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| **BARBARA A. LARKIN, et al.,** | * | **IN THE** |
| **PLAINTIFFS** | * | **CIRCUIT COURT** |
| **v.** | * | **FOR** |
| **JOSEPH M. DELLA RATTA, et al.,** | * | **ANNE ARUNDEL COUNTY** |
| **DEFENDANTS** | * | **CASE NO.: C-2002-80480.BC** |
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## MEMORANDUM OPINION

## BACKGROUND

The liability phase of this case was tried in January 2003. Following an adverse judgment, Defendants appealed and the Maryland Court of Appeals issued a writ of *certiorari.* In *Della Ratta v. Larkin*, 382 Md. 553 (2004), the Maryland Court of Appeals held that Plaintiffs, who were four limited partners of East Park Limited Partnership ("East Park"), had properly exercised their right under Md. Code Ann., Corps & Ass'ns, § 10-603 (b)[1] to withdraw from the partnership. The Court also held that, pursuant to § 10-604, Plaintiffs were entitled to receive the "fair value" of their partnership interests in East Park, as of the date of withdrawal, based on their respective rights to share in distributions from the limited partnership, and the case was remanded back to this Court.

The relief phase of this case was tried before this Court on February 9, 2005 and the matter was taken under advisement to consider the evidence and the arguments presented.

[1]All statutory references are to the Corporations and Associations Article unless otherwise indicated.

## DISCUSSION

In order to establish the amount of distribution that Plaintiffs are entitled to under § 10-604, the court must first determine the value of the entity itself. Thereafter, the court must determine the "fair value" of the withdrawing partners' interests.

Besides cash on hand, East Park has only one asset; namely, the shopping center property that is the subject of these proceedings. Thus, the value of the entity consists of the value of the property plus cash on hand, less partnership liabilities.

### A. Valuation of the Property

The value of the property is determined by utilizing the commonly accepted concept of fair market value, that is the price that a willing seller and willing buyer, without being compelled, would agree upon for the property in the open market. *See, e.g., Bern-Shaw Ltd. P'ship v. Mayor of Baltimore,* 377 Md. 277, 302-03 (2003); Black's Law Dictionary 597 (6th ed. 1990).

To establish the fair market value of the property, Plaintiffs presented the testimony of M. Ronald Lipman during the trials of both phases of this case. Mr. Lipman is an experienced real estate appraiser with significant expertise in valuing similar commercial properties. He serves on the Board of Trustees of Mid-Atlantic Realty Trust ("MART"), an entity that owns a number of shopping centers and is regularly engaged in the sales and acquisitions of commercial properties.

Mr. Lipman prepared a comprehensive report appraising the fair market value of the property as of the relevant date which is September 29, 2002. In conducting the appraisal, Mr. Lipman appropriately compared the results of three methods of valuation to arrive at an opinion

of the fair market value.

The primary purpose of the property is production of income. Therefore, Mr. Lipman utilized the income approach to valuation. He did that by conducting both a direct capitalization analysis and a discounted cash flow analysis. In addition to the income approach, Mr. Lipman performed an analysis of comparable sales. Thereafter, he reconciled the three values to arrive at his conclusion of the fair market value. In Mr. Lipman's original appraisal, the results of his calculations were:

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| Direct Capitalization Method | \$20,000,000.00 |
| Discounted Cash Flow Method | \$19,150,000.00 |
| Sales Comparison Method | \$19,500,000.00 |

Mr. Lipman noted that the property had surplus land which could result in some additional development potential. He recognized that, as of the date of valuation one could not quantify a precise value for the surplus land since the prospect of future development was uncertain. However, Mr. Lipman concluded that a prospective purchaser would find the potential of development an attractive feature, and therefore, would purchase the property at the higher end of the range of values. Thus, after reconciling the three valuation approaches, Mr. Lipman's reached a the conclusion that the fair market value of the property was \$19,500,000.

During a subsequent deposition, Mr. Lipman learned that one of the two anchor tenants, Giant Food, had mistakenly overpaid percentage rent, thereby inflating the results of his original income analysis. Mr. Lipman issued a supplemental report dated January 14, 2003 in which he recalculated the income approach values. His revised appraisal yielded the following:

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| Direct Capitalization Method | \$19,650,000.00 |

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| Discounted Cash Flow Method | $18,770,000.00 |
| Sales Comparison Method | $19,500,000.00 |

Mr. Lipman's final reconciliation of valuation remained at $19,500,000.00. When asked why he arrived at the same final value despite having reduced the values reached via the income approach, Mr. Lipman testified credibly, that between the time of his initial appraisal and the supplemental report, one of Mr. Lipman's staff members spoke with a representative of Anne Arundel County, and obtained specific information about negotiations between the County and the property owners for development of the surplus land. This information was more concrete than what was known previously and justified increased optimism as to the potential of developing the surplus land, thereby supporting the conclusion that the property was worth $19,500,000.

