

To Be Argued By:  
**MICHAEL C. MARCUS, ESQ.**  
Time Requested 20 Minutes

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# New York Supreme Court

## APPELLATE DIVISION-SECOND DEPARTMENT

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**MAN CHOI CHIU and 42-52 NORTHERN BLVD, LLC,**  
*Plaintiffs-Respondents,*

*App. Div. No.*  
**2013-02792**

*-against-*

**WINSTON CHIU,**

*Defendant-Appellant.*

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**WINSTON CHIU,**

*Counterclaim Plaintiff*  
*/Third-Party Plaintiff-Appellant,*

*-against-*

**MAN CHOI CHUI,**

*Counterclaim Defendant*  
*/Third-Party Defendant-Respondent,*

*-and-*

**HELEN CHIU and TERESA CHIU,**

*Nominal Counterclaim*  
*Defendants-Respondents,*

*-and-*

**42-52 NORTHERN BOULEVARD, LLC,**

*Nominal Counterclaim*  
*Defendant-Respondent.*

---

**WINSTON CHIU,**

*Plaintiff-Appellant,*

*-against-*

**MAN CHOI CHIU and 42-52 NORTHERN BLVD, LLC,**

*Defendants-Respondents.*

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### BRIEF FOR DEFENDANT/COUNTERCLAIM PLAINTIFF /THIRD-PARTY PLAINTIFF/PLAINTIFF-APPELLANT WINSTON CHIU

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*Queens County Clerk's Index Nos. 21905/07; 25275/07*

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STATEMENT PURSUANT TO CPLR §5531

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION SECOND DEPARTMENT

-----X  
Man Choi Chiu and 42-52 Northern Blvd, LLC,  
Plaintiffs-Respondents,

App Div Nos.  
2013-02150  
2013-02191

-against-

Winston Chiu,  
Defendant-Appellant.

-----X  
Winston Chiu,  
Counterclaim Plaintiff  
/Third-Party Plaintiff-Appellant,  
-against-  
Man Choi Chui,  
Counterclaim Defendant/  
Third-Party Defendant-Respondent,

-and-

Helen Chiu and Teresa Chiu,  
Nominal Counterclaim Defendants-Respondents,

-and-

42-52 Northern Boulevard, LLC,  
Nominal Counterclaim Defendant-Respondent.

-----X  
Winston Chiu,  
Plaintiff-Appellant,

-against-

Man Choi Chiu and 42-52 Northern Blvd, LLC,  
Defendants-Respondents.

-----X

- 1] The index numbers in the Court below are 21905/07 and 25275/07.
- 2] The full names of the original parties are as above.  
There has been no change.
- 3] This actions were commenced in the Supreme Court, Queens County.
- 4] Index No. 21905/07: The action was commenced by the filing of a Summons and Complaint on or about August 30, 2007. Issue was joined by service of an Answer on or about March 9, 2009.

Index No. 25275/07: The action was commenced by the filing of a Summons and Complaint on or about October 10, 2007. Issue was joined by service of defendants' Answer on or about April 29, 2008.

- 5] The nature and object of the action under Index No. 21905/07 is for a declaration of the parties' respective ownership interest in 42-52 Northern Blvd., LLC and for an accounting.

The nature and object of the action under Index No. 25275/07 is for a declaration of the extent of Winston Chiu's ownership interest in 42-52 Northern Blvd., LLC and for breach of fiduciary duty.

- 6] The appeal is from: (i) an Order entered in the office of the County Clerk of Queens County, on January 17, 2013, denying motions to set aside and vacate the trial court's post-trial decision; and (ii) a Judgment entered in the office of the County Clerk of Queens County, on February 6, 2013, after a non-jury trial (Allan B. Weiss, J.).
- 7] This appeal is on a full reproduced record.

