PRELIMINARY STATEMENT

The lower court failed to properly determine the amount of just compensation due to Claimant-Respondent-Cross Appellant New York Central Lines, Inc. ("CSX").

Having found that the highest and best use of the Subject Property was as a rail corridor and that the Comparable Sales method was the correct means by which to value it, the lower court then erred in applying the proper methodology. It used one component of value, the ATF value (a/k/a land value), but disregarded the second component, the Corridor Factor. In doing so, not only did the lower court disregard a key component of value, but it disregarded the marketplace, as the marketplace values corridors with the use of a Corridor Factor.

The Reply Brief of the Defendant-Appellant-Cross Respondent State of New York ("State") fails to persuasively argue to the contrary. First, the State mischaracterized the nature of the property taken, repeatedly claiming that "no rail corridor was taken here." But in point of fact, the State's appropriation took title to the actual rail corridor, including the tracks, ballast, sub-ballast and the like. Indeed, all parties were in agreement at trial that the highest and best use of the property was for "continued use as a railroad corridor." Accordingly, the State's arguments based on

this false factual premise must fail.

The State's critique of CSX's comparable corridor sales is equally lacking, failing to cite to evidence from any witness, expert appraiser, treatise or other document supporting its claims. Its argument is no more than empty assertions. Furthermore, the evidence at trial conclusively showed that CSX's comparable sales were carefully chosen, reasonably adjusted, and deserving of the highest weight.

In light of the above, the lower court's decision should be reversed and the Subject Parcels should be valued using a Corridor Factor of 2.5.

ARGUMENT

I. CSX Is Entitled to Direct Damages for the Railroad Corridor That Was Appropriated

The State's Reply Brief mischaracterized the property that was appropriated, repeatedly claiming that "no rail corridor was taken here."[1] It is unclear whether the State actually believes that to be true or if it was mere literary license meant to illustrate some larger point. Regardless however, as the assertion is patently incorrect the arguments on which it is based must fail.

First and foremost, the State did, in fact, take title to the rail corridor of CSX, including portions of the track, ballast, sub-ballast and the like. Many of the parcels taken literally go right through the center of CSX's former rail line.[2] Had no remedial measures been taken, CSX's rail line would have been severed. Consequently, both CSX and the State agreed that the highest and best use of the Subject Property prior to the State's appropriation was as a railroad corridor.[3] The lower court came to the same conclusion.[4]

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[1] Reply Brief for the State of New York at pp. 2, 8, 14

[2] R. 1408-1409, 1453, 1459, 1465, 1471, 1483, 1489, 1495, 1501, 1504, 1510, 1513

[3] R. 232-234, 1531-1534, 2553-2554, 2811

In light of the above, it remains a mystery how the State can plausibly claim that "no rail corridor was taken here" when even the State's own appraiser agreed that "the highest and best use of the subject property, as improved, before the taking, is for continued use as a railroad corridor."[5]

The State's mischaracterization of the Subject Property as "not a railroad corridor" appears linked to its argument that the application of a Corridor Factor constitutes a "premium" that gives CSX a "higher value" above and beyond the mere value of the land.[6] However, the application of the Corridor Factor is not a "premium," to be awarded like bonus money for special owners. The Subject Property is a rail corridor and the Corridor Valuation method is the well established means by which to determine the value of a corridor,[7] the industry standard, and what is used by buyers and sellers in order to determine price.[8] The validity of this methodology is also attested to by numerous real estate appraisal articles, including ones cited to by the State.[9]

In making this argument the State misperceives its own case. Not only is the

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[4] R. 8
[5] R. 2554
[6] State's Brief in Opposition, at p. 8-9
[7] R. 1428-1429
[8] R. 244, 247

application of the Corridor Factor *not* a premium, it results in a significantly lower value than the Cost Approach advocated by the State.

Under the Cost Approach, there would be certain costs associated with assembling all of the property. For example: the properties must be surveyed, the properties must be appraised, there are costs involved in the purchase of real estate, people must be hired to negotiate the sales, there may be legal fees and court costs, damages may be owed to the former owners including for the land, any improvements and severance damages, relocation assistance may need to be provided, environmental impact and mitigation will need to be studied and ultimately, properties may need to be condemned.[10] Similar to a Corridor Factor, the cost of assemblage is accounted for by applying a multiplier called the Assemblage Factor.

