondents were denied an opportunity to review the financial status of the property, re-evaluate their position regarding assessment and avoid additional tax assessment review proceedings on the same property. Third, Respondents have incurred litigation costs and attorneys fees which may

have been avoided or reduced by the having the opportunity to address the financial basis of Petitioners claims sooner rather than later [ See e.g., Matter of Rose Mount Vernon, Corp., supra ] .

#### **Judiciary Law § 489**

The Respondent Edgemont seeks a determination that Midway and Burlington have violated Judiciary Law § 489 which " stems from the ( actions of ) the property owner and landlord ( Midway ) ( in granting ) to Burlington in April 20, 2005... authorizations<sup>80</sup> to initiate and maintain the above tax assessment review proceedings 2-1/2 years after the termination of the Burlington Lease. Further, the authorizations from Midway were given after Burlington had relinquished its pecuniary interest in any tax refunds effective as of the December 1, 2002 termination of the...Lease "<sup>81</sup>.

Judiciary Law § 489 provides, in part, that " No person or...corporation...shall solicit, buy or take an assignment of...with the intent and for the purpose of bringing an action or proceeding thereon ". A review of the Authorizations executed by Midway<sup>82</sup> designating and authorizing Burlington and " Alan S. Moller, Esq. " to act as representative and agent of Midway in negotiations, BAR proceedings and RPTL Article 7 proceedings challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed by the Respondent Town do not reveal that any assignment of claim has been solicited, bought or taken<sup>83</sup> [ see e.g.,

Bluebird Partners, LP v. First Fidelity Bank, N.A., 94 N.Y. 2d 726, 731 N.E. 2d 581, 709 N.Y.S. 2d 865 ( 2000 )( purchase of claims ); Krusch v. Affordable Housing LLC, 266 A.D. 2d 122, 698 N.Y.S. 2d 674 ( 1<sup>st</sup> Dept. 1999 )( acquisition of notes ) ]. In addition, the Authorizations are not limited solely to bringing an RPTL Article 7 proceeding [ see e.g., Matter of Barthel v. Board of Assessors of the Town of Hurley, 292 A.D. 2d 754, 739 N.Y.S. 2d 771 ( 3d Dept. 2002 )( " In this case, Peck's fairly obvious purpose was to bring about a reduction in the contracting parties' real property tax assessments by any available means, including negotiation, administrative review and, as a last resort, judicial review...Certainly, on the present record, it cannot be stated as a matter of law that the acquisition of petitioners' claims was ' made with the intent and for the purpose...of bringing an action or proceeding ' " )<sup>84</sup>.

Summary disposition without a complete record is, particularly, inappropriate when considering a violation of Judiciary Law § 489 [ see Bluebird Partners, LP, supra, at 94 N.Y. 2d 734-737 ( " This Court's jurisprudence demonstrates that while this Court has been willing to find that an action is not champertous as a matter of law...it has been hesitant to find that an action is champertous as a matter of law...we are satisfied that the record [ which included testimony of witnesses ] here does not support a finding of champerty as a matter of law for summary resolution. In cannot be determined on this record and in this procedural posture that champerty was the primary motivation, no less the sole basis, for all this strategic jockeying and financial positioning " )].

## **Conclusion**

Based upon the foregoing the CPLR § 3212 motion of the Intervenor-Respondent Edgemont Union Free School District is granted to the extent of dismissing the subject 1998, 1999, 2000, 2001 and 2002 RPTL Article 7 petitions on the grounds that Burlington never had any authority to represent Midway nor did it ever have any standing to represent itself under RPTL § 704 in challenging the 1998, 1999, 2000, 2001 and 2002 tax assessments imposed upon Midway, and denied to the extent the motion seeks a determination that Midway and Burlington have violated Judiciary Law § 489. The Motion of the Respondents The Town of Greenburgh, its Assessor and BAR pursuant to 22 NYCRR § 202.21(e) seeking to vacate the Notes of Issue filed herein for a failure to comply with the filing and service requirements of 22 NYCRR §§ 202.59(b),(d)(1) and pursuant to RPTL § 718(2)(d) dismissing the 1998, 1999, 2000, 2001 and 2002 Petitions is granted in all respects. And the cross motion of the Petitioners is denied in all respects.



