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Claimant, Gyrodyne Company of America, Inc. ("Gyrodyne"), submits this memorandum of law in support of its motion for an additional allowance pursuant to the Eminent Domain Procedure Law ("EDPL") § 701 for attorneys fees, appraisal fees, and other actual and necessary disbursements incurred.

INTRODUCTION

Following five years of litigation, including four days of trial, this Court on June 21, 2010 granted Gyrodyne an award of One Hundred and Twenty-Five Million Dollars (\$125,000,000). This Court also awarded statutory interest from the vesting date of November 2, 2005. Judgment was entered on August 17, 2010. The award was compensation for the taking by the State University of New York of 245.46 acres Gyrodyne had owned in the Towns of Brookhaven and Smithtown.

Exclusive of interest, the award represents an excess of 475% over the defendant State of New York's ("State") advance payment of only Twenty-Six Million, Three Hundred and Fifteen Thousand Dollars (\$26,315,000), and over five times the Twenty-Two Million, Four Hundred and Fifty Thousand (\$22,450,000), which the State contended was the value at trial. EDPL § 701 permits this Court to award an additional allowance for attorney and other fees and expenses where the award is "substantially in excess" of the State's valuation. New York courts have regularly found that differences in value of only 30% or less qualify as substantially in excess. Here an almost 500% difference certainly qualifies.

The success of Gyrodyne's counsel in obtaining an award of the full amount for which they argued at trial demonstrates their efforts were necessary and valuable to obtaining the award. Although a contingent fee is normal in such condemnation actions, Gyrodyne's counsel

handled this matter on an hourly basis. As a result, the attorney's fees and costs of \$973,668.82 are tens of millions of dollars less than the normal contingent fee, and clearly reasonable.

In support of its valuation of the condemned property at the trial, Gyrodyne offered the appraisals and testimony of a number of experts, including Gary Taylor of Rogers & Taylor Appraisers, Inc., and Alan King, Jr., a professional traffic engineer. As this Court noted in its Decision, dated June 21, 2010 (the "Decision") p.33, Gyrodyne's planning and zoning expert Daniel Gulizio testified without compensation. In addition, Gyrodyne retained the services of, and relied extensively pre-trial, trial and post-trial on, Timothy Barnes of Cushman & Wakefield, an expert real estate appraiser, as well as other consulting experts on planning and zoning issues. Accordingly, Gyrodyne incurred the following expenses:

• Attorney's fees Robinson & Cole LLP:	\$ 907,070.00;
• Costs and Disbursements incurred by Robinson & Cole LLP:	\$ 66,598.82;
• Appraisal and testimony of Gary Taylor of Rogers & Taylor Appraisers, Inc., expert appraiser:	\$ 73,087.00;
• Traffic impact study and testimony of Alan King, Jr., Cameron Engineering, a licensed professional traffic engineer:	\$ 164,397.61;
• Consulting expert advice of Tim Barnes, of Cushman & Wakefield, Inc., expert appraiser:	\$ 226,000.00;
• Consulting expert advice and yield analysis of BFJ Planning:	\$ 32,037.75;
• Consulting expert advice on planning and zoning issues of Thomas Cramer:	\$ <u>5,000.00;</u>
TOTAL COSTS AND DISBURSEMENTS:	\$ <u>1,474,191.18.</u>

All of these expenses were both necessary and reasonable, contributing significantly to Gyrodyne's success in this action. An additional allowance in this amount is more than justified under EDPL § 701.

ARGUMENT

EDPL § 701 ENTITLES GYRODYNE TO ADDITIONAL ALLOWANCES

EDPL § 701 states:

In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.

As the Court of Appeals explained in *Hakes v. State of New York*, 81 N.Y.2d 392, 397 (1993), the purpose of Section 701 is to insure that "the condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer." Fair compensation is a constitutional requirement. The condemnee should not have its recovery reduced by the costs expended to demonstrate to the court that the amount the State offered to pay failed to meet the constitutional mandate. Even before the adoption of the EDPL § 701, New York courts had long recognized a discretionary authority to award additional allowances in condemnation proceedings. *See Hakes*, 81 N.Y. 2d at 397. EDPL § 701 incorporates that

concept into statute, allowing a court “to ameliorate the condemnee’s costs in cases it considers appropriate.” *Id.*, at 398.

A. The Award In This Case Was Substantially In Excess Of The State’s Offer.

While the 1987 amendments to EDPL § 701 removed the fixed numeric criteria for what constitutes “substantially in excess,” based on legislative history the courts have recognized that claimant must prove “more than a modest increase in value.” *Malin v. New York*, 183 A.D.2d 899 (2d Dept. 1992). *See also In the Matter of New York City Transit Authority (Northern Boulevard)*, 150 Misc.2d 917 (Queens Sup. Ct. 1991) (finding the award substantially in excess where the difference from the offer was “ample and considerable”). A series of decisions by the Second Department has found that a difference of 30% or more between the initial offer and award qualifies as substantial. *See e.g., Gelsomino v. City of New Rochelle*, 25 A.D.3d 554, 555 (2d Dept. 2006) (35.5%); *Town of Riverhead v. Lobozzo*, 207 A.D.2d 789, 790 (2d Dept. 1994) (38%); *Karas v. State of New York*, 169 A.D.2d 816 (2d Dept. 1991) (30%). *See also Hakes*, 81 N.Y.2d, at 397 (“There is no dispute that the awards in both cases [differences of \$30,000 and \$100,000] were substantially in excess”); *Malin*, 183 A.D.2d, at 899 (difference of \$200,000 “substantially in excess”).