According to CSX's appraiser, state Department of Transportation studies from across the country have shown that when constructing a corridor, the Assemblage Factor is 4x to 10x the ATF value.[11] For example, Mr. Rex testified that he did a study of a sixty to seventy mile pipeline in California where the Assemblage Factor was 9.6x

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[9] R. 1194, 1655, 1669, 1967, 2005, 2029-2038, 3409
[10] R. 302-303, 684-685, 2043-2044
[11] R. 245

the ATF value.[12]

The State, while agreeing in principle that an Assemblage Factor was appropriate, declined to calculate it for various, contradictory reasons.[13] Said the State in its appraisal report:

> *Overall, the subject property meets [the criteria for an assemblage factor]...especially as a transportation corridor in the before and after.* The assemblage factor reflects the increment in value of the assembled corridor entity, over and above its total across the fence value, and accounts for its special purpose utility and characteristics as a transportation corridor. In order to estimate the assemblage

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[12] *Id.*

[13] The State proffered three contradictory excuses,

> (1) According to the State, an assemblage factor was not used was simply because it would be the same "before" and "after." (R. 1083-1084, 2586-2587, 2848) However, this explanation is a clearly incorrect. If one were to assume that the ATF value of the condemned land was $100,000 "before" and $100,000 "after", with an assemblage factor of 1, the damages would be $100,000, and with an assemblage factor of 3, the damages would be $300,000. The State's appraiser later disavowed this rationale at trial claiming that the statements in his report were "worded poorly" and that "english [was] never his strongest language." (R. 1083-1087)
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> (2) The State contended in order to properly use an assemblage factor, there must be an economic incentive to build the corridor and that there was no such economic incentive in the underlying matter. (R. 922-925, 984, 1073) Yet, the State presented no proof that the corridor was financially infeasible. Moreover, in both the State's report and at trial it contended that the highest and best, and financially feasible, use of the property was as a rail corridor. (R. 1076, 2552, 2811) Indeed, the State's appraiser stated that "for the purposes of this analysis, we have assumed the operation of the railroad is profitable." (R. 910, 1078, 2812-2813, 2553-2554, 2586)
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> (3) The State claimed that an assemblage factor was not necessary because the corridor was already assembled. (R.1081-1082) This is illogical. If the State is using the Cost Approach, it must account for the fact that there is a cost to assemble the corridor.

> factor applicable to the subject corridor, we have reviewed a number of sales of corridors...comparing the price paid to the "across the fence" value of the corridor land. *Although the subject's location and other attributes may justify an assemblage factor, the adjustment would be the same in the "before and after" scenario. Therefore, no assemblage factor was applied.*[14]

Obviously, the State's rationale for declining to use an Assemblage Factor is mathematically incorrect. For example, with an Assemblage Factor of 1 and an ATF value of $100,000, the damages would be $100,000; and with an Assemblage Factor of 3, the damages would be $300,000. Not surprisingly, the State's appraiser admitted at trial that the above rationale was incorrect.[15]

Taking this point to its conclusion, were the Cost Approach to be used, the ATF value of the Subject Property must be multiplied by an Assemblage Factor of between 4 and 10, as the only evidence of an Assemblage Factor was proffered by CSX. As set forth by the Second Department in *Gyrodyne*, "having rejected the State's appraisal, the trial court was bound to either accept the claimant's appraisal or explain the basis for any departure."[16]

In this context, CSX's Corridor Factor of 2.5 was not a "premium," but a well-

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[14] R. 2586-2587 (emphasis added)
[15] R. 1083-1087

supported determination that actually yields a lower value than the application of the Cost Approach promoted by the State. Indeed, in the article cited by the State in its Brief at page 8, "ATF Appraisal in Eminent Domain Cases," the Cost Approach is characterized as "the upper limit of value for corridor transactions,"[17] in no small part due to the cost of assemblage.[18]

In claiming that "no rail corridor was taken here" perhaps the State was also confused by the fact that CSX's rail line had to be relocated and rebuilt as a result of the appropriation. Such was done and paid for by the State because had it not done so, the State would have been responsible for that cost in any event as part of the "Cost to Cure."[19]

Yet the rebuilding of the rail line elsewhere does nothing to change the nature of what was taken in the first place. As of the date of title vesting, the Subject Property held a working freight rail line and that is what must be valued here. As is well established, the direct damages to CSX are based upon those property rights that were lost, not the fact that some property rights may remain.[20] Or to put it another way,

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[16] *Gyrodyne v. State*, 89 AD3d 988, 989 (2d Dept 2011), citing cases
[17] R. 2044
[18] R. 2043-2044
[19] R. 118, 121-122, 126, 148-149
[20] *Boston Chamber of Commerce*, 217 US 189, 195 (1910)

simply because CSX suffered no consequential damages, does not mean that the State can value the Subject Property as something other than the railroad corridor that it was as of the date of title vesting. Moreover, all of the property within the railroad corridor is valued as the same, irrespective of whether it is the property directly underneath the railroad tracks or the property adjacent to the railroad tracks.[21] Using the analogy set forth in CSX's original brief, in valuing a residential home, the land underneath the house is the same price as the land in the backyard and the same price as the land underneath the driveway. For railroad corridors it is no different. At trial, the State was in agreement.[22]