The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y. 10606  
March 29, 2006

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## ENDNOTES

1. Affirmation of Allan S. Moller dated December 7, 2005 [ " Moller Aff. I " ] at para. 4.
2. Moller Aff. I at Exs. C-5 ( 1998 Petition ) and E ( 2001 Petition ); Affirmation of Paul J. Goldman dated October 14, 2005 [ " Goldman Aff. I " ] Exs. B ( 1998 Petition ), C ( 1999 Petition ), D ( 2000 Petition ), E ( 2001 Petition ) and F ( 2002 Petition ).
3. Goldman Aff. I at para. 2.
4. Affirmation of Peter Carparelli dated October 21, 2005 [ " Carparelli Aff. I " ] at paras. 3-4.
5. Carparelli Aff. I at Ex. B.
6. Reply Affirmation of Peter Carparelli dated January 24, 2006 [ " Carparelli Aff. II " ] at paras. 2-11.
7. Moller Aff. I at para. 80 ( " Petitioner concedes that the income and expense statements were not filed with the Westchester County Clerk before the filing of the Notes of Issue and concedes that this does not satisfy 22 N.Y.C.R.R. § 202.59(d)(1) " ).
8. Notice of Cross Motion dated December 7, 2005.
9. Moller Aff. I at G-1, G-2.
10. Moller Aff. I at Ex. L.
11. Goldman Aff. I at Ex. A; Moller Aff. I at Ex. A.
12. Goldman Aff. I at Ex. A; Moller Aff. I at Ex. A.
13. The letter of credit is referred to in the Lease at para. 1(j) and appears as an attachment to the Lease Addendum [ Goldman Aff. I at Ex. A ] and was issued on the account of Burlington Coat Factory Warehouse of Detroit, Inc. and not the Petitioner Burlington Coat Factory Warehouse of Scarsdale, Inc.
14. Moller Aff. I at Ex. B-3.
15. Moller Aff. I at Ex. B-3.
16. Moller Aff. I at Ex. B-3.

17. Moller Aff. I at fn 2 on p. 5.
18. Moller Aff. I at Ex. B-1.
19. Moller Aff. I at Ex. B-2.
20. Moller Aff. I at Ex. B-3.
21. Moller Aff. I at Ex. B-3.
22. Moller Aff. I at Ex. B-4.
23. Moller Aff. I at Ex. B-5.
24. Affirmation of Mark S. Tulis dated December 2, 2005 [ " Tulis Aff. " ] at para. 6. See also Moller Aff. I at para. 11.
25. Moller Aff. I at Ex. C-1.
26. Moller Aff. I at Ex. C-4.
27. Moller Aff. I at Ex. C-5.
28. Moller Aff. I at Ex. D-1 ( 1999 ), D-2 ( 2000 ), D-3 ( 2001 ), D-4 ( 2002 ).
29. Goldman Aff. I at Ex. C ( 1999 ), Ex. D ( 2000 ), Ex. E ( 2001 ), Ex. F ( 2002 ).
30. Moller Aff. I at para. 16.
31. Moller Aff. I at para. 80 ( " Petitioner concedes that the income and expense statements were not filed with the Westchester County Clerk before the filing of the Notes of Issue and concedes that this does not satisfy 22 N.Y.C.R.R. § 202.59(d)(1). Nevertheless, the income and expense statements were still filed with the *County Clerk*, albeit after the filing of the Notes of Issue, on the following dates: i) For 2000, 2001 and 2002 on September 17, 2004 and ii) For the 1998 and 1999 years, more recently, on December 5, 2005... " )].
32. Moller Aff. I at Ex. H.
33. Moller Aff. I at paras. 17-19; Exs. F-1, F-2. The documents underlying the September 20, 2002 Stipulation provide some useful insights. For example, the September 5, 2002 letter from Allan S. Moller to Susan Mancuso, Town Attorney, indicates [ contrary to