The case of *Town of Islip v. Sikora*, 220 A.D.2d 434 (2d Dept. 1995), has similarities to the present matter, but with far smaller numbers. There, the court rejected the Town’s claim that the highest and best use was as presently zoned industrial. Instead, the court agreed with claimants that a change to medical purposes would be the highest and best use, although the court did not award the full valuation amount claimant sought. *Id.*, at 435. Based on the accepted increased valuation of \$178,000 over the Town’s advance payment, the court granted an additional allowance for counsel and appraisal fees. *Id.* On appeal, the Second Department upheld the valuation (after correcting a mathematical error) and found “that the trial court

properly exercised its discretion in making an additional allowance.” *Id.*, at 437. *See also In the Matter of the Application of the Bd. of Commissioners of Great Neck Park District*, 2009 N.Y. Misc. LEXIS 4013 (Nassau Sup. Ct., February 24, 2009) (holding a difference of \$500,000 (22.9%), was “clearly sufficient to satisfy the substantial test particularly in today’s economy”).

In contrast, this Court’s award of \$125 million represents an increase of almost \$100 million from the State’s advance payment - a difference of almost 500%. At trial, the State even attempted to prove a value of \$2 million less than the payment it had already authorized; an attempt this Court rejected. In these circumstances, “[i]t need not be belabored that the amount here involved” is substantially in excess of the State’s advance payment. *In the Matter of New York City Transit Authority (Gun Hill Bus Depot)*, 142 Misc.2d 629, 634 (Bronx Sup. Ct. 1989) *aff’d.*, 166 A.D.2d 336 (1st Dept. 1990).

Nor can there be any question that the attorneys and experts, whose fees are sought to be recovered, were “necessary for the claimants to achieve just and adequate compensation.” *Gelsomino*, 25 A.D.3d, at 555. *See also Malin*, 183 A.D.2d, at 899. Here, without the effort of these professionals, Gyrodyne would not have been able to demonstrate the gross undervaluation by the State. This Court made clear throughout its Decision that the expert testimony of Gyrodyne’s witnesses was critical to this Court’s resolution of the matter. Only by obtaining the reimbursement provided in EDPL § 701, will the claimant truly be made whole. *See City of Yonkers v. Celwyn Co.*, 221 A.D.2d 437, 438 (2d Dept. 1995) (holding that the failure to make an award of additional allowance where the condemnation award was substantially in excess of the condemnor’s initial offer constituted an abuse of discretion).

B. The Attorney Fees And Costs Were Reasonable.

The courts of New York have long recognized that attorney contingency fees of 1/3 of the award are the “standard” for attorneys in condemnation actions. *See In the Matter of New*

York Convention Center Development Corp., 234 A.D.2d 167 (1st Dept. 1996) (noting the 1/3 standard and ruling that a § 701 fee request seeking “only 25%” was therefore “manifestly reasonable”). See also *In the Matter of New York City (Powell’s Cove)*, 2009 N.Y. Misc. LEXIS 2389, at *7 (Queens Sup. Ct., September 9, 2009) (citing cases). This Court’s Decision, p. 28 n.25, specifically noted this “industry standard” of 1/3 of any money over and above the advance payment. Gyrodyne’s attorneys Robinson & Cole LLP, however, were retained on an hourly fee basis, not a contingency. As a result instead of seeking a EDPL § 701 allowance of \$30 to \$40 million, Gyrodyne seeks attorney’s fees and costs of less than \$1 million (\$973,668.82) on a recovery more than 100 times that figure. As in *New York Convention Center*, this is manifestly reasonable. See e.g. *Madowitz v. State of New York*, 288 A.D.2d 443 (2d Dept. 2001) (fees equaling 60% of the total award reasonable); *Malin*, 183 A.D.2d at 597 (fees of \$66,000 on a recovery of \$200,000 approved).

C. The Expert Fees In This Case Were Reasonable.

This Court’s Decision highlighted the critical importance and relative value of Gyrodyne’s experts:

Defendant’s experts were inconsistent with their own reports and vague as to their testimony on cross-examination. . . . In contrast, claimant’s experts were detailed in their analyses . . . they pointed to solid facts in determining that the highest and best use would be for a change of zone to residential use.