Whether or not that development potential will ultimately come to fruition has no bearing on the fair market value of the property as of September 29, 2002. All that matters is whether the information that was then available and the reasonable assumptions that would have been made by a hypothetical buyer would have stimulated a premium price for the property as of the valuation date. In the context of a fair market value analysis, a prospective purchaser must make reasonable assumptions about the future. The purchaser will not have the benefit of hindsight to determine whether his assumptions turn out to be correct.

The Court finds that the income assumptions and projections utilized by Mr. Lipman are the result of an accurate and thorough analysis of the information that was then available. Mr. Lipman properly quantified the value of the property by reconciling the three relevant approaches to valuation. A prospective purchaser attempting to determine the fair market value of the

property would have been likely to follow a similar method and would have been likely to reach similar conclusions as Mr. Lipman from the information that was then available.

Generally, the income approach and particularly a discounted cash flow analysis is given greater weight than a comparable sales approach in valuing commercial real estate. However, in addition to the consideration of the surplus land described above, there is another strong piece of evidence that supports Mr. Lipman's ultimate conclusion that the fair market value of the subject property was $19.5 million.

At the original trial, Plaintiffs produced testimony and documentary evidence establishing that MART had been attempting to buy this property over the course of nearly a decade and had made prior offers to purchase which were rejected. The most recent attempt to purchase the property occurred in August 2002, within close proximity to the date of valuation.[2] At that time, MART issued a Letter of Intent offering to purchase the property for $19,500,000. Carl Robinson, Executive Vice-President of MART, testified credibly that he had carefully analyzed Mr. Lipman's appraisal, prior to making the offer. Mr. Robinson, who had significant experience and sophistication in determining reasonable values for shopping centers, applied his own independent judgment and concluded that Mr. Lipman's valuation was fair and reasonable. Furthermore, in offering $19,500,000, Mr. Robinson recognized that the seller would most likely demand a higher price and that further negotiation might result in a price greater than that offered. While MART's offer is certainly not proof of the fair market value of the property, it is highly persuasive evidence that corroborates the reasonableness of Mr. Lipman's opinion.

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[2] Although the date of valuation is September 29, 2002, the original appraisal was completed August 19, 2002 using a date of value of July 20, 2002. However, Mr. Lipman testified that the September 29, 2002 value would have been the same.

Defendants expressed suspicion of Mr. Lipman's appraisal because he was serving on MART's Board of Trustees at the time of the most recent offer to purchase. But, under the procedures that were ordinarily followed by MART in determining whether to make an offer to purchase property, Mr. Lipman would not have been aware of MART's impending offer. Indeed, Mr. Lipman testified quite credibly that he had no knowledge of MART's intent to make an offer to purchase the property when he prepared his initial appraisal and that later, when he prepared the supplemental report, the offer had no affect on his opinion. If, for the sake of argument, Mr. Lipman were to have fashioned his appraisal to benefit MART, logic dictates that he would have understated the value of the property rather than inflated the price.

On the other hand, if Defendants are suggesting that Mr. Robinson's offer was merely a subterfuge to support Mr. Lipman's appraisal, the evidence would disprove such a theory. As mentioned above, MART had been pursuing acquisition of this property for approximately ten years. It had made prior offers to purchase, which had been rejected. During the pertinent time frame, the availability of real estate that would meet MART's portfolio requirements was limited and, according to Mr. Lipman's uncontroverted testimony, "the marketplace was chasing the few deals that were available." E - 244. The Court is convinced that Mr. Robinson's letter of intent was a *bona fide* offer to purchase the property for $19,500,000.

Mr. Lipman's uncontroverted testimony also established that, during the relevant time period, the mortgage market was excellent for buyers as interest rates were at an all time low. Furthermore, aside from MART, there was a very ready market for such property and, to quote Mr. Lipman, "... if this property had been offered for sale, it would have been sold very quickly probably in excess of my $19,500,000."