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## **PRELIMINARY STATEMENT**

Winston Chiu (“Winston”) respectfully submits this brief in support of his appeal from the judgment entered on February 6, 2013, after a bench trial in the Supreme Court of Queens County (Allan Weiss, J.S.C.) (the “Trial Court”). The judgment (i) declared that Winston owned a 10% membership interest in 42-52 Northern Blvd. LLC (the “LLC”), rather than a 25% interest, as of February 9, 2008 (the “Valuation Date”); (ii) awarded a money judgment in favor of Winston against his brother Man Choi Chiu (“Man Choi”) in accordance with a 10% membership interest rather than a 25% interest in the LLC; and (iii) dismissed Winston’s Causes of Action for breach of fiduciary duty.

The LLC is a holding company whose only asset is a single building in Queens (“the Property”). The main issues for the Trial Court to decide were the percentage of Winston’s membership interest and its value. The Trial Court erred in determining that Winston owned only a 10% interest in the LLC as of the Valuation Date. According to all the LLC’s tax returns and corporate records, signed or prepared by Man Choi, Winston was a 25% member of the LLC. In a prior decision relating to this dispute, this Court ordered the Trial Court to rely “primarily” on such documents. Moreover, Man Choi and the LLC were estopped from arguing that Winston’s membership interest was anything but 25% based on their admissions in the LLC’s sworn tax returns, which they promptly stopped

filing as soon as the dispute with Winston arose. The result reached by the Trial Court would provide business owners in dispute with other owners a perverse incentive to avoid filing corporate tax returns and disavow those it has filed, an incentive that this Court should not tolerate.

Finally, in reducing Winston's membership interest from 25% to 10%, the Trial Court erred in determining that some \$1.2 million paid by Man Choi and his entities to customize the Property for Man Choi's separate retail and light manufacturing operations, were capital contributions to the LLC by Man Choi that changed the ownership percentages of the two members. These payments, all of which were made while Man Choi and his affiliated entities occupied the Property at what all agree were well below market rents, were loans or rental payments, at best.

Although Winston's contributions to the acquisition of the property were substantial and his 25% membership interest well documented and long admitted to by Man Choi and his daughters, Winston was callously frozen out of the LLC's affairs. Winston's contributions included putting in roughly a quarter of a million dollars in contributions and loans and personally applying for and guaranteeing the entire \$3.5 million mortgage for the Property. Even if the funds expended by Man Choi for alterations were properly deemed capital contributions, they cannot be applied to alter the ownership percentages of the two brothers. This is so because

one member of a New York LLC cannot unilaterally dilute the other member of the LLC at all, much less by customizing the LLC's real property to suit his own preferences without the other member being given notice and an opportunity to contribute as well. Here, not only was Winston not afforded a say in whether the property would be altered, but he was also completely and unlawfully frozen out of the LLC's affairs by Man Choi and his daughters in open breach of their fiduciary duties. Winston is entitled to damages, plus attorneys' fees for this freeze out.

Accordingly, this Court should modify the Judgment to reflect that Winston was a 25% member of the LLC as of the Valuation Date and grant judgment to Winston for the fair value of his 25% interest, in the amount of \$2,612,434.75, with pre-judgment interest since the Valuation Date at the statutory rate and grant him nominal damages and attorneys' fees on his breach of fiduciary duty claims.

### **QUESTIONS PRESENTED**

**QUESTION NO. 1:** Should judgment have been granted declaring Winston to be a 25% member of the LLC, where the LLC's own sworn tax returns and the other corporate documents show him as a 25% member, and Man Choi, Helen Chiu, and the LLC's accountants all confirm that the tax returns and other documents were accurate?

**ANSWER BELOW:** No.

QUESTION NO. 2: Were Man Choi, his daughters, Helen and Teresa Chiu, and the LLC (the “MCC Parties”) estopped from arguing that Winston had less than a 25% membership interest in the LLC for years after 1999 and 2000, the years that Man Choi swore to the Federal Government that Winston was a 25% member?

ANSWER BELOW: No.

QUESTION NO. 3: Was it proper for the Trial Court to find that \$1,233,014 expended for alterations of the Property unilaterally done by Man Choi and paid for by him or his separate entities to customize the Property to suit the needs of his separate businesses was a capital contribution of Man Choi to the LLC that sharply diluted Winston’s 25% interest?

ANSWER BELOW: Yes.

