

**Matter of American Premier Underwriters, Inc. v
Abelow**

2007 NY Slip Op 32330(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0603973/2006

Judge: Helen E. Freedman

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

PRESENT: _____
Justice

PART _____

Index Number : 603973/2006

AMERICAN PREMIER UNDERWRITERS

vs

ABELOW, HERBERT B.

Sequence Number : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

5/29/07

Is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 7/17/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 39

-----X
IN THE MATTER OF THE APPLICATION OF
AMERICAN PREMIER UNDERWRITERS, INC.,

Petitioner,

Index No. 603973/06

-against-

HERBERT B. ABELOW, GLADYS GARDSTEIN CASH,
CEDE & CO., JEFF HERR, JULIE M. HERR, JULIE
HERR IRREVOCABLE TRUST, ALAN RUSSELL KAHN,
AMANDA HEATHER KAHN AKA AMANDA HEATHER
KAHN-KIRBY, KIMBERLY ROBIN KAHN, JULES V.
LANE, STANLEY LANE, ELEANOR L. SIEGEL AKA
ELEANOR LANE, and CHARLES J. TANENBAUM,

Respondents,

TO DETERMINE THE FAIR VALUE OF THE SHARES OF
THE NEW YORK AND HARLEM RAILROAD COMPANY
UNDER N.Y. BUS. CORP. LAW § 623.

-----X
Helen E. Freedman, J.:

Petitioner American Premier Underwriters, Inc. (“APU”) brings this application pursuant to BCL § 623 to determine the rights of minority shareholders of New York and Harlem Railroad Company (“NY&H”) and to fix the fair value of the shares of the shareholders who dissented to the September 27, 2006 merger between NY&H and APU. On January 4, 2007, this Court granted the dissenting shareholders’ cross motion to this petition for the purposes of seeking additional discovery, retention of an expert, and depositions of respective parties’ experts.

Discovery having been completed, petitioner now seeks an order declaring \$462 per share to be the fair price to compensate the shareholders and an order declaring that certain dissenting shareholders have neither complied with BCL § 623 nor submitted evidence of beneficial ownership of shares and, thus, are not entitled to receive the BCL § 623 appraisal remedy. NY&H contends that

the offer price is too low and that the appropriate price per share should be \$1,178 or, at a minimum \$1,023. The difference between the parties' fair value estimates stems from their dispute concerning the timing of certain asset transfers from APU to NY&H and the appropriate discount rate to use to value NY&H's future cash receipts. For the reasons stated below, the petition is granted, and the fair value is fixed at \$462 per share.

Parties and Shares:

NY&H was incorporated in 1831. At that time, it owned the Harlem Railroad Line and the railroad terminal now known as Grand Central Station.

APU leased the railroad property from NY&H in 1873, and the two entities merged in 2006. When the lease was originally executed, APU was known as the New York Central and Hudson River Railroad Company, and then the Penn Central Corporation. For simplicity, APU and its predecessors will be referred to as "APU." APU's wholly owned subsidiary, the Owasco River Railway, Inc. ("Owasco"), owns the Hudson Railroad Line. APU is wholly owned by APU Holding Company, which is wholly owned by the American Financial Group ("AFG").

Prior to the merger, NY&H had 200,000 outstanding common and preferred shares. APU Holding Company owned 194,229 of those shares or 97% of NY&H capital stock. NY&H's minority shareholders who are unrelated to APU own the remaining 5,771 shares. At oral argument on June 8, 2007, the parties stated that most of the minority shareholders have accepted the \$462 per share offer price, and only minority shareholders that own approximately 1,000 shares constitute the dissenting shareholders who seek additional compensation.