Equally unavailing is the State's citation to an article entitled "ATF Appraisal in Eminent Domain Cases."[23] According to the State, it stands for the proposition that the Corridor Valuation method doesn't apply if the taking does not affect railway operations.[24] Yet a review of the article shows that the five word snippet referenced by the State only pertains to instances where the condemnation was a transverse taking for

[21] R. 507-511

[22] R. 948 (when asked whether the property's value was "dependent on whether or not the track is actually located on them? Or is it their presence within the corridor?" the State's appraiser responded, "It is their presence within the corridor. I had a railroad corridor, that is what we valued before and that is what we valued after. And, basically, there has been no change in the functional utility of that corridor in the before and after"), R. 1172-1173 (same), R. 2844-2845 (the State's appraiser valued the property within the corridor based on the adjacent land use and did not differentiate as to whether any particular parcel or portion thereof contained the tracks, ballast, etc.)

[23] State's Brief in Opposition, at p. 8

a street crossing over the railway.[25] That is not the case here where the State appropriated the tracks, ballast, etc., leaving CSX's rail line severed and inoperable absent remedial measures.

Importantly, the article also states that "if, in the appraiser's opinion, the highest and best use of the site is for continued corridor use, then the ATF methodology [ATF value x an "enhancement factor" a/k/a corridor factor] is the correct method to be used."[26]

Coincidently enough, here the State's appraiser concurred that the highest and best use was for "continued use as a railroad corridor."[27]

The article relied on by the State goes on:

> The ATF methodology for corridor evaluation has a long history, stretching back more than 80 years. Established by the ICC [Interstate Commerce Commission] as a means of making railroads account for their land holdings, ATF has been promulgated by some of this country's most respected appraisers, it has been upheld in court, and is the predominant method used by both buyers and sellers in completing corridor transactions.[28]

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[24] State's Brief in Opposition, at p. 8
[25] R. 2044-2045
[26] R. 2041
[27] R. 2554, 2811
[28] R. 2045

In light of the above, it was error for the lower court to depart from the Corridor Valuation methodology. It is the industry standard with which to value a corridor,[29] the methodology relied on by buyers and sellers in the marketplace[30] and is supported by numerous treatises.[31] Having properly determined that the highest and best use of the Subject Property was as a rail corridor[32] and that the comparable sales methodology was the proper valuation technique,[33] it was error for the lower court to then disregard a key component of value within the Corridor Valuation methodology.

Accordingly, the lower court's decision should be reversed and the Subject Property should be valued using a Corridor Factor of 2.5.

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[29] R. 1428-1429
[30] R. 244, 247
[31] R. 1194, 1655, 1669, 3409
[32] R. 8
[33] R. 10

II. CSX's Corridor Sales Were Comparable and Properly Adjusted

The State also claimed that CSX's corridor sales were not comparable. Notably however, the lower court made no such finding.[34] The State's argument, therefore, represents an invitation for the Appellate Division to independently assess the weight and credibility of all of the evidence, documents, appraisal reports, rebuttal reports and testimony presented and to come to a de novo conclusion about the expert evidence. This Court should not take the bait.

More importantly, the State's contentions are entirely unsupported. Its critiques are tantamount to a shotgun approach alleging that the corridor sales are not comparable because not all were secondary lines, because the comparable sales were of different length than the Subject rail corridor, and because the adjustments made by CSX's appraiser were allegedly improper. And yet conspicuously absent from the State's Brief are citations to the testimony of any witness or expert appraiser, or any treatises, articles or other documents endorsing the interpretations of the evidence made by the State's appellate counsel. In fact, the State has pointed to nothing to prove that the methodology or implementation of that methodology relied upon by CSX was incorrect. It is all bluster, no backing. Anyone can claim that a corridor sale is

unreliable. But simply making the claim with no underlying support or proof to the contrary is an exercise in futility.

Similarly, the State's claim that the corridor sales were not comparable because they were not located near the Subject Property reflects a lack of understanding as to how a Corridor Valuation works. The purpose of the comparable corridor sales is simply to quantify the importance of the corridor.[35] Whether the corridor is located in New York or Des Moines the Corridor Factor reflects, for example, that a frequently used passenger line is more valuable than a rarely used industrial line. Location has nothing to do with it. Rather, the value of the location itself is reflected by the ATF value.[36]

In stark contrast to the State's Reply Brief, there is ample evidence in the Record to support the fact that CSX's corridor sales were conscientiously chosen and reasonably and fairly adjusted.