Defendants did not produce an appraisal to contradict Mr. Lipman's. Instead, they relied on the property tax assessment set by the State Department of Assessments and Taxation ("SDAT"). The statement of proposed tax assessment for tax year starting July 1, 2002 indicated an assessment of $17,668,600. However, according to Mr. Lipman's uncontroverted testimony, the assessment did not include the free standing pad sites located on the subject property. E-242. Those pad sites represent a significant additional value to the property which was not factored into SDAT's assessment.

Defendants challenged the initial assessment. After providing certain financial information to the assessor, Defendants succeeded in having the assessment reduced to $13,895,500. The assessor's income worksheets, which were introduced into evidence at trial, had handwritten income figures that were provided by Defendants in support of their appeal of the initial assessment. Based on the evidence presented at trial, this Court concludes that the income figures provided by Defendants to the assessor significantly understated the net operating income from the property. Furthermore, the figures provided by Defendants failed to account for all of the reimbursable items which should have been credited to the partnership and which would have demonstrated that the income generated by the property was greater. These errors would have caused the assessment to understate the value of the property.

In calculating the assessment, the assessor utilized the direct capitalization method which is not as accurate as the discounted cash flow method. The former takes a snapshot in time as of the date of valuation and capitalizes the income at a selected rate. By contrast, the discounted cash flow method projects the property's income over a period of time, thus yielding a more realistic estimate of present value.

The Court recognizes that tax assessors conduct assessments on a large volume basis for a specific purpose, namely, collection of taxes. The assessor must balance the interest of the State in obtaining all of the taxes to which it is entitled while at the same time accommodating the individual citizen who owns the property. Final tax assessments for commercial properties are quite often the result of a negotiated compromise between the assessor and the taxpayer and they do not necessarily reflect true fair market value. The Court does not find the tax assessment to be a persuasive indicator of fair market value in this case, particularly when compared to a comprehensive appraisal that thoroughly analyzed the income flow and which more accurately takes into consideration the marketplace as was done by Mr. Lipman.

The utilization of tax assessments for the purpose of determining fair market value of real property was discussed in *Graverstine v. Graverstine*, 58 Md. App. 158, 172 (1984), which stated the general rule that "the value of the property cannot be proven by assessments made for tax purposes." *See also E.L. Gardner, Inc. v. Bowie Joint Venture*, 64 Md. App. 302 (1985), in which the court states that "generally, in and of itself, assessed valuation is not admissible as evidence of valuation for purposes other than taxation."[3]

For these reasons, the Court finds that as of September 29, 2002, the fair market value of the real property owned by the limited partnership was $19,500,000.00.

**B. Valuation of the Entity**

The Defendants urge the Court to consider the partnership's book value in determining the value of the entity. However, the book value offers no meaningful assistance in this case.

[3] The admissibility of the tax assessment was not raised as an issue in this case. However, the authorities cited above establish that assessment figures have limited use in determining the value of property.

Book value is an accounting concept which takes into consideration the <u>cost</u> value of assets, less accumulated depreciation, plus any cash on hand. From that subtotal, the entity's liabilities are deducted to arrive at the book value. This is a particularly inappropriate method to determine fair market value of this entity's primary asset, namely the real property. Cost has little relation to the income stream, which is the true component of value for this property. Furthermore, by deducting for accumulated depreciation of the improvements, the book value ignores reality which is that, although the improvements may physically depreciate over time, the property as a whole has, in fact, appreciated.

Plaintiffs produced William Bavis, C.P.A., a qualified expert in business valuation to testify regarding the value of the entity as a going concern. Mr. Bavis utilized the partnership's financial statement as of September 29, 2002 (Exhibit 74), which he adjusted to more accurately reflect the value of the assets. He calculated what he described as the "adjusted net book value" by utilizing the value of $19,500,000 for the fixed assets instead of the depreciated cost figure contained in the original financial statement. To the fixed assets he added the cash of the partnership and then deducted the liabilities. The result of this calculation is a net value of $14,643,606.

As the Court has concluded that the fair market value of the property as of the date of valuation was indeed $19,500,000, the Court likewise finds that the net value of the limited partnership as a going concern on September 29, 2002 was $14,643,606.

**C. Fair value of the Plaintiffs' Partnership Interests**

The Court's task in this case is to determine the "fair value" of the Plaintiffs' partnership interests pursuant to § 10-604, which provides:

> Except as otherwise provided in this subtitle, on withdrawal any withdrawing partner is entitled to receive any distribution to which the partner is entitled under the partnership agreement and, if not otherwise provided in the partnership agreement, the partner is entitled to receive, within a reasonable time after withdrawal, the fair value of the partner's partnership interest in the limited partnership as of the date of withdrawal, based on the partner's right to share in distributions from the limited partnership.