QUESTION NO. 4: Should Winston’s claims for breach of fiduciary duty have been dismissed because the Trial Court found that Winston did not prove that Man Choi breached fiduciary duties by causing the LLC to take unauthorized actions, that Winston did not suffer damages as a result of being frozen out of the LLC, and that any underpayment of rent by entities owned by Man Choi to the LLC was a derivative rather than a direct claim that Winston could not pursue because he did not bring the claim until after he withdrew from the LLC?

ANSWER BELOW: Yes.

## **STATEMENT OF FACTS**

Winston and Man Choi are brothers who owned an LLC together, which, in turn, owns an income producing commercial building at 42-52 Northern Boulevard, in Long Island City (the “Building” or the “Property”). This dispute arose after May 2000, following the unexpected death of Henry Chiu, the son of Man Choi and nephew of Winston. After Henry died, Man Choi felt slighted by Winston and started to pretend that Winston had never been a member of the LLC. A summary of the relevant background is as follows.

### **A. The 2007 Appellate Order**

This Court held in *Chiu v. Chiu*, 38 A.D.3d 619, 620-21, 832 N.Y.S.2d 89, 92 (2d Dep’t 2007) (the “2007 Appellate Order”), which concerned the same parties and Property at issue in the current appeals, that:

*[T]he court’s determination as to the membership of the LLC should have been based primarily on the LLC’s own records, which, by law must include ‘a current list of the full name set forth in alphabetical order and last known mailing address of each member together with the contribution and the share of profits and losses of each member or information from which such share can be readily derived.’ The only documentary evidence that arguably satisfies this requirement consisted of the LLC’s tax returns for the years 1999 and 2000, both of which listed the defendant Winston Chiu as a member having a 25% ownership of capital, profit sharing, and loss sharing and the plaintiff Man Choi Chiu as the other member having a 75% ownership of capital, profit sharing, and loss sharing.*

(citation omitted) (emphasis supplied). Unfortunately, the Trial Court ignored this instruction from this Court and based its decision on other novel factors discussed

in detail below. The documentary evidence admitted in this case includes not only the LLC's tax returns, *but the very list called for in the 2007 Appellate Order*. This list, Def's Ex. B, (R. 5347-49), *which was not before the Court in the previous action and appeal which is quoted above*, was prepared by Helen Chiu (Man Choi's daughter), the LLC's Vice-President in charge of finances and recordkeeping, and provided by her to the LLC's accountant, who, unlike the MCC Parties, produced it during discovery.

The 2007 Appellate Order held that Winston was a member of the LLC but did not declare the percent of Winston's membership or its value. Following that order, in 2007, both brothers commenced the lawsuits at issue in this appeal, referred to herein as the Man Choi Action and the Winston Action.

**B. Issues Narrowed Prior To Trial**

The only remaining claims at issue at the time of trial were, in the Man Choi Action, the MCC Parties' First Cause of Action to the extent it sought a declaration of Winston's membership interest in the LLC<sup>1</sup> and Winston's First Counterclaim and First Third-Party Cause of Action, which sought damages, derivatively on behalf of the LLC, for the MCC Parties' waste and self-dealing with respect to the LLC. (R. 19-20). *See also Chiu v. Chiu*, 71 A.D.3d 646, 896 N.Y.S.2d 131 (2d Dep't 2010) and *Chiu v. Chiu*, 71 A.D.3d 621, 896 N.Y.S.2d 132 (2d Dep't 2010).

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<sup>1</sup> Justice Dollard dismissed that portion of Man Choi's First Cause of Action that sought a declaration that Winston had only "a nominal financial interest or ownership interest in and to the LLC." *Chiu v. Chiu*, Index No. 21905/2007, Short Form Order, dated March 11, 2008.

In the Winston Action, Winston's First, Second, Third, in whole or in part, and Eighth Causes of Action survived motions to dismiss, with damages on the Eighth Cause of Action limited to those that occurred on or after October 10, 2004. (R. 21-22). Winston's First Cause of Action sought a judgment declaring the extent of his interest in the LLC, his Second Cause of Action sought a judgment permitting him to withdraw from the LLC and awarding him the fair value of his membership interest, his Third Cause of Action sought the dissolution of the LLC, and his Eighth Cause of Action sought damages for Man Choi's breach of fiduciary duties. (*Id.*).