the assertion that " by signing the 2002 Stipulation and agreeing to the one-year extension, the Town took an active role and leant its imprimatur to Burlington's right to file on behalf of the shopping center...the Town affirmed Burlington's right to file the petitions in the name of Midway Shopping Center and waived any objection " ] ( Moller Aff. I. at para. 61 )] that there was, in fact, considerable uncertainty as to Burlington's standing and that the Stipulation would be helpful to " allow the time needed to work out the issue of who ( Midway or Burlington, or both ) will be representing the property in this proceeding ". Indeed, Mr. Moller promised to clarify this uncertainty in, presumably, a breach of lease agreement action [ " These issues will most probably be resolved through the court in separate proceedings ancillary to the subject petition, they will take time to work out " ] arising from Midway's refusal " to contest or review " its tax assessments after Burlington exercised its " right to require " as set forth in paragraph 31(g) of the Lease Addendum as discussed above.

34. Affidavit of Gennaro Iagallo sworn to October 21, 2005 [ " Iagallo Aff. I " ] at para. 4 ( " Counsel has further requested that I conduct a review of my files and the file maintained by the ( BAR ) with respect to the subject premises to determine whether verified income and expense statements were ever served on the Assessor or BAR. A review of said files indicates no verified or certified income and expense statements were served on the undersigned or submitted to the BAR, although my files do contain the Independent Auditors Reports...which apparently my office received from the Town Attorney in or about July of 2003 " ).

35. Moller Aff. I at Ex. G-1.

36. Carparelli Aff. I at para. 4.

37. Carparelli Aff. II at para. 8; Moller Sur-Reply Aff. at paras. 13-14.

38. Moller Aff. I at Ex. G-2; Carparelli Aff. I at Ex. B.

39. Moller Aff. I at Ex. G-2; Carparelli Aff. I at Ex. B.

40. Moller Aff. I at Ex. G-2.

41. Moller Aff. I at I-1, I-2, I-3.

42. Moller Aff. I at para. 86; Ex. L.

43.Moller Aff. I. at para. 27; Ex. J.

44.Moller Aff. I at para. 29; Ex. K-2.

45.One of the more incredible pieces of " evidence " relied upon by Burlington is the transformation of the gratuitous advice given to its counsel, Allan S. Moller, Esq., by Mark Tulis, Esq., an attorney never retained by Midway " that in order to fully protect ( Burlington's ) interest in reducing the tax assessment at the shopping center ( Burlington ) should file a complaint with ( the BAR ) " [ Tulis Aff. at para. 6 ] into an authorization from Midway empowering Burlington to challenge the subject tax assessments on Midway's behalf [ see Moller Aff. I at paras. 9-11, 34 ( " Burlington acted in the name of Midway and on June 16, 1998 filed a Complaint ( before the BAR ) " ); Goldman Aff. I at paras. 29-33 ].

46.The language in the 1998 BAR complaint [ Moller Aff. I at Ex. C-1 ] identifying Burlington's New Jersey address as the address of the " owner(s) " is misleading since it is not Midway's address. The language identifying Allan S. Moller, Esq. as " representative of owner " and " owner or representative " is misleading since Mr. Moller was not an owner or representative of Midway. This pattern of misleading statements was repeated in subsequently filed BAR complaints in 1999 ( Moller Aff. I. Ex. D-1 ), 2000 ( Moller Aff. I at Ex. D-2 ), 2001 ( Moller Aff. I at Ex. D-3 ) and 2002 ( Moller Aff. I at Ex. D-4 ). There is no evidence that prior to April 28, 2005 Mr. Moller or Burlington were ever authorized by Midway to be its " representative " and act on its behalf. In addition, there is no evidence that Midway ever authorized Mr. Moller or Burlington to identify Burlington's New Jersey address as Midway's address.

47.In the 1999 Property Appearance Form Allen S. Moller, Esq. is identified as the " REP. " of Midway ( Moller Aff. at I Ex. D-1 ) and in the 2000 Form as the " REPRESENTATIVE " of Midway ( Moller Aff. I at Ex. D-2 ). These statements are misleading since there is no evidence that prior to April 28, 2005 Midway ever authorized Mr. Moller to be its representative.