Section 10-604 is a part of Maryland's Revised Uniform Limited Partnership Act ("MRULPA"), adopted by Maryland in 1982 and codified in § 10-101 et seq. MRULPA is the Uniform Limited Partnership Act ("ULPA") as drafted by National Conference of Commissioners on Uniform State Laws ("NCCUSL"), with some revisions. As the Court of Appeals has determined in this case, Maryland's Uniform Partnership Act ("MUPA") applies, except to the extent that its provisions are inconsistent or modified by MRULPA. § 10-108; *Della Ratta,* 382 Md. at 568. Since MRULPA has a provision dealing with the valuation of a withdrawing partner's interest, the Court does not need to look to MUPA.

There is no definition of "fair value" provided by Maryland's partnership statutes or anywhere else in the Annotated Code. The Court must therefore determine the meaning of the term. The legislative intent should be ascertained from the statutory language, reading pertinent parts of the legislative language together, giving effect to all of those parts if possible, and rendering no part of the law surplusage. *Adamson v. Corr. Med. Servs., Inc.* 359 Md. 238, 251-52 (2000). If the Legislature's intentions are evident from the text of the statute, the inquiry normally ceases and the plain meaning of the statute will govern. *Id.* The court can look to legislative history or other sources for a more complete understanding of what the General Assembly intended when it enacted particular legislation. *Id.* In so doing, the court "may also consider the particular problem or problems the legislature was addressing, and the objectives it

sought to attain." *Id.* at 252.

The Court finds that the meaning of "fair value" is not clear on the face of the statute and that it must look beyond the statute to ascertain the meaning of the phrase. Upon adopting RULPA, the Maryland Legislature recognized that the "determination of fair value of the withdrawing partner's interest may be difficult." 1981 Md. Laws, ch. 801, at 3042. In 1998, Maryland added to § 10-604 that the value is to be "based upon the partner's right to share in distributions from the partnership." 1998 Md. Laws, ch. 758 (adopting H.B. 1381 (1998)). The comments indicate the language was added to provide a basis for determining the fair value of a partnership interest.[4] The Bill Analysis for House Bill 1381 (1998) indicates that the additional language was added to parallel Maryland's Limited Liability Company ("LLC") Act, which states that if a member of an LLC ceases to be a member, the LLC may elect to pay that person the fair value of that person's interest in the LLC on the date the person ceased to be a member based upon the person's right to share in distribution from the LLC. *See* Economic Matters Committee, Bill Analysis, H.B.1381, *located in* Committee House File (1998 H.B. 1381); § 4A-606.1 (a)(1).[5] There is no other information in either Maryland's or the NCCUSL's legislative history offering more guidance on the definition of "fair value" as used in § 604.

By adding the phrase "based on the right to share distributions", the Legislature did not intend to change the calculation of the amount that a withdrawing partner is entitled to receive. The purpose of the statute is to indemnify the withdrawing partners for the interests that they are

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[4] This language was in the NCCUSL's draft of ULPA from its inception, but was not contained in Maryland's initial adoption of the law.

[5] There are no Maryland cases discussing the meaning of "fair value" in the context of LLC's.

giving up upon withdrawal, in the same proportion as the partner would participate in distributions from the partnership.

It is clear that fair value is a legal concept which differs from fair market value, the latter being a term which has a well understood meaning. *See, e.g., Ex Parte Baron Servs.,* 874 So. 2d 545, 549 (Ala. 2003); *Pueblo Bancorporation v. Lindoe, Inc.,* 37 P.3d 492, 495 (Colo. Ct. App. 2001). Had the legislature intended the term "fair value" to mean "fair market value", it would have used the latter term, which is a clearly understood expression defined by countless cases and found throughout the Annotated Code. *See Toler v. Motor Vehicle Admin.,* 373 Md. 214, 235 (2003) (stating that when the legislature uses different words, especially in the same section or part of the statute that deals with the same subject, it usually intends different things) (*citing* 2A Norman J. Singer, Sutherland Statutes & Statutory Construction § 46.06 (6th ed. 2000)).