Decision, p. 31. As the Decision, p. 29, points out, “the outcome of this case hing[ed] on whether or not the Court accept[ed] claimant’s position that the subject property would be rezoned to allow a PDD for residential use.” Gyrodyne’s experts presented the vital evidence “that a change of zone for the subject property to residential was probable” (Decision, p. 31) and that such a highest and best use “was not speculative or hypothetical.” *Id.*, at 32. As this Court pointed out:

In establishing its case, claimant presented the Court with: the background and history of the subject property (Pitsiokos); a businessman willing to invest time and money toward developing the subject property (Barton); a traffic study to compare and contrast the impact of traffic in an industrial scenario and a residential scenario (King); an expert in rezoning (Gulizio); and a real estate appraiser (Taylor). Each of claimant's experts was either local to Long Island or had experience on Long Island and had extensive backgrounds in their field.

Decision, p.29. The costs to Gyrodyne of preparing and presenting this expert evidence are properly recoverable under EDPL § 701.

1. Testifying Experts.

a) Gary Taylor.

Mr. Taylor is a state certified real estate appraiser with Rogers & Taylor Appraisers Inc. At the time of the trial he lived in Setauket, New York within minutes of the Gyrodyne property. (Mr. Taylor has since moved to Florida.) He worked as an appraiser in New York for 36 years. Decision, p. 12; Transcript ("Tr.") p. 322. As this Court noted, in appraising Gyrodyne's property Mr. Taylor "looked at the general character of the surrounding area and his own personal experience of living nearby for 30 years." Decision, p. 12. It was Mr. Taylor's testimony that "the highest and best use for the subject property was a change of zone to a PDD and for residential development of three to six units per acre." Decision 15. Most importantly it was Mr. Taylor who appraised the property taken at \$125 million, the value ultimately determined by this Court. Tr. 383.

Gyrodyne paid Rogers & Taylor \$50,000.00 for the appraisal. In addition Gyrodyne paid Mr. Taylor \$23,087.00 in expert witness fees. The total paid was \$73,087.00.

b) Alan King.

Mr. King is a licensed professional engineer and a partner in Cameron Engineering & Associates LLP. Decision, p. 19; Tr. 180. He has worked as a traffic engineer for over 23 years,

fourteen of those on Long Island where Cameron Engineering is located. Tr. 180. Mr. King prepared the Traffic Impact Study introduced at trial. Decision, p. 19. This study compared the effects of a full build out, both industrial and residential, of the Gyrodyne property on traffic in the vicinity of the property. *Id.*, at 20. Mr. King presented the Traffic Study in both written and visual form at trial. He testified that the negative effects of an industrial build out would far exceed the negative effects of a residential build out. *Id.*, at 21.

While Cameron Engineering did other work for Gyrodyne during this period, the bills for fees related to the condemnation have been separated. Gyrodyne paid Mr. King and Cameron Engineering \$164,397.61.

c) **Daniel Gulizio.**

Mr. Gulizio, a planning and zoning expert for over 20 years, testified concerning the probability of rezoning. Decision, p. 16. His testimony was central to Gyrodyne's case. *Id.*, at 16-19. However, as this Court noted in its Decision:

Gulizio testified he began working for claimant prior to his employment with the County of Suffolk...to avoid any appearance of working for "two masters," the witness completed his work for claimant without charging a fee.

Id., at p. 33 (emphasis added). Therefore, Gyrodyne has no claim for fees of its planning and zoning expert Mr. Gulizio.

2. **Consulting Experts.**

a) **Timothy Barnes.**

Gyrodyne retained a consulting expert, Mr. Timothy Barnes, who advised it on valuation both before and during the trial, but did not testify. Mr. Barnes worked as an appraiser for many years, joining Cushman & Wakefield, a global real estate firm, in 2003 as a Managing Director in Long Island. Mr. Barnes has provided valuation and counseling services on a wide variety of

commercial, industrial, and residential properties including industrial buildings, shopping centers, office buildings, apartment complexes, malls, mixed-use complexes, auto-related properties, contaminated properties, golf courses, headquarters facilities, portfolios, adapted use properties, environmentally significant land, air rights, underwater land, acreage tracts, and fractional interests. He has prepared reports and studies for institutional, legal, government, private, and corporate clients. These reports have been prepared for mortgage purposes, buy/sell decisions, condemnation matters, zoning and land-use hearings, insurance and contamination claims, real estate tax review proceedings, federal tax trials, bankruptcy proceedings, foreclosure hearings, partnership disputes, and arbitration.

Mr. Barnes regularly provides expert services to the Internal Revenue Service, the New York State Department of Transportation as well as other State agencies including the Department of Environmental Conservation, and the Department of Parks, Recreation, and Historical Preservation. He has conducted seminars before the Suffolk County Department of Real Estate, the Appraisal Institute, and the Suffolk County Bar Association (Environmental Committee), and has spoken on a number of topics before appraisal education groups including the Candidates Forum of the Appraisal Institute. He has been a guest lecturer at New York University and the Long Island Real Estate Institute. Mr. Barnes has appeared before numerous planning boards and town boards on behalf of client/applicants and has qualified as an expert witness before a number of trial courts including U.S. Bankruptcy Court, U.S. Tax and Tariff Court, the Supreme Court of the State of New York, and the New York State Court of Claims.