Background:

In 1873, NY&H leased the railroad properties to APU (the "Ground Lease"). The Ground

Lease had a 401 year term, entitling APU to operate and manage the properties, enter into sublease or sale agreements, and retain the revenue. In exchange, APU agreed to pay rent to NY&H equal to five dollars per NY&H share, totaling one million dollars each year, which NY&H distributed to shareholders as dividends. APU also agreed to pay the interest on NY&H's outstanding mortgage bonds and to pay NY&H's operating expenses. Upon expiration of the Ground Lease in 2274, APU was obligated to return to NY&H the proceeds from the sale of NY&H properties and any remaining NY&H property in its original state. The parties refer to APU's obligation to return the sale proceeds in 2274 without interest to NY&H as the "Advance." The obligation to pay the Advance stems from the provision in the April 1, 1873 Ground Lease that requires APU to pay back money received upon the sale of assets not necessary to operate the railroad. It states:

And that it [APU] will account for and pay over to the said party of the first part [NY&H] the consideration money received for any portion of the lands hereby demised, which, having been found not necessary for the use of the said demised railroad and branch, may have been disposed of absolutely, except such as may have been exchanged for other lands of equal value; but no interest is to accrue on such consideration-money during the continuance of this contract; and, on the termination of this contract, the said party of the first part, its successors and assigns, shall pay to the said party of the second part [APU], its successors and assigns, the amount expended out of its own means, but without interest, in the acquirement, otherwise by exchange, of additional real estate for the use of the railroad and branch hereby demised; provided, the said party of the first part shall elect to take the same; so far it shall elect not to take such real estate, it shall, if the title has been taken in its name, convey the same as the said party of the second part shall direct, but without covenants of warranty.

At the time of the merger, the Advance totaled \$145 million, and NY&H's right to receive the Advance in the future comprised approximately ninety-five percent of NY&H's value.

In 1970, APU, then known as Penn Central Transportation Company, commenced a bankruptcy reorganization. In 1972, as part of its reorganization and its decision to move away from the railroad operation business, APU and Owasco subleased Grand Central Terminal, the Harlem

Railroad Line, and the Hudson Railroad Line to the Metropolitan Transportation Authority (the “MTA Sublease”). The MTA Sublease had a sixty year term with an option to renew for an additional thirty years. APU retained the right to sell certain transferable air development rights (“TDRs”) in the Grand Central Terminal area that belonged to NY&H and to sell certain other “de minimus” assets.

In 1994, APU, Owasco, and the MTA amended the MTA Sublease to extend the term to 2274, the year that the APU and NY&H Ground Lease would expire. The parties to the MTA Sublease also entered into an option agreement that granted the MTA the option to purchase Grand Central Terminal, the Harlem Railroad Line, and the Hudson Railroad Line (the “MTA Purchase Option”). The MTA had the right to exercise that option between 2017 and 2019, with closing to occur no earlier than April 2019. APU had the right to postpone the MTA’s purchase for fifteen years to 2034. If closing occurred in 2019, the purchase price would equal between \$23.1 million and \$33.1 million, and if closing occurred in 2034, the purchase price would increase by one hundred thousand dollars. Additionally, upon the exercise of the option, eleven million dollars of the total purchase price would be allocated to NY&H. At a 1994 shareholders’ meeting, the NY&H shareholders approved the MTA Purchase Option.

In 1994, a group of minority shareholders sued NY&H to enjoin approval of the option agreement. The Court denied the injunction and dismissed the action, stating that the shareholders’ sole remedy was to seek an appraisal. The Appellate Division affirmed. *Norte & Co. v. N.Y. & Harlem R.R. Co.*, Index No. 108611/94, aff’d 222 A.D.2d 357 (1st Dept. 1995). However, the shareholders did not seek an appraisal at that time. After the MTA Sublease amendment, APU sold 916,370 square feet of TDRs, the proceeds of which were added to the Advance.

In August 2006, APU, Owasco, and NY&H entered into a sales contract with a third-party purchaser, Midtown Ventures LLC, to sell the right to receive rent from the MTA for its use of the railroad properties as well as the remaining TDRs and real estate for \$57.5 million (the "Asset Purchase Agreement"). Of the total purchase price, \$31.5 million would be allocated to NY&H and added to the Advance. In 2006, the New York City Department of Finance concluded that for purposes of General Corporation Taxes, NY&H and APU should be taxed separately. As a result, NY&H had a tax obligation of eight million dollars for the years 1995 to 2001, largely based on the gains from the sale of TDRs. In order to avoid this tax treatment in the future and specifically to avoid heavy tax liability for the 2006 Asset Purchase Agreement, APU's and NY&H's management considered merging the companies.