The only Maryland appellate decision to discuss § 10-604 is the one in this very case. There, the Court of Appeals stated: "The distribution upon withdrawal referred to in § 10-604 would be paid by the partnership, not by a third- party purchaser or individual partners.... Harmonized, §§ 10-603 & 10-604 essentially allow a partner to 'cash out' his or her equity before the partnership terminates." *Della Ratta,* 382 Md. at 576. The Court of Appeals drew a distinction between the right to "cash out" under § 10-604 and other provisions contained in East Park's Partnership Agreement [§§ 11(d), 11(f), 11(k) and 13], where a partner would receive payment from a third party or from other partners. This language leads to the conclusion that it would be erroneous to view the valuation of a withdrawing partner's interest from the perspective of a third party such as would be done in a fair market value analysis. Instead, the valuation must be viewed from the perspective of the withdrawing partners who are surrendering

their interests back to the partnership.

Absent a clear definition of "fair value" in § 10-604 or elsewhere in the statute or the case law of limited partnerships, the Court can presume that the Legislature intended the expression to have the same meaning as it has in similar statutes. *See Nat'l Corp. for Housing P'ship, Meadowood Townhouse, Inc. v. Keller,* 353 Md. 171, 185 (1999) ("[w]here the same language is used in different clauses of [statute] upon the same or similar subjects, it must receive the same construction, unless [there is] some particular reason to the contrary"). One such statutory scheme in Maryland that uses the term "fair value" is found in § 3-202, et seq. (hereinafter "Dissenting Shareholder Statute"). This statute relates to valuation of the interests of shareholders who withdraw from a corporation that has engaged in a merger contrary to the minority shareholders' wishes.

The Dissenting Shareholder Statute provides that a dissenting stockholder has the right to demand and receive payment of the "fair value" of his/her stock. § 3-202. "Dissenting shareholder statutes are designed to provide a limited remedy that puts the dissenting minority shareholders in the position they would have been in had the corporation been dissolved." *Pueblo Bancorporation,* 37 P.3d at 496; *accord, Warren v. Baltimore Transit Co.,* 220 Md. 478, 483 (1959). This prevents minority shareholders from being forced to sell at unfairly low values while allowing the majority to proceed as it desires. *Pueblo Bancorporation,* 37 P.3d at 496.

Fair value, in the dissenting shareholder context, has been stated to require that the dissenting shareholder be paid for his or her proportionate interest in a going concern, or the intrinsic value of the shareholder's economic interest in the corporate enterprise. *Friedman v. Beway Realty Corp.,* 661 N.E.2d 972, 976 (N.Y. 1995). The determination should be made by

taking the going concern value of the corporation as a whole, as opposed to the value of the individual shares. *Id.* The purpose of the statute is to save the dissenting stockholder from any loss by reason of the change in the nature of the business. *Id.* The dissenting shareholder statute should be construed in favor of the dissenting shareholder. *Lawson Mardon Wheaton Inc. v. Smith,* 734 A.2d 738, 748 (N.J. 1999). "The very nature of the term 'fair value' suggests that courts must take fairness and equity into account in deciding whether to apply a discount to the value of the dissenting shareholder's stock[.]" *Id.*

A Maryland case, which both parties cite for its discussion of "fair value" of a dissenting shareholder's interest is *Warren v. Baltimore Transit Co.,* 220 Md. 478 (1959). In that case, the Court of Appeals stated that to arrive at the fair value of the interest:

> the real objective is to ascertain the actual worth of that which the dissenter loses because of his unwillingness to go along with the controlling stockholders, that is, to indemnify him. The textwriters and cases agree generally that this is to be determined by assuming that the corporation will continue as a going concern – not that it is being liquidated – and on this assumption by appraising all material factors and elements that affect value, giving to each the weight indicated by the circumstances, including the nature of the business and its operations, its assets and liabilities, its earning capacity, the investment value of its stock, the market value of its stock, the price of stocks of like character, the size of the surplus, the amount and regularity of dividends, future prospects of any industry and of the company, and good will, if any.

*Id.* at 483.

Plaintiffs rely on *Warren* for guidance in determining fair value. Defendants, on the other hand, cite it to support their argument that it would be tantamount to "liquidation value" if the Court simply took the value of the entity and prorated it among the withdrawing partners. A liquidation can occur under a variety of scenarios that range from fair market value to a distress sale. However the term "liquidation" generally implies that the sale of the entity's assets will net

less than if the entity were sold as a going concern. *See, e.g., Creel v. Lilly,* 354 Md. 77 (1999) ("[l]iquidation can be a harmful and destructive measure, especially to a small business . . ., and it is often unnecessary to determining the true value of a partnership").