Winston moved for partial summary judgment in both the Man Choi Action and the Winston Action declaring that he owned at least a 25% membership interest in the LLC and on his breach of fiduciary duty claim, which motions were denied by Justice Strauss on January 26, 2011. Justice Strauss also held, on the MCC Parties' cross-motion, that Winston had withdrawn from the LLC as of the Valuation Date of February 9, 2008, and that any buyout should be as of that date. Winston appealed Justice Strauss' decisions to the extent they denied his motion for partial summary judgment declaring that he had at least a 25% membership interest in the LLC. This Court affirmed the denial of Winston's motion for partial summary judgment for the sole reason that, since Winston sought a declaration of his minimum interest, "the relief requested would not conclusively dispose of the

merits of the first cause of action, or any part of that cause of action...” *Chiu v. Chiu*, 92 A.D.3d 922, 922, 938 N.Y.S.2d 899, 900 (2d Dep’t 2012); *see also Chiu v. Chiu*, 92 A.D.3d 914, 938 N.Y.S.2d 900 (2d Dep’t 2012).

**C. The Testimony And Evidence At Trial**

A consolidated bench trial in the Man Choi and Winston Actions was held over 23 days during 2011 and 2012. Witnesses for both sides testified the LLC had a Net Asset Value (“NAV”) of approximately \$10.4 million, albeit calculated in different fashions. Furthermore, the tax returns and other records of the LLC demonstrated that Winston was intended to be, and was at all times, a 25% member of the LLC until his withdrawal as of the Valuation Date.

**1. Both Mr. Mercer And Mr. Nelson Agree The LLC’s Net Asset Value Is \$10.4 Million**

Z. Christopher Mercer, Winston’s valuation expert, concluded that the LLC’s net asset value, on the Valuation Date, was \$10,427,000. (R. 1575-76). Joseph Nelson, the MCC Parties’ witness, similarly concluded that the LLC’s net asset value was \$10,449,739. (R. 5247). Without any discussion, the Trial Court accepted Mr. Nelson’s NAV of \$10,449,739, over Mr. Mercer’s of \$10,427,000, presumably because it was higher than the valuation put forth by Winston and because the difference between the two final values was negligible. (R. 36).

**2. The MCC Parties Have Repeatedly Admitted That Winston Is A 25% Member Of The LLC**

Numerous LLC records reflect Winston’s membership as 25%. Def’s Ex. A

gives a summary of contributions and loans that specifically notes that the capital contributed by Man Choi and Winston resulted in a 75%/25% split. (R. 5338-46).<sup>2</sup> Man Choi testified he prepared this document personally, even under questioning from his own attorney. (R. 6223-28).

The LLC's balance sheet as of December 31, 1999, (R. 5355), states under the Equity Interests of Members that Man Choi's was \$581,562.93 and that Winston's was \$193,854.50. These figures are in a 3:1 (75%/25%) ratio. The balance sheets for 2000 through 2002 also reflect figures that are in a 3:1 ratio. (R. 5350-5354). Furthermore, the MCC Parties entered into evidence a balance sheet as of December 31, 2007, which contained figures as of December 31, 2003, December 31, 2004, December 31, 2005, and December 31, 2006. (R. 4061-62). This balance sheet shows, under Equity, the capital account of Man Choi as \$410,660.74 and that of Winston being \$136,866.88 for the years 2003-2007. (*Id.*). These figures are also in a 3:1 (75%/25%) ratio through 2007.

The tax returns for the LLC, for the years 1999 and 2000, sworn to by Man Choi on behalf of the LLC, contain a Schedule K-1 for Winston, indicating that he has a 25% interest as a member in the LLC. (R. 1778-1803). Helen Chiu, the LLC's Vice-President in charge of finances and recordkeeping, (R. 110), testified

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<sup>2</sup> Def's Ex. A, at 2, (R. 5339), also shows that the only cash from Man Choi and Winston used in the purchase of the Property was Winston's \$193,854.51 and Man Choi's \$581,562.93 (\$60,000 of which was a loan from Winston to a Man Choi entity, 1-9 Bondst Realty, Inc. ("1-9 Bondst")), and most of which represented the contract deposit. The remainder was funded by the mortgage or a loan from 1-9 Bondst in the amount of \$1,142,040.