48.The language in the 1998 Notice of Petition [ Moller Aff. I at Ex. C-5 ] which identifies Allan S. Moller, Esq. as " Attorney for Petitioner " and in the Petition which identifies Mr. Moller as the " Duly Authorized Representative " of " Petitioner " and Mr. Moller's sworn statement that he is " the duly authorized representative and attorney for the aforementioned petitioner " is misleading in that it asserts that he is Midway's authorized representative and attorney. This pattern of misleading

statements was repeated in the 1999, 2000 and 2002 Notices of Petition and Petitions [ Goldman Aff. I at Exs. C, E & F ]. There is no evidence that prior to April 28, 2005 Mr. Moller was ever authorized to act as Midway's representative and attorney or that he and Burlington were ever authorized by Midway to act on its behalf.

The 2001 Notice of Petition and Petition [ Moller Aff. I at Ex. E ] is the least misleading of the five RPTL Article 7 Petitions since the Petitioner is only identified as " Burlington Coat Factory Warehouse of Scarsdale, Inc. ". As a consequence the language in the Notice of Petition which identifies Allan S. Moller, Esq. as " Attorney for Petitioner " and in the Petition which identifies Mr. Moller as " Duly Authorized Representative " and Mr. Moller's Verification which states that " he is the duly authorized representative and attorney for the aforementioned petitioner " would appear to be true and accurate unlike similar language in the 1998, 1999, 2000 and 2002 Notices of Petition and Petitions.

The 1998 Petition [ Moller Aff. I at Ex. C-5 ] is misleading in other respects, e.g., the FIRST paragraph describes the Petitioner [ " Midway Shopping Center, by Burlington Coat Factory Warehouse of Scarsdale, Inc. " ] as a " domestic corporate owner " ( Midway ) " or lessee obligated to pay taxes " ( Burlington ). Burlington as a fractional lessee was never obligated to pay any real estate taxes to the Respondent Town. Paragraphs 31(a), (b) of the Lease Addendum require Burlington to only pay additional rent to Midway reflecting its share [ 24.78% ] of real property taxes, the payment of which is the sole responsibility of Midway. This pattern of misleading statements was repeated in the 1999, 2000 and 2002 Petitions [ Goldman Aff. I at Exs. C, E & F ].

49. The Notes of Issue and RJI forms [ Moller Aff. I at Ex. H ] identify Allan S. Moller, Esq. As " Attorney for Petitioner(s) " " Midway Shopping Center by Burlington Coat Factory Warehouse of Scarsdale, Inc. ". As with the Notices of Petition and Petitions this language is misleading in that it asserts that Mr. Moller represents not only Burlington but Midway as well. **There is no evidence that prior to April 28, 2005 Mr. Moller or Burlington were ever authorized by Midway to act on its behalf.**

50. Affirmation of Paul Goldman dated January 23, 2006 [ " Goldman Aff. II " ] at paras. 21-22, 55-56; Affidavit of Gennaro Iagallo sworn to January 19, 2006 [ " Iagallo Aff. II " ] at para. 6.

51. Iagallo Aff. II at paras. 7, 22-23.

52. Moller Aff. I at paras. 48-59.

53. Iagallo Aff. II at para. 7.

54. Moller Aff. I at Ex. F-1.

55. Goldman Aff. II at paras. 55-56.

56. Moller Aff. I at paras. 59-64.

57. Intervenor-Respondent's Memorandum of Law [ " Edgemont Memo. " ] at pp. 8-10 ( " In New York, in the absence of a survival clause, there is no further liability under a lease after termination...the interest [of] Burlington in the tax refunds reverted to Midway at the expiration of the Burlington Lease absent a survival clause or other contractual arrangement. The parties to the Burlington Lease did not expressly provide that any aspect of ( paragraph ) 31 of the ( Lease Addendum ) would survive termination and expiration...Since the rights of Burlington expired on December 1, 2002 there is no preserved ability for Midway to manufacture the pecuniary right to commence and maintain the proceedings two and one-half years after lease termination " ).

58. Edgemont Memo. at pp. 9-10 ( " the Authorizations provided by Midway to Burlington on April 20, 2005...occurred after the termination of the Burlington Lease, and the expiration of the July 30, 1998, July 30, 1999, July 30, 2000, July 30, 2001 and July 30, 2002 statutes of limitation for the commencement of each RPTL proceeding, are ineffective, null and void " ).