In an August 2, 2006 letter, APU Holding proposed to the NY&H directors a merger between APU and NY&H, and offered to compensate NY&H's shareholders \$462 in cash per share. APU Holding arrived at that amount by calculating the present value of NY&H's "gross cash flows," including anticipated cash flow from the Asset Purchase Agreement. APU Holding assumed that the MTA would exercise its option in 2019, which would cause the Ground Lease to terminate and trigger APU's obligation to pay the Advance to NY&H two hundred and fifty-five years before the Ground Lease expired. In order to determine the present value of the cash flow, APU Holding applied a seven percent discount rate, based on prevailing interest rates for loans that mature at or near the date of the future payment and on the potential risk to NY&H of not receiving the funds due in the future. It also considered a 2004 analysis by CIBC World Markets, an independent investment banking firm, which valued the outstanding minority shares of NY&H during APU Holding's restructuring and applied a 7.625% discount rate. APU Holding also considered the inter-company

credit agreement between APU and NY&H, under which NY&H was paid interest at a variable rate of 5.846%. APU Holding included in its analysis the potential tax benefits resulting from the Merger and the \$31.5 million allocation to NY&H from the asset purchase agreement, although that agreement was not scheduled to close until after the merger.

In August 2006, NY&H retained the independent financial advisory firm Ryan Beck & Co. (“Ryan Beck”) to analyze the fairness of the Merger Price of \$462 per share. Ryan Beck used present value methodology and a discounted cash flow analysis. It concluded that the offer price was fair from a financial point of view to the minority shareholders. The \$462 per share offer represented the top of Ryan Beck’s estimated range of fair value for those shares.

On August 31, 2006, NY&H’s Board of Directors approved the terms and provisions of an Agreement and Plan of Merger among APU Holding, APU, and NY&H (“Merger Agreement”), which provided that NY&H would be merged into APU. The NY&H Board of Directors recommended that its shareholders vote “for” the merger. On September 1, 2006, NY&H mailed the Notice of Special Meeting of Shareholders to be held on September 26, 2006 to its shareholders of record who were either entitled to vote or who would be entitled to receive payment for shares. This notice letter was accompanied by an information statement, a copy of the Merger Agreement, and a copy of BCL § 623.

At the September 26, 2006 special meeting, NY&H’s shareholders adopted and approved the Merger Agreement by affirmative votes of the record holders of more than two-thirds of NY&H’s outstanding shares. Following this meeting, the officers of APU and NY&H executed the Certificate of Merger, which was filed with the New York Department of State on September 27, 2006.

Before the September 26, 2006 meeting, the shareholders that dissented to the merger (the

“Dissenting Shareholders”) filed Notices of Election to Dissent and demanded payment for their shares. Within fifteen days of the merger, APU mailed them written offers to pay either \$462 per share if they accepted that price or to pay eighty percent of the offer amount, on condition that the Dissenting Shareholders submitted certificates for notation of the fact of their Notice of Election to Dissent pursuant to BCL § 623(f) and (g). The Dissenting Shareholders refused APU’s written offer, and they submitted share certificates for notation of the fact of their election. APU sent the Dissenting Shareholders a check for eighty percent of the offer amount pursuant to BCL § 623(g).

APU brought this petition seeking an order declaring that (1) the fair value of the Dissenting Shareholders’ shares is \$462 per share, (2) that respondents Cede &Co. and the Julie Herr Irrevocable Trust (the “Herr Trust”) have not complied with BCL § 623, are not entitled to receive payment, and are limited solely to the rights of non-dissenting shareholders under the Merger Agreement, and that (3) respondent Stanley Lane does not satisfy the BCL § 623 requirements, has not submitted proof of beneficial ownership of shares, and is not entitled to receive payment.¹ The respondents cross moved for additional discovery, and that cross motion was granted pursuant to BCL § 623(h)(4).