Mr. Barnes is certified as a Real Estate General Appraiser by the State of New York (No. 46-6137). He is a member of the Counselors of Real Estate and has participated nationally at both the committee and task force levels, including Alternate Dispute Resolution, Litigation

Support, Editorial Board of Real Estate Issues, and Invitation Advisory. He is a State Accredited Affiliate of the Appraisal Institute and has variously been affiliated with the Urban Land Institute, the Pension Real Estate Association, the American Bar Association, and the Institute of Professionals in Taxation. In 2008, Mr. Barnes was elected a Fellow of the Royal Institution Chartered Surveyors.

Gyrodyne retained Mr. Barnes in 2006 to provide expert advice concerning the appraisal and other aspects of this condemnation action. Mr. Barnes worked directly with Gyrodyne and Gyrodyne's counsel to identify potential witnesses both lay and expert, interview prospective candidates for the trial team, select and assist in their preparation and develop trial strategy. Mr. Barnes consulted with Gyrodyne's trial counsel during the trial and assisted in the formulation of its arguments for the post-trial brief. Mr. Barnes' contributed directly to the successful resolution of this case. For his expert services Gyrodyne paid Mr. Barnes \$226,749.49.

EDPL § 701 does not limit recovery to experts who actually testify. Rather the statute permits payment of "actual and necessary costs, disbursements and expenses." The fees paid Mr. Barnes fall within those parameters and should be awarded here.

b) BFJ Planning (Buckhurst, Fish & Jacquemart).

As part of Mr. Gulizio's planning and zoning analysis he utilized a "yield analysis provided by BFJ Planning." *See Zoning Analysis – Gyrodyne Property* by Daniel J. Gulizio dated October 17, 2007, p. 5; *see also* Appraisal Report of Rogers & Taylor Appraisers dated October 17, 2007, p. 48. This yield analysis calculated the square footage of industrial build-outs of the Gyrodyne Property in an as-zoned state. The yield analysis conclusions were also utilized by Mr. King in the traffic study.

BFJ Planning provides professional advice and services in the areas transportation planning, urban design, environmental analysis as well as real estate consulting in Long Island.

Mr. Fish, BFJ Planning's lead person on the Gyrodyne case specializes in comprehensive planning and public approvals. He has represented more than 30 municipalities throughout the Northeast as well as major private sector clients. He is on the faculty of New York University.

While Mr. Gulizio was not compensated for his expert analysis and testimony, Gyrodyne did pay BFJ Planning for preparing its expert yield analysis and related work including as of right plans, highest and best use plan, existing condition and combined sites. Those payments, totaling \$32,037.75, are reflected in invoices attached to the affidavit of the claimant Gyrodyne.

c) Thomas Cramer.

Mr. Cramer, a principal in the Cramer Consulting Group of Miller Place, New York, advises and assists parties in planning and zoning application. An expert in planning and zoning, he regularly advises applicants and appears before Long Island planning and zoning boards. Mr. Cramer was retained by Gyrodyne to provide expert analysis of the zoning issues in this case. As part of his services he reviewed Mr. Gulizio's report. Mr. Cramer provided expert assistance in formulating trial strategy, particularly in defending Mr. Gulizio's expert report and opinions. Mr. Cramer was paid \$5,000.00. A copy of Cramer Consulting Group's invoice in that amount is attached to the affidavit of the claimant Gyrodyne.

CONCLUSION

The Court awarded Gyrodyne an amount that is almost 500% in excess of that offered by the State in this eminent domain proceeding. The expert fees, attorney fees, consultant fees, costs, and expenses incurred by Gyrodyne were reasonable and necessary to prevail on its claim, Claimant is entitled to additional allowances under EDPL §701 in the amount of \$1,474,191.18.

Dated: New York, New York
September 2, 2010

ROBINSON & COLE LLP

By: 

Joseph L. Clasen
Thomas J. Donlon
885 Third Avenue, 28th Floor
New York, NY 10022
Tel: (212) 451-2900

Attorneys for Claimant

TO: J. Gardner Ryan, Esq.
Assistant Attorney General
Office of the Attorney General
235 Main Street, 3rd Floor
Poughkeepsie, NY 12601
Tel: (845) 485-3900

STATE OF NEW YORK: COURT OF CLAIMS

----- X	
GYRODYNE COMPANY OF AMERICA, INC.	: Claim No.: 112279
Claimant,	: Hon. James J. Lack
-against-	: AFFIDAVIT OF TIMOTHY
THE STATE OF NEW YORK,	: BARNES IN SUPPORT OF
Defendant.	: CLAIMANT'S MOTION FOR EDPL
	: § 701 ADDITIONAL ALLOWANCE
----- X	

STATE OF NEW YORK)
) ss.:
 COUNTY OF SUFFOLK)

Timothy Barnes, being duly sworn, deposes and states as follows:

1. I am employed by Cushman & Wakefield. I make this affidavit in support of the motion of Claimant Gyrodyne Company of America ("Gyrodyne") motion for an order awarding an additional allowance pursuant to EDPL § 701 for attorneys fees, appraisal fees, and other actual and necessary disbursements incurred to achieve just compensation for the appropriation of Gyrodyne's property by the Defendant State of New York (the "State").