In *Creel*, the Court of Appeals stated that its goal was to "prevent the disruption and loss that are attendant with a forced sale, while at the same time preserving the right of the deceased partner's estate to be paid his or her fair share of the partnership." 354 Md. at 107 (holding that liquidation of partnership was not required upon death of one of the partners). The trial court took the total value of the partnership assets, less the debts to creditors and partners and capital contributions of the partners. The trial court then determined that the deceased partner's estate was due the 52% (his partnership interest) of the balance, plus his capital account. *Id.* at 106. Although the Court did not compel a liquidation, it employed the same method that Plaintiffs suggest in the instant case, that is, to value the assets of the partnership, deduct the liabilities and determine the partner's pro rata share in the remainder.

The *Creel* Court stated it was aiming to preserve the right of the estate to be paid for the deceased partner's fair share of the partnership, rather than have a "fire sale" of all of the partnership's assets. *Id.* at 107. The Court here is not contemplating a "fire sale" of East Park nor, for that matter, that the partnership or its asset be sold at all.

It is true that the *Creel* and *Warren* courts rejected a "liquidation theory" as the basis for valuing a partner's interest. However, Defendants' argument obscures the facts of this case. It must be remembered that East Park's business consists of nothing more than ownership of the real estate. Unlike a business that loses value when it ceases to operate because of the loss of goodwill or other intangible assets, this particular business has no value other than the value of

its underlying fixed assets. Under the facts of this case, there is no distinction between liquidation value and going concern value. The fair value of the partnership interests equal the amount that the partners would receive if East Park sold its sole asset in an arms length transaction.

Although Maryland's Revised Uniform Partnership Act ("MRUPA"), § 9A-101, et seq., is not directly applicable to this case, the Act provides valuable guidance. MRUPA, which was adopted by Maryland in 1998 with certain phase-in clauses, was derived from the Revised Uniform Partnership Act ("RUPA") as drafted by the NCCUSL.[6] Section 9A-701 of MRUPA provides for the purchase of a dissociating partner's interest. Like §10-604 and the Dissenting Shareholder Statute, the purpose of § 9A-701 is to indemnify a withdrawing partner. Under § 9A-701, the term "buyout price" was introduced to describe the amount payable to a withdrawing partner. Buyout price is defined as "the amount that would have been distributable to the dissociating partner under § 9A-807 (b) . . . if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date." § 9A-701 (b). The NCCUSL purposely chose not to use either the term fair market value or fair value in RUPA to avoid confusion, as these are terms of art with special meanings in certain contexts. *See* RUPA, § 701, cmt. 3.

The aim of both § 9A-701 and the Dissenting Shareholder Statute is similar to § 10-604 that is, to "cash out" the interests of the dissenting shareholders in order to avoid compelling the

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[6] As was previously determined by this Court and affirmed by the Court of Appeals, it does not apply in this case.

shareholders to participate in a corporate course they find objectionable. In the case at bar, § 10-604 has been invoked by Plaintiffs for the same purpose. The Court of Appeals affirmed this Court's previous decision that Mr. Della Ratta breached his fiduciary duties to the minority partners and compelled them to exercise their right to withdraw in order to avoid an unreasonable and oppressive capital call. *Della Ratta*, 382 Md. at 580. The similarity in application of §10-604 under the facts of this case and the reasoning behind the Dissenting Shareholder Statutes justifies looking at the latter to understand the former.

The Court has considered the Ohio case of *Conti v. Christoff*, 2001 WL 1199056 (Ohio Ct. App. 2001) (unpublished), cited by Defendants which addresses "fair value" in the limited partnership context. In that case, Appellant was a limited partner in a partnership with a commercial office as its primary asset. Each partner owned a 25% interest in the partnership. Appellant exercised his right to withdraw and the partners were unable to agree on the amount he was entitled to under Ohio Rev. Code, § 1782.34, which is the same as § 10-604 in Maryland. Because "fair value" was not defined in the limited partnership portion of Ohio's statute, the trial court looked to other "laws upon the same or similar subjects" to determine the intent of the legislature. One such law was Ohio Rev. Code, § 1782.437, which deals with a dissenting partner's right to withdraw from a limited partnership after a merger or consolidation. That statute, <u>unlike any Maryland analogue</u>, uses the expression "fair cash value" which it defines as "the amount that a willing seller who is under no compulsion to sell would be willing to accept and that a willing buyer who is under no compulsion to purchase would be willing to pay." *Id.* at *4. The Ohio Court of Appeals held that the trial court did not abuse its discretion in considering Ohio Rev. Code, § 1782.437 for guidance in defining fair value. The Court also

stated that minority and marketability discounts may be, but do not have to be, applied as valuation is a factual issue left to the discretion of the trier of fact. *Id.*