Expert Reports:

In August 2006, Michael Kollender from Ryan Beck prepared a fairness opinion (the “Kollender Report”). In March 2007, respondents’ expert Arnold Kastenbaum from Chodan Advisors, Inc. prepared a report (the “Kastenbaum Report”). Both experts used present value methodology based on a discounted cash flow analysis. That method involves quantifying the future

¹On January 25, 2007, this Court granted petitioner a default judgment against Gladys Gardstein Cash for failure to respond to the petition and declared that Gladys Gardstein Cash is not entitled to an appraisal.

potential cash flow to NY&H and then discounting that future cash flow in order to determine present value. Neither expert reduced the valuation based on any lack of marketability for minority shares. The experts agreed that NY&H's valuation should be based on the value of its three major assets: (1) the annual five dollar dividends, (2) the Advance, and (3) other assets, consisting primarily of a \$7.4 million note receivable due from APU. The Advance made up ninety-five percent of NY&H's value, and the sooner it was to be paid, the more valuable it became. The experts' assignments and findings are discussed below.

A. The Kollender Report:

Kollender's assignment was to determine whether the \$462 per share offer was fair from a financial point of view. The Kollender Report found that the \$145 million Advance and the \$31.5 million allocation of the 2006 asset purchase had three potential repayment years: (1) 2019, the earliest possible closing date for the MTA Purchase Option, (2) 2034, the closing date for the MTA Purchase Option if APU postpones exercise of the option, and (3) 2274, the year the Ground Lease expires pursuant to the 1873 Ground Lease. Kollender found that NY&H had no liquid market for the company stock and it had no "traditional" operating assets. Its assets, Grand Central Station and the Harlem commuter railroad line, were encumbered by the Ground Lease, the MTA Sublease, and the asset sales.

In order to apply appropriate discount rates to the value of NY&H's future cash flow, Kollender compared the value of NY&H's cash flow, which included the periodic payment of the dividends and the terminal values of the Advance and promissory note, to fixed income securities. It thus analyzed fixed income securities that are tracked and traded in organized markets and that offer different yields based on perceived levels of market risk. Kollender reviewed present yields

for periods up to thirty years for selected composite indexes of debt securities based on Bloomberg data as of August 9, 2006. The Kollender Report considered APU's and its parent corporations' credit risks. Kollender also considered the fact that APU's yearly dividend obligations to NY&H were primarily funded by MTA's rent payments, which provided reasonable security and permitted application of a lower discount rate. With respect to the Advance, Kollender determined that a slightly higher discount rate was appropriate based on a default risk comparable to that placed on BBB-rated securities. Kollender considered interest rates of insurance companies comparable to AFG. Kollender estimated an appropriate discount range of 6.00% to 7.50% for payment of shareholder dividends, and it estimated a discount range of 6.50% - 8.00% for the Advance and for NY&H's additional assets.

Kollender attested in his supplemental affidavit that the merger and dissolution of the Ground Lease did not add any value to NY&H except that the merger would produce tax benefits for the surviving entity. Kollender did not apply a minority discount, and he did not reduce the value based on potential tax liabilities or potential environmental claims. Kollender attested that he only analyzed scenarios that could occur irrespective of the merger between NY&H and APU. He stated that "it is standard practice in the financial industry to analyze the valuation range of a company as it stands prior to the merger. In accordance with that standard practice, Ryan Beck analyzed the fairness of the consideration to be received by the NY&H minority shareholders based on the value of NY&H as a going concern before the merger was completed."

Taking into account the three possible payment years and the discount rate range, Kollender determined a valuation range of \$66.04 and \$465.77. Thus, the offer of \$462 represented the highest range of value for the shares and was fair from a financial point of view.

B. The Kastenbaum Report:

Arnold Kastenbaum's assignment was to value NY&H shares based on three different scenarios provided by respondents. Under Scenario 1, Kastenbaum assumed that the NY&H lease would terminate upon the earlier of the exercise of the MTA Purchase Option or the expiration of the 401-year Ground Lease. Under Scenario 2, the Ground Lease was deemed terminated on the date of the Asset Purchase Agreement among NY&H, APU, and Midtown Ventures LLC on August 10, 2006. Under that scenario, Kastenbaum assumed that upon APU's default, the MTA Sublease would continue and the MTA would pay rent to NY&H instead of to its sublessor, APU. Under Scenario 3, the Ground Lease was considered terminated on April 8, 1994 upon execution of the MTA Purchase Option.