CSX's appraiser, Charles Rex, has been a real estate appraiser for 35 years[37] and

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[34] generally, R. 7-20
[35] R. 153, 230, 1419
[36] R. 153, 243, 463, 1419
[37] R. 150

spent the last 15+ years specializing in the valuation of corridors.[38] In that time, he has valued approximately 100 corridors,[39] primarily rail corridors, but also utility corridors and "rails-to-trails" corridors.[40] He has studied the corridor market extensively and attempted to obtain and analyze every corridor sale across the country that he could find.[41] In fact, the State's appraiser noted at trial that many appraisers get their information regarding corridors from Mr. Rex.[42] Mr. Rex is even one of the authors of the definition of a "corridor" in the Dictionary of Real Estate Appraisal.[43] Throughout his career, Mr. Rex has been retained by a multitude of railroads including the CSX, Union Pacific Railroad, Norfolk Southern Railroad, Canadian Pacific Railroad, NYS&W Railroad, Central Oregon Railroad, Arizona Pacific Railroad and Florida East Coast Railroad.[44]

CSX's fourteen comparable sales were more than sufficient to determine the applicable corridor factor and culled from the approximately 100 corridor sales in Mr. Rex's files.[45] For each sale, Mr. Rex confirmed the information with the buyer and/or

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[38] R. 152
[39] R. 153
[40] R. 152
[41] R. 155
[42] R. 1139
[43] R. 362
[44] R. 155-156
[45] R. 250

seller, including that the sale was an arms-length transaction.[46] He also confirmed what "in-kind consideration" may have been a part of the sale,[47] the ATF value that was used by the parties to that particular transaction,[48] and the Corridor Factor relied upon by the parties to the transaction (further evidence that the market determines the price of a corridor using a Corridor Factor).[49]

His adjustments to these comparable corridor sales were discussed at great length at trial and in Mr. Rex's report.[50] He made measured adjustments based on the corridor's type, whether the buyer purchased an entire corridor or just a portion thereof, and the corridor's length.[51]

Also impacting the Corridor Factor were the particular characteristics of the Subject rail corridor. Namely, that the Fremont Secondary Line is the only direct freight rail link between Long Island, Brooklyn and Queens and the rest of the mainland[52] and that the only other way to get a freight car back and forth is to float it

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[46] R. 249, 258, 1213-1214, 1593 *et seq.*
[47] *Id.*
[48] R. 245, 1593 *et seq.*
[49] R. 1593 *et seq*
[50] R. 264-275, 288-307, 1543-1550
[51] R. 269-275, 1543-1549
[52] R. 163, 216, 230, 1423-1424

on a barge from New Jersey to Brooklyn.[53] Furthermore, since CSX's acquisition of the Subject Property from Conrail in 1999,[54] freight traffic has almost doubled.[55] As of the dates of title vesting, the corridor was used by CSX, Canadian Pacific Railroad and Providence & Worcester Railroad. CSX operated five trains per week, each consisting of approximately 100 cars.[56] Canadian Pacific and Providence & Worchester each used the line approximately three times per week, for a total of an additional 50 cars each way.[57] As of the dates of title vesting, it was anticipated that freight traffic along Fremont Secondary would further increase over time.[58]

With the above in mind, Mr. Rex determined that the corridor sales that were most comparable to the Subject Property were his Sales 7, 13, 102 and 7199.[59] These four sales represented those most similar in importance to the Subject Property.[60] Corridor Sale 7199 closed a mere 6 months prior to the date of title vesting.[61] Sale 013 was in a dense urban area, as was the Subject. Moreover, although this sale was for a mainline track, its importance as such was somewhat lessened by the availability of

[53] R. 1423-1424
[54] R. 1424
[55] R. 1428
[56] R. 217, 1425
[57] R. 218, 1425
[58] R. 230, 1424-1426
[59] R. 304-307, 1549-1550
[60] R. 304-307, 1549-1550
[61] R. 304-307, 1543, 1549-1550

alternate routes, increasing its similarity to the Subject Property.[62] Sale 102 was an industrial line, also in a dense urban area.[63] Corridor Sale 7 was a mainline sale with freight traffic similar to the Subject's.[64]

In light of the above, CSX's determination that the applicable Corridor Factor was 2.5 was reasonable, well supported and substantiated by the Record.[65] The same cannot be said of the State's unfounded critiques.

Accordingly, the lower court's decision should be reversed and the Subject Property should be valued applying a Corridor Factor of 2.5.

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[62] R. 304-307, 1549-1550
[63] R. 304-307, 1549-1550
[64] R. 304-307, 1549-1550
[65] R. 305, 1550

CONCLUSION

For all of the reasons set forth above and within CSX's Brief dated February 16, 2012, the lower court's decision should be reversed, the Subject Parcels should be valued using a Corridor Factor of 2.5, and Parcels 130-A, 193-F, 194-J and 195-H should be valued at $724,470. Furthermore, the State's appeal should be dismissed in its entirety, with costs, together with such other and further relief as may be appropriate.

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Respectfully Submitted,

By: ______________________________

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