59. Moller Aff. I at para. 29; Ex. K-2.

60. Moller Aff. I at Ex. K-1; Goldman Aff. II at paras. 43-45.

61. Moller Aff. I. at para. 28; Goldman Aff. II at paras. 37, 43-45.

62. Goldman Aff. II. at paras. 11-13 ( " any pecuniary interest of Burlington in Midway's real estate taxes is too remote since Midway can not force Burlington to pay the real estate tax obligations under the Lease. The Lease included a specially negotiated ' non-recourse clause in favor of Burlington Scarsdale ' .( Addendum § 61 ). In Addendum § 61 Midway agreed to limit its remedies against the Tenant...Midway agreed that it would look ' solely ' to the Letter of Credit attached to the Addendum for the collection of any judgment requiring payment of money by tenant upon an event of default and ' no other assets of the Tenant shall be subject to levy, execution or other judicial process for

the satisfaction of the Landlord's claims "...In essence, the sole security that the Landlord had for the payment of rent, the additional rent, including its share of real estate taxes, and the other lease obligations was the Letter of Credit for a single year's rent ( Lease § 1(j)). More importantly, the actual Letter of Credit for the Lease was issued on the account of Burlington Coat Factory Warehouse of Detroit, Inc. not Burlington Coat Factory Warehouse of Scarsdale, Inc. [ Goldman Aff. I at Ex. A ]...Burlington Scarsdale...did not have any liability under the Lease or the Letter of Credit for the payment of its share of real estate taxes. In sum, Burlington Scarsdale does not possess a legally sufficient pecuniary interest " ); See Matter of Saint Gobain v. Town of Wheatfield, 17 A.D. 3d 1112, 1113 ( 4<sup>th</sup> Dept. 2005 )( parent corporation did not have standing to bring a tax assessment proceeding on property owned by a wholly-owned subsidiary ).

63. Moller Aff. I Exs. B-1 to B-5.

64. Moller Aff. I at para. 33.

65. Moller Aff. I at para. 35-37. See also Sur-Reply Affirmation of Allan S. Moller dated February 15, 2006 [ " Moller Sur-Reply Aff. " ] at para. 11 ( " The only issue is whether Burlington can proceed when Midway failed to act " ).

66. Goldman Aff. II at paras. 36-42.

67. Moller Aff. I at Ex. F-1

68. Goldman Aff. II at paras. 49-50.

69. Goldman Aff. II at para. 36.

70. Moller Aff. I at Ex. A, Lease Addendum para. 31(h) .

71. Moller Aff. I at paras. 20-23; Moller Sur-Reply Aff. at paras. 12-25.

72. Carparelli Aff. I at para. 4-10; Affidavit of Gennaro Iagallo sworn to October 21, 2005 [ " Iagallo Aff. I " ] at para. 3-4.

73. Compare the 2005 Verification of Midway's income and expenses at Ex. A to Carparelli Aff. II. In addition, the " Midway Representation Letters " annexed to the Moller Sur-Reply Aff. at Ex. D are unsworn and no substitute for certified or verified income and expense statements pursuant to 22 NYCRR §§ 202.59(b), (d)(1).



74. Carparelli Aff. II at para. 8; Moller Sur Reply Aff. at paras. 13-14.
75. Carparelli Aff. II at Ex. A.
76. Carparelli Aff. II at para. 8.
77. Moller Aff. I at para. 80.
78. Moller Aff. I at I-1, I-2, I-3.
79. Moller Aff. I at para. 86; Ex. L.
80. Goldman Aff. I at Ex. H; Moller Aff. I at Ex. K-2.
81. Goldman Aff. I at para. 2; see also: Intervenor-Respondent's Memo. at pp. 11-12; Goldman Aff. II at paras. 21-23.
82. Moller Aff. I at Ex. K.
83. Petitioner's Memorandum of Law dated December 7, 2005 at pp. 7-8; Affidavit of Lyle Ison Steinberg sworn to December 6, 2005 at para. 4.
84. Contrary to the assertions at p. 11 of the Intervenor-Respondent's Memo. the Court in Barthel, supra, at 292 A.D. 2d 755-756 did not find a violation of Judiciary Law § 489 but voided the agreements because " Peck lacked authority [ as a non-attorney ] to institute these proceedings on behalf of the affected landowners ".