Kastenbaum did not discuss whether the assumptions underlying his calculations were customary in the financial industry and did not distinguish between scenarios that could or could not occur irrespective of the merger. Kastenbaum found that the MTA rent payments to APU provided substantial security that APU would continue to pay dividends. He estimated a discount rate for the Advance by reviewing AFG's market yield. His report assumed that APU Holding was obligated to pay the Advance. He explained at his deposition, that although it was APU, not APU Holding, that was obligated to pay the Advance, that fact would not alter the discount rate, which he concluded should be based on AFG's market yields. He explained at his deposition, that he performed an "eyeball mental extrapolation" of data from September 26, 28, and 29, which stated that AFG bonds traded at yields between 5.5 to 5.7. Although on September 26, some bonds traded a yield of 7.10, Kastenbaum stated that he did not consider those trades because they appeared to be anomalies. He applied a 5.57% discount rate to the dividend stream and a 5.77% discount rate to

the Advance. He did not apply a discount rate to the note receivable because he assumed that the interest rate for the note would cancel out any discount. Kastenbaum also challenged the method used to calculate the eleven million dollars allocated to NY&H in the August 2006 Asset Purchase Agreement. However, that calculation is not at issue here. Under Scenarios 1, 2, and 3, Kastenbaum valued the shares at \$523.07, \$1,023.03, and \$1,78.99, respectively.

Valuation Claims:

APU contends that \$462 per share is based on assumptions most favorable to the Dissenting Shareholders, and it is within its expert's highest valuation range. The fairness of this price is further demonstrated by the fact that before the MTA Purchase Option, the shares had a value of "literally pennies." Petitioner contends that the most favorable assumption to the Dissenting Shareholders is that the Advance would have been paid in 2019. Respondents' position that fair value should be based on the Advance being paid in 1994 or 2006 makes no sense because the challenge to the 1994 Purchase Option Agreement was already resolved in *Norte & Co. v. N.Y. & Harlem R.R. Co.*, 222 A.D.2d 357 (1st Dept. 1995), the 2006 Asset Purchase Agreement did not result in a breach of the Ground Lease since both NY&H and APU were parties to the 2006 Asset Purchase Agreement, and the 2006 merger did not trigger APU's obligation to pay the Advance to NY&H because NY&H no longer existed after the merger.

APU contends that the Kastenbaum Report should be rejected because it relies on assumptions provided by respondents' counsel instead of standards used in the financial industry and is based on data retrieved after the merger date. With respect to the discount rate applied to the Advance, the Kastenbaum Report states that APU Holding was obligated to pay the Advance, when in fact APU had the obligation to pay the Advance, and it uses AFG's bond yield as the sole basis

for the Advance discount rate, although AFG had no direct obligation to pay the Advance. Additionally, petitioner contends that Kastenbaum improperly extrapolated from a 2 ½ year AFG bond yield to approximate a hypothetical 12 ½ year AFG bond yield. Kastenbaum conceded at his deposition that the assumption supporting that calculation “could be wrong.” With respect to the discount rate applied to dividends, petitioner contends that Kastenbaum improperly relied solely on MTA’s “A” bond rating, an indicator of substantial credit security, rather than APU’s risk profile. While the MTA’s “A” bond rating is relevant, according to Kollender, “it would be inappropriate to use the MTA’s direct rate because [the dividends are] not an obligation or guaranteed by the MTA.” Even if it were appropriate to rely solely on the MTA’s “A” bond rating, Kastenbaum improperly relied upon information from March 2, 2007, more than five months after the merger. Petitioner further contends that Kastenbaum improperly applied a uniform discount rate to both the Advance and the dividends, regardless of when they would be paid, rather than apply a higher discount rate to obligations due further into the future.