2. My office is in Islandia, New York.

3. I have worked for Cushman & Wakefield, a global real estate firm since 2003 as an appraiser, counselor and expert, becoming a Managing Director upon being hired. I have provided valuation and counseling services on a wide variety of commercial, industrial, and residential properties including industrial buildings, shopping centers, office buildings, apartment complexes, malls, mixed-use complexes, auto-related properties, contaminated properties, golf courses, headquarters facilities, portfolios, adapted use properties, environmentally significant land, air rights, underwater land, acreage tracts, and fractional interests.

4. I have also prepared reports and studies for institutional, legal, government, private, and corporate clients. These reports have been prepared for mortgage purposes, buy/sell decisions, condemnation matters, zoning and land-use hearings, insurance and contamination claims, real estate tax review proceedings, federal tax trials, bankruptcy proceedings, foreclosure hearings, partnership disputes, and arbitration.

5. I have regularly provided expert services to the Internal Revenue Service, the New York State Department of Transportation as well as other State agencies including the Department of Environmental Conservation, and the Department of Parks, Recreation, and Historical Preservation. I have conducted seminars before the Suffolk County Department of Real Estate, the Appraisal Institute, and the Suffolk County Bar Association (Environmental Committee), and spoken on a number of topics before appraisal education groups including the Candidates Forum of the Appraisal Institute. I have been a guest lecturer at New York University and the Long Island Real Estate Institute.

6. I have appeared before numerous planning board and town boards on behalf of client/applicants and has qualified as an expert witness before a number of courts including U.S. Bankruptcy Court, U.S. Tax Court, the Supreme Court of the State of New York, and the New York State Court of Claims.

7. I am a member of the Counselors of Real Estate and have participated nationally at both the committee and task force levels, including Alternate Dispute Resolution, Litigation Support, Editorial Board of Real Estate Issues, and Invitation Advisory. I am also a State Accredited Affiliate of the Appraisal Institute and was variously affiliated with the Urban Land Institute, the Pension Real Estate Association, the American Bar Association, and the Institute of

Professionals in Taxation. In 2008, I was elected a Fellow of the Royal Institution Chartered Surveyors.


8. I was retained on behalf of Gyrodyne in 2006 to provide expert advice concerning the condemnation and appraisal. I worked with Gyrodyne's counsel, Robinson & Cole LLP, to identify expert witnesses, assist in their preparation and develop trial strategy. I worked with counsel throughout the trial and assisted in formulating the post-trial briefs. For all these services, I was paid \$226,749.49.

9. Copies of my firm's invoices for the above services are attached hereto. The fees charged by my firm for these services are customary and reasonable.


TIMOTHY BARNES

Sworn to before me this

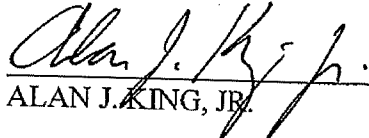
16th day of August 2010


Notary Public

MARTINA SCHULTHEIS
Notary Public, State of New York
Reg. No. 01SC4957387
Qualified in Suffolk County
Commission Expires Oct. 16, 2013

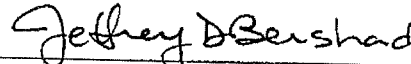
5. In addition, I reviewed the State's traffic assessment, provided advice to Gyrodyne and testified as an expert at trial. For all these services, Cameron Engineering was paid \$164,397.61.

6. Copies of my firm's invoices for the above services are attached hereto. During the period in question, Cameron Engineering did other work for Gyrodyne. The amounts for such work, which appear on the invoices, have not been included in the total. The fees charged by my firm for the services related to the condemnation action are customary and reasonable.


ALAN J. KING, JR.

Sworn to before me this

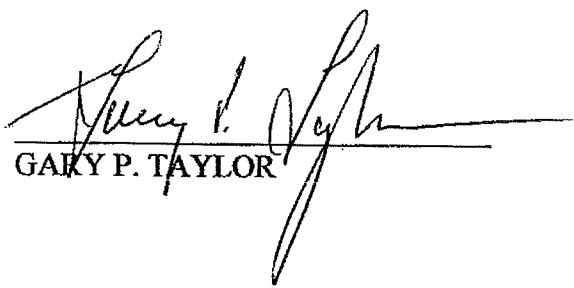
27 day of August 2010


Notary Public


JEFFREY D. BERSHAD
Notary Public, State of New York
No. 01BE6083120
Qualified in Nassau County
Commission Expires November 12, 20 10

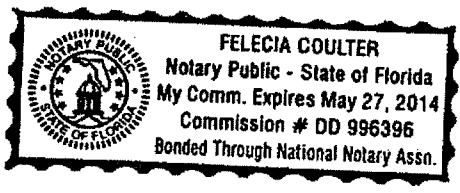
5. In addition, I reviewed the State's appraisal report, provided advice to Gyrodyne and testified as an expert at trial. For these services, Rogers & Taylor was paid an additional \$23,087.00 for a total of \$73,087.00.