A critical distinction is that the Ohio court equated "fair value" and "fair cash value." The statutory definition of the latter term mirrors the generally recognized definition of "fair market value." But, as discussed elsewhere in this Opinion, fair value is not the same as fair market value. Since the Ohio court's premise is incorrect under Maryland law, the *Conti* case has little persuasive value.[7]

***1. Applicability of Discounts***

Defendants strenuously argue that the withdrawing partners' interests should reflect discounts for their minority status and lack of marketability. A minority discount adjusts for the seller's lack of control in the management of entity. *Arnaud v. Stockgrowers State Bank of Ashland,* 992 P.2d 216, 218 (Kan. 1999). That discount assumes that an investor would pay less for such an interest than for an interest that would permit a voice in management decisions.

A marketability discount adjusts for the lack of liquidity based on the notion that there are limited potential buyers for shares in a small organization. *Ex parte Baron Servs., Inc.,* 874 So. 2d 545, 549 (Ala. 2003). To some extent, these discount factors overlap since lack of management control, which is the primary factor of the minority discount, also affects marketability.

In support of their position, Defendants, presented testimony by Joel Charkatz, C.P.A.,

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[7] Under Rule 2(g) of the Ohio Supreme Court Rules, an unpublished opinion is not controlling authority in Ohio. *See also* Md. R. 1-104 (stating that unreported opinions of Maryland's appellate courts are neither precedent nor persuasive authority).

*Shopf v. Marina Del Ray Partnership*, 549 So. 2d 833 (La. 1989), also relied on by Defendants is likewise unpersuasive. The statute analyzed in that case uses the expression "value" which the Louisiana court determined to mean fair market value. For the reasons discussed by this Court, fair market value is not the proper standard.

who applied a minority discount of 31.27% and a lack of marketability discount of 25% to various alternative fair market values in order to arrive at the value of the withdrawing partners' interests. Mr. Charkatz had not been asked to conduct an independent valuation, but only to perform the discount calculation. It is clear that Mr. Charkatz made no distinction between the concept of fair value required by §10-604 and the more commonly understood concept of fair market value. In a fair market value analysis, discounts for lack of marketability and for minority status may sometimes be appropriate.

Plaintiffs, on the other hand urge the more persuasive position that a distribution under § 10-604 is not a open market transaction in which such discounts have any relevance. Section 10-604 is silent with respect to whether such discounts should be applied when determining fair value. However, it bears repeating that, as the Court of Appeals stated in this case, under §10-604, a withdrawing partner is entitled to "cash out" his or her equity before the partnership terminates. *Della Ratta,* 382 Md. at 576. This statement affirms that the transaction should be seen as an internal redemption of the partnership interest and should not be viewed from the perspective of the marketplace.

In dissenting shareholder cases, most of the courts addressing the issue have determined that neither minority nor marketability discounts are applicable. "The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a 'going concern.'" *Cavalier Oil Corp. v. Harnett,* 564 A.2d 1137, 1144 (Del. 1989). Fair value is the value of what has been taken from the shareholder, *i.e.,* his proportionate interest in the entity as a going concern. *Id.; Baron,* 874 So. 2d at 550. If a minority shareholder is not given the full proportionate values of her shares, it imposes a penalty for lack of control, and unfairly enriches

the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder. *Cavalier Oil Corp.,* 564 A.2d at 1145; *Hansen v. 75 Ranch Co.,* 957 P.2d 32, 41 (Mont. 1998). Applying the discount does not give a minority shareholder the full proportionate value of his shares and enriches the majority shareholders, and also penalizes the minority for taking advantage of the statute. *Lawson Mardon Wheaton, Inc.,* 734 A.2d at 748-49; *Baron,* 874 So. 2d at 550 ("applying a lack of marketability discount would allow the majority who approved the transaction to later buy out with a net gain what the minority dissenters have lost, granting the majority an unfair windfall").