Respondents contend that the primary reason why the \$462 price per share is unfair is because that amount was reached under the assumption that the earliest payment date for the Advance would be 2019, when in fact the Advance should have been paid in either 1994 or 2006. Respondents aver that the Ground Lease terminated either in 1994, at the time the MTA Option agreement was executed, or in 2006, when APU and NY&H merged because both of those events terminated the Ground Lease, and termination triggers the Advance. Respondents further contend that the Kollender Report does not actually calculate the fair value of NY&H and instead “merely opines that the merger price is within a range of fairness.” Respondents contend that the lower discount rate that Kastenbaum used is more appropriate than the range proposed in the Kollender

Report because APU's obligation to pay a dividend was akin to a secured obligation since APU regularly distributed dividends, and APU was subject to harsh consequences if it defaulted. A default would trigger NY&H's right to reenter the railroad property. Thus, it contends that the shares should be valued at \$1,178.99 or, at a minimum, \$1,023.03 per share.

Analysis:

BCL § 623 is a "remedial mechanism" designed to protect "minority shareholders from being forced to sell at unfair values imposed by those dominating the corporation while allowing the majority to proceed with its desired merger." *Cawley v. SCM Corp.*, 72 N.Y.2d 465 (1988). The "stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger." *Id.* at 474. The shareholders are entitled to the "fair value as of the close of business on the day prior to the shareholders' authorization date." BCL § 623(h)(4).

Determining fair value requires an examination of "the nature of the transaction giving rise to the shareholder's right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors." BCL § 623(h)(4). The "other relevant factors" may include the "prospective, nonspeculative tax benefits accruing to the acquired corporation from the merger." *Cawley v. SCM Corp.*, 72 N.Y.2d 465 (1988). One means of demonstrating that the price offered to dissenting shareholders was fair and that it reflected a price that would have been reached had it been negotiated in an arm's length transaction is to submit

evidence that an independent investment firm was retained to render a fairness opinion. *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 572 (1984).

Although relevant factors for assessing fair value include a corporation's net asset value, investment value, and market value, *Matter of Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161 (1995), here, the parties' experts agree that NY&H's investment value is most relevant. The sole dispute is whether the petitioner's discount rate and assumption that the Ground Lease would terminate in 2019, triggering the Advance at that time, is fair to the Dissenting Shareholders, or whether respondents' lower discount rate and assumption that the Advance should have already been paid in either 1994 or 2006 is more appropriate.

Conclusion:

Under BCL § 623(h)(4), valuations should be conducted in accordance with the "concepts and methods then customary in the relevant securities and financial markets for determining fair value." The use of a fairness opinion rather than a calculation of a corporation's value is entirely appropriate as evidence that the offer price was fair. *See Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557 (1984). Here, the Ryan Beck fairness opinion found that the \$462 per share offer price was fair from a financial point of view.

The crux of the respondents' position is that APU and its expert should have calculated the offer price under the assumption that the Advance should have been paid in 1994. However, the Ground Lease did not terminate in 1994. In *Norte & Co. v. N.Y. & Harlem R.R. Co.*, 222 A.D.2d 357 (1st Dept. 1995), the Court found that NY&H specifically conceded that termination of the lease and payment of the Advance will occur when the MTA exercises the option. Pursuant to the MTA Purchase Option Agreement, the earliest date the option could be exercised is 2019. Moreover, the

2006 merger did not trigger APU's obligation to pay NY&H the Advance since NY&H ceased to exist upon the merger, and under the Ground Lease, APU was obligated to pay the Advance to NY&H, not to NY&H's shareholders. The Dissenting Shareholders are entitled to receive compensation for the "intrinsic value of [their] stock which has been taken by the merger" and non-speculative tax benefits resulting from the merger, *Cawley v. SCM Corp.*, 72 N.Y.2d 465 (1988); they should not receive additional compensation for amounts that they did not but allegedly should have received in the past. Thus, the most favorable assumption to the Dissenting Shareholders is that the Ground Lease would have terminated and the Advance would have been paid in 2019 had the merger not occurred.