6. Copies of my firm's invoices for the above services are attached hereto. The fees charged by my firm for these services are customary and reasonable.


GARY P. TAYLOR

Sworn to before me this
10th day of AUGUST, 2010


Notary Public



Robinson & Cole LLP. Pursuant to that hourly agreement, Gyrodyne has paid Robinson & Cole LLP fees and costs of \$973,668.82 to date.

4. In addition, Gyrodyne has incurred and paid the following fees for experts in this matter:

Appraisal and Testimony of by Gary Taylor of Rogers & Taylor Appraisers, Inc.:	\$ <u>73,087.00</u> ;
Traffic impact study and Testimony of by Alan King, Jr., a licensed professional traffic engineer:	\$ <u>164,397.61</u> ;
Consultancy fees of Timothy Barnes, a real estate and appraisal expert of Cushman & Wakefield, Inc.:	\$ <u>226,749.40</u> ;

Affidavits of these experts are being submitted along with this affidavit in support of the motion.

5. Gyrodyne also retained the services of Daniel Gulizio, a planning and zoning expert. After his retention by Gyrodyne but prior to trial, Mr. Gulizio took a new position as Deputy Director of Planning for Suffolk County. In order to avoid even the appearance of a future conflict of interest, Mr. Gulizio refused any compensation for his assistance and testimony as an expert witness. Gyrodyne did not pay Mr. Gulizio a fee.

6. In support of the expert analysis of Mr. Gulizio and Mr. King, Gyrodyne retained the services of a planning firm, BFJ Planning. BFJ Planning prepared a yield analysis to calculate the square footage that could be built on the property as currently zoned. This yield analysis was in turn utilized by Mr. Gulizio and Mr. King in formulating their opinions regarding zoning and traffic. Gyrodyne paid BFJ Planning \$32,037.75. Copies of the invoices supporting these payments are attached hereto as Exhibit A.

7. Gyrodyne also retained Mr. Tom Cramer of Cramer Consulting Group to provide expert analysis of the zoning issues in this case. While Mr. Cramer did not testify, he provided

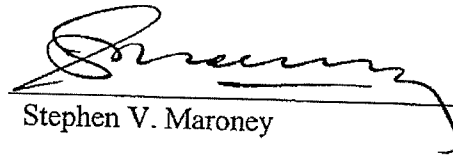
expert assistance in reviewing Mr. Gulizio's report and conclusions, and helping prepare the case for trial. Gyrodyne paid Mr. Cramer \$5,000. A copy of the invoice supporting that payment is attached hereto as Exhibit B.

8. Gyrodyne necessarily incurred legal fees, appraisal fees, and other costs and expenses in this matter totaling \$1,474,191.18 in its effort to procure just compensation for the State's appropriation of Gyrodyne's property. The State refused to offer Gyrodyne an amount greater than its advance payment of \$26,315,000.00. Such an amount was obviously substantially less than the fair market value of the subject property, and so Gyrodyne was left without any choice but to make and prosecute the instant claim in the Court of Claims in an effort to procure just compensation for the State's taking. The fees paid by Gyrodyne in support of its claims were thus reasonable and necessary.

9. Gyrodyne will not be justly and adequately compensated for the State's appropriation of Gyrodyne's property unless this Court grants an additional allowance for Gyrodyne's fees and expenses. The State paid the Gyrodyne the sum of \$26,315,000.00 as an advance payment and persistently refused to offer any more. At trial, the State offered proof that the fair market value of the subject property was only \$22,450,000.00 at the time of taking. The Court, after trial, awarded Gyrodyne \$125,000,000.00 with statutory interest thereon from the vesting date of November 2, 2005, a sum 475% greater than the State's advance payment and over 500% greater than the State's proof at trial.

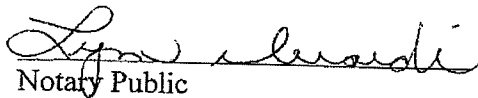
WHEREFORE, for the foregoing reasons, I respectfully request this Court to grant Gyrodyne's motion for an Order awarding an additional allowance pursuant to EDPL § 701 for Gyrodyne's attorney's fees, appraisal fees, and other actual and necessary disbursements in the

total amount of \$1,474,191.18, incurred to achieve just compensation for the State's appropriation of Gyrodyne's property.


Stephen V. Maroney

Sworn to before me this

2nd day of September


Notary Public

Lynn Ierardi
NOTARY PUBLIC State of NY
No. 5008509, Suffolk County
Term Expires 2/21/11

STATE OF NEW YORK: COURT OF CLAIMS

GYRODYNE COMPANY OF AMERICA, INC.

Claimant,

-against-

THE STATE OF NEW YORK,

Defendant.