Furthermore, it is generally held that minority discounts should not be applied when the interests are sold to another shareholder or the corporation. *Friedman,* 661 N.E.2d at 977; *Hansen,* 957 P.2dat 41; *Arnaud v. Stockgrowers State Bank of Ashland,* 992 P.2d 216, 220 (Kan. 1999) (holding that minority and marketability discounts are not applicable when the purchaser of the stock is either the majority shareholder or the corporation itself). The difference between a sale to the entity or its shareholders should be distinguished from a sale in the open market. *Hansen,* 957 P.2d at 41. A sale to a majority shareholder simply increases the interests of those already in control. *Id.* Applying discounts destroys the legislative intent to protect the minority shareholder's right to dissent. *Id.* at 41-42.

Similarly, under MRUPA, minority discounts are not applicable in determining the buyout price, as the applicability is negated by valuing the business as a going concern. *See* RUPA, § 701, cmt. 3. Lack of marketability discounts or discounts for the loss of a key partner may be, but are not always, applicable under RUPA § 701. *See also,* Brian Tully, *Determining the Fair Value of a Withdrawing Partner's Partnership Interest: Exploring the Uncharted*

*Alphabet Soup of Texas Partnership Law,* 54 Baylor L. Rev. 927 (2002). None of the cases cited by Defendants, including *Warren* and *Creel*, discussed previously, supports Defendants' ultimate proposition that failing to apply discounts to the withdrawing partners' interests is the functional equivalent of a liquidation value, rather than the value of an ongoing concern.

The logic of the authorities that reject both minority and marketability discounts in the dissenting shareholder context is equally applicable to a valuation analysis under § 10-604. This is not a marketplace transaction involving a third party purchaser. Instead it is a statutory redemption intended to make the withdrawing partners whole by allowing them to "cash out" their interests. If discounts were applied, the remaining partners would end up acquiring the interests of the withdrawing partners for less than they were worth if those interests had remained in the hands of the withdrawing partners. The Court finds that under the circumstances of this case, it is not appropriate to apply such discounts in order to determine the value of the interests of the withdrawing partners under §10-604.

**D. Conclusion as to partnership interests**

For the reasons stated above, the Court concludes the fair value of the withdrawing partners' interests should be calculated by prorating the enterprise value established above, that is $14,643,606. The fair value of the partnership interests of the Plaintiffs in East Park Limited Partnership as of September 29,2002 is as follows:

| | | |
|---|---|---|
| Barbara Larkin | 12.2183% | $1,789,200 |
| Valeere Sass, Trustee | 3.7975% | $556,091 |
| Charles L. Helferstay Trust | 3.1875% | $466,765 |
| Rosemary Krupnick | 1.5937% | $233,375 |

**E. <u>Pre judgment interest</u>**

Plaintiffs have requested an award of prejudgment interest at the legal rate of 6% per annum on the fair value of their partnership interests from September 29, 2002. Whether to award prejudgment interest when it is not otherwise provided by contract or statute is within the sound discretion of the trial court. *Buxton v. Buxton,* 363 Md. 634, 656 (2001); *Crystal v. West & Callahan, Inc.,* 328 Md. 318, 343 (1992).

The right to prejudgment interest is clear when an obligation to pay is certain, definite and liquidated by a specific date prior to judgment so that the withholding of payment deprives the creditor of the use of the money. However, in cases where damages are not easily ascertainable until the verdict, prejudgment interest is generally not appropriate. *Buxton,* 363 Md. at 656. In this case, the amount of damages were not ascertainable before the date of trial for two reasons. First, the fair market value of East Park's real property was fairly debatable prior to trial on the relief phase of this case. Second, the concept of fair value in this context would have been unclear to the parties. Since fair value is a legal concept that is not susceptible to ready definition, the parties would not have been able to ascertain the amount owed to the Plaintiffs with any degree of precision before trial.

Plaintiff points to other analogous statutes, such as the Dissenting Shareholder Statute and MRUPA, that do provide for assessment of interest to departing shareholders or partners. § 3-211(c); § 9A-701(b). While the Court finds the construction given to these statutes persuasive in other areas discussed in this Opinion, they do not support Plaintiffs' claim for interest. It is significant that § 10-604 is silent regarding the issue of interest. The Court must presume that, if the Legislature had intended to allow for interest, it would have provided for it in

that section as it did in the other statutes. The Court cannot add language into § 10-604 that the Legislature clearly left out. The Court therefore concludes that, by failing to include language regarding interest in § 10-604, the Legislature did not intend for interest to be awardable under that section.

For these reasons, the Court must reject Plaintiffs' request for prejudgment interest.

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PAUL A. HACKNER, JUDGE

cc: Robert Warfield, Esquire, Attorney for Plaintiffs
James E. Carbine, Esquire, Attorney for Defendants