Parties also dispute which discount rate should be applied. Since the gravamen of the value of NY&H is its right to receive cash in the future, it is necessary to discount the value of potential future cash flow to present value and to take into account the risk of not receiving those funds in the future. Kollender supported the discount rate ranges of 6.00 to 7.50% and 6.50 to 8.00% with financial analysis, assessing the credit risks of APU, which had the direct payment obligation, and affiliated entities. Kastenbaum proposed a slightly lower discount rate, which does not appear to fully account for the risk associated with payment in the future and is based, in part, on financial data obtained after the merger became effective. He admitted during his deposition that he did not have full access to financial data as of the date of the merger because he does not have access to Bloomberg reports. Taking into account the risks of nonpayment in the future, financial data as of the day before shareholder authorization of the merger (BCL § 623(h)(4)), and information regarding the relevant entities with payment obligations and of comparable companies, the discount rate range that Kollender proposed is fair and consistent with petitioner's offer price. Thus, the Dissenting

Shareholders' shares should be valued at \$462 per share.

APU has already paid the Dissenting Shareholders eighty percent of the offer price pursuant to BCL § 623(g). Under BCL § 623(h)(6), the Dissenting Shareholders are entitled to the remaining twenty percent of the offer price. Although petitioner asserts that the shareholders' dissent was arbitrary and in bad faith, there is no evidence that the dissent was "arbitrary, vexatious, or otherwise in bad faith," BCL § 623(h)(6), particularly where APU Holding's ninety-seven percent ownership of NY&H renders the merger process susceptible of abuse. Thus, the Dissenting Shareholders are entitled to interest from the date that APU commenced this action to the date of payment pursuant to BCL § 623(h)(6). *Miller Bros. Industries, Inc. v. Lazy River Inv. Co.*, 272 A.D.2d 166 (1st Dept. 2000). Among the factors relevant to the determination of the interest rate is the rate that the corporation would have had to pay to borrow money during the pendency of the proceeding. BCL § 623(h)(6).

Noncompliant Dissenters:

APU also argues that not all respondents complied with BCL § 623, and thus are not entitled to the statutory appraisal remedy because BCL § 623 requirements are strictly construed. It avers that Cede & Co., the nominee of the Depository Trust Company, was the record holder of 210 common shares of NY&H for the benefit of the Herr Trust. Cede & Co. and the Herr Trust filed written objections to the merger that were dated October 23, 2006 and were received on October 25, one month following the shareholder authorization. APU avers that Stanley Lane is not entitled to an appraisal because he is neither a record holder nor has he produced evidence of beneficial ownership.

The BCL § 623 requirements for preserving appraisal rights are strictly construed. *Albany-*

Plattsburgh United Corp. v. Bell, 202 A.D.2d 800 (3rd Dept. 1994). BCL § 623(a) provides that objecting shareholders must file a written objection before the shareholder vote, and late objections preclude the right to take advantage of the appraisal remedy. *In re Sikorski*, 30 A.D.3d 429 (2d Dept. 2006). Here, Cede & Co. and the beneficial owner, the Herr Trust, filed written objections one month after the vote. However, beneficial holders that did not comply with BCL § 623 are entitled to benefit from the same rights as the non-dissenting shareholders, the merger offer price of \$462 per share. Respondent Stanley Lane has not submitted evidence demonstrating that he is a beneficial owner of NY&H shares. Thus, Stanley Lane is not entitled to an appraisal.

Accordingly, the petition is granted, and it is

DECLARED AND ADJUDGED that the offer price of \$462 per share for NY&H shares is fair, and it is

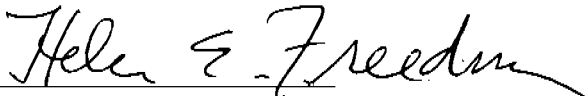
ORDERED that APU pay the Dissenting Shareholders that complied with BCL § 623 the remaining twenty percent of the offer price plus interest at a rate of nine percent from the date this action commenced pursuant to BCL § 623(h)(6), and it is further

DECLARED AND ADJUDGED that Cede & Co. and the Julie Herr Irrevocable Trust have not complied with BCL § 623, but are entitled to the rights of non dissenting shareholders, and it is further

DECLARED AND ADJUDGED that Stanley Lane is not entitled to receive compensation for shares.

DATED: July 17, 2007

ENTER:


Helen E. Freedman, J.S.C.