Claim No.: 112279

Hon. James J. Lack

NOTICE OF MOTION

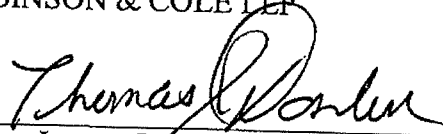
PLEASE TAKE NOTICE that upon the annexed Affirmation of Joseph L. Clasen, Esq., sworn to on the 3d day of September, 2010; Affidavit of Stephen V. Maroney, sworn to on the 2d day of September, 2010; Affidavit of Gary P. Taylor sworn to the 16th day of August 2010; Affidavit of Timothy Barnes sworn to the 16th day of August 2010; Affidavit of Alan J. King Jr. sworn to the 27th day of August 2010; Memorandum in Support dated September 2, 2010, and upon all prior pleadings and papers herein, the Claimant will move this court at a Motion Term of the Court, to be held at the State Office Building, Veterans Memorial Highway, Hauppauge, New York 11788, on the 13th day of October, 2010, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, for an order granting the Claimant an additional allowance pursuant to EDPL § 701 for its attorneys fees, appraisal fees, and other actual and necessary disbursements incurred to achieve just compensation in the Defendant's appropriation of the Claimant's real property and for such other and further relief as to the Court may seem just and proper.

The instant proceeding is for recovery of compensation for Defendant's appropriation of Claimant's real property. Pursuant to CPLR 2214(b), answering affidavits, if any, shall be served at least seven (7) days before the return date of the motion.

Dated: New York, New York
September 3, 2010

ROBINSON & COLE LLP

BY:



JOSEPH L. CLASEN

THOMAS J. DONLON

Attorneys for Claimant
885 Third Avenue, 28th Floor
New York, New York 10022
212-451-2900

TO:

J. Gardner Ryan, Esq.
Assistant Attorney General
Office of the Attorney General
Attorneys for Defendant
235 Main Street, 3rd Floor
Poughkeepsie, NY 12601
845-485-3900

4. The taking date of the subject property vested on November 2, 2005. The present claim was filed May 1, 2006.

5. After Gyrodyne was notified by the State that the State intended to appropriate the subject property for use by the State University of New York Stony Brook, Gyrodyne retained Robinson & Cole LLP as its attorneys to represent it for purposes of procuring just and adequate compensation for the State's taking.

6. Robinson & Cole LLP timely prepared, filed, and served a Claim on behalf of Gyrodyne against the State.

7. Robinson & Cole LLP coordinated the retention of qualified appraisers on the Gyrodyne's behalf to appraise the subject property and thoroughly reviewed each such appraiser's appraisal reports to ensure that they conformed with appropriate legal standards and requirements.

8. Robinson & Cole also obtained the services of other consulting and testifying experts in the areas of planning and zoning, and traffic.

9. On behalf of Gyrodyne, Robinson & Cole LLP attempted to resolve the issue of just and adequate compensation through negotiations with officials of the State of New York prior to trial, but such negotiations proved unsuccessful because the State failed and refused to make a reasonable offer of compensation for its taking of the subject property.

10. The Defendant made an advance payment to Gyrodyne in the sum of \$26,315,000.00, but such advance payment was substantially below the estimated fair market value of the subject property as determined by Gyrodyne's appraisers.

11. The matter proceeded to trial, at which the Court of Claims, the Honorable James J. Lack presiding, in a decision dated June 21, 2010 awarded Gyrodyne total damages of

\$125,000,000.00 with statutory interest thereon from the vesting date of November 2, 2005. A copy the Decision is annexed hereto as Exhibit A for ease of reference.

12. At trial, the State relied on the appraisal of American Property Counselors (hereinafter the "Defendant's Appraisal") and the testimony of the president thereof, Kenneth L. Golub. The State's Appraisal estimated the fair market value of the subject property to be \$22,450,000.00.

13. At trial, Gyrodyne relied on the appraisals and testimony of Gary Taylor of Rogers & Taylor Appraisers, Inc. and Daniel J. Gulizio, a planning and zoning expert. Claimant further relied on the testimony and traffic study conducted by Alan King, Jr., a traffic engineer, the testimony of Gerald Barton, a developer, as well as the advice of Timothy Barnes, an appraisal and real estate expert, Tom Cramer, a planning and zoning expert and Frank Fish of BFJ Planning, a planning expert. Taken together, Gyrodyne's appraisers estimated the fair market value of the entire property to be \$153,000,000.00.

14. In his Decision, Judge Lack accepted Gyrodyne's proof of value of the property taken as \$125,000,000.00 and awarded Gyrodyne that sum with statutory interest thereon from the vesting date of November 2, 2005. Judgment in the amount of \$125,000,000 plus interest was entered on August 17, 2010. A copy of the Judgment is attached as Exhibit B for ease of reference.

15. The Court's award is almost 500% in excess of both the State's advance payment to Gyrodyne and the State's offered proof at trial. Thus, the award is "substantially in excess" for the purposes of EDPL § 701.

16. Gyrodyne necessarily incurred legal and professional fees in its efforts to procure just and adequate compensation from the State for the appropriation of the subject property.

Given the Court's determination that the subject property has a value in excess of \$125,000,000.00, and the Defendant's failure and refusal to offer the Claimant anything more than an advance payment of \$26,315,000, an amount which constitutes only 21% of the subject property's fair market value, Gyrodyne had no reasonable alternative but to make claim in the Court of Claims for a determination of the just and adequate compensation to which it was entitled for the State's appropriation of its property. Gyrodyne's incurrence of legal and professional fees in support of its claim were thus reasonable and necessary.

17. In lieu of the standard contingent fee arrangement in such condemnation actions, Gyrodyne and Robinson & Cole LLP entered into an hourly fee agreement. Pursuant to this agreement, Gyrodyne paid Robinson & Cole LLP fees of \$907,070.00 and costs of \$66,598.82 for a total of \$973,668.82. Copies of Robinson & Cole LLP's invoices for services are annexed hereto as Exhibit C and made a part hereof. I respectfully represent that, given an industry standard of a 1/3 contingent fee, Robinson & Cole's hourly fees far less than that are reasonable and necessary.

18. Mr. Gulizio was not paid for his expert analysis, report or testimony.

19. Gyrodyne paid Gary Taylor a fee of \$50,000.00 for the preparation of an appraisal of the land of the subject property. Gary Taylor conducted detailed personal inspections of the subject property and several comparable properties, reviewed real property records and other documents and information, and prepared a lengthy and detailed appraisal report on the subject property. The Claimant paid Gary Taylor an additional fee of \$23,087.00, to review and critique the Defendant's appraiser's appraisal report prior to trial and to testify at trial, for a total of \$73,087.00. Mr. Taylor has submitted an affidavit with copies of his invoices in that amount. I respectfully submit that the Mr. Taylor's fee was customary, reasonable, and necessary.

20. Gyrodyne paid Alan King Jr. a fee of \$164,397.61 for the preparation of a traffic impact study of the subject property to evaluate traffic conditions surrounding the property under various scenarios as of November 2, 2005, the date of the taking, and for his testimony. Mr. King has submitted an affidavit with copies of his invoices in that amount. I respectfully submit that the Mr. King's fee was customary, reasonable, and necessary.

21. Gyrodyne paid Timothy Barnes a fee of \$226,749.49 for his expert advice regarding appraisals, condemnation and issues related to trial. Mr. Barnes has submitted an affidavit with copies of his invoices in that amount. I respectfully submit that the Mr. Barnes's fee was customary, reasonable, and necessary.

22. Gyrodyne paid BFJ Planning \$32,037.75 for preparing a yield analysis of the property (which was utilized by Mr. King and Mr. Gulizio in conducting their studies and formulating their expert opinions) as well as for expert advice. A copy of BFJ Planning's invoices is attached to Claimant Gyrodyne's affidavit. I respectfully submit that BFJ Planning's fees were customary, reasonable and necessary.

23. Gyrodyne paid Mr. Tom Cramer of Cramer Consulting Group \$5,000 for his expert advice and counsel concerning the zoning issues in this case. A copy of Mr. Cramer's invoice is attached to the Claimant Gyrodyne's affidavit. I respectfully submit that Mr. Cramer's fee was customary, reasonable and necessary.

24. In summary, Gyrodyne has incurred fees and expenses as follows:

Attorneys Fees and costs	\$ <u>973,668.82</u>
Gary Taylor's Fee	\$ <u>73,087.00</u>
Alan King Jr.'s Fee	\$ <u>164,397.61</u>
Timothy Barnes's Fee	\$ <u>226,749.49</u>
BFJ Planning's Fee	\$ <u>32,037.75</u>
Tom Cramer's Fee	\$ <u>5,000.00</u>

TOTAL Fees and Costs

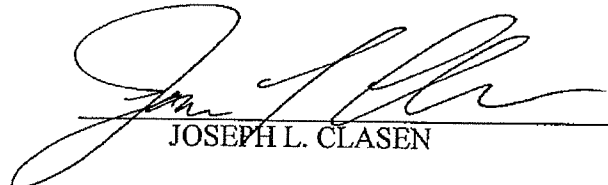
\$1,474,191.18

25. Given the foregoing, it is respectfully requested that Gyrodyne be granted an additional allowance pursuant to EDPL § 701 for its attorneys fees, appraisal fees, and other actual and necessary disbursements.

26. As set forth in the accompanying memorandum of law, the Court in its discretion may award an additional allowance in instances, such as the present action, where the Court's award is substantially in excess of the condemnor's advance payment and where such an additional allowance is necessary for the condemnor to achieve just and adequate compensation.

WHEREFORE, Gyrodyne respectfully requests the Court to grant an order in its favor and against the State awarding it an additional allowance pursuant to EDPL § 701 for its attorneys fees, appraisal fees and other actual and necessary disbursements, together with such other and further relief as to the Court seems just.

Dated: New York, New York
September 3, 2010


JOSEPH L. CLASEN