that she provided the information used in these returns to the LLC's accountants. (R. 115; *see also* R. 6095-6099, 6106-111, 6123-24, 6133-36). She further prepared and provided the accountants with the 25% figure used in the K-1's, as set forth in the list in evidence as Def's Ex. B. (R. 5347-49, 6118-22).<sup>3</sup> She knew that the information on the tax returns had to be true. (R. 119). Having received draft tax returns, with the K-1's, containing the same 75% and 25% figures, she did not request any changes, and explained them to Man Choi, who signed them. (R. 5713-5765; R. 118; R. 6106-11, 6116-17, 6125-28, 6133-36). Nor did the MCC Parties ever request that the tax returns be amended. (R. 142-43).

Thus, the record is replete with evidence showing not only that Winston was a 25% member but also why. First, unlike Man Choi, on September 8, 1999, at the closing for the Property (where he but not Man Choi was in attendance), Winston personally guaranteed the entire amount of the \$3.5 million mortgage. (R. 5518-19; R. 5676; R. 5868-6064, R. 3905). Second, Winston made a financial contribution of \$193,854.51 and also loaned another \$60,000 to the LLC. (R. 5659; R. 5673-74; R. 5809-22; R. 222; R. 658-59; R. 730; R. 847-48). Third, the

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<sup>3</sup> The MCC Parties fought vehemently to keep this list, R. 5347-49, out of the record in this action, but cannot escape that it was in the files of the LLC's accountant, Mr. Miller, (R. 468), and that Helen Chiu testified at her deposition that she had written and submitted it to the accountant, (R. 6118-22), although she could predictably no longer recall having submitted the page with the list at trial. (R. 128-29). Finally, regardless of any argument by the MCC Parties to the contrary, the third page contains the very information Helen states she is sending to the accountants on the first page, namely the address, name, and social security numbers of Winston and Man Choi, as well as their percentage membership interest in the LLC, and thus the pages in the exhibit are plainly connected. (R. 5347-49).

parties agreed in writing to a structure whereby Winston would be a 25% member of the LLC. (R. 5637-5650).

### **3. Winston's Membership In The LLC**

At trial, the evidence confirmed that Winston was always intended to be a member of the LLC. Neither the MCC Parties' self-serving testimony, nor the wholesale revision of the LLC's books and records by Mr. Nelson can be credited in the face of both the overwhelming documentary evidence to the contrary and the MCC Parties' admissions discussed above.

#### **a. The Agreements**

The LLC was formed May 13, 1999. (R. 5662-64; R. 1777). Three days earlier on May 10, 1999, Winston, Man Choi, and Henry Chiu signed a number of agreements concerning the LLC and its purchase of the property at 42-52 Northern Blvd (the "Property"). (R. 5637-5650). Winston, Man Choi, and Henry signed these agreements while they were at Man Choi's house, the pages are in the correct order, and the signatures match up with the parties to the respective agreements, all of which Man Choi has verified. (R. 823; R. 839-40). Both Man Choi and Winston verified that the signatures were theirs and Henry's. (R. 427; R. 429-30; R. 823-24; R. 6175-83; R. 6196-6204; R. 6242-46; R. 6266-68). Henry drafted these agreements and they were edited by Man Choi's and Henry's attorney, Fred

Samuel, Esq. (R. 654-55, 665; R. 669-670).<sup>4</sup> These agreements were included in the Closing Statement, Def's Ex. D, R. 5637-5650, at Henry's request to the LLC's attorney, Ronald Fishman. (R. 1025).

The agreements refer to a company "42-42 Northern Blvd Realty, LLC" or a similar named company to be formed." (R. 5637-50).<sup>5</sup> The agreements in essence set up the structure whereby an entity owned by Man Choi, 1-9 Bondst, would loan the LLC \$1.8 million dollars for use in paying the contract deposit and the down payment at the closing for the Property, the LLC would rent out the building to an entity to be formed and owned by Man Choi and Henry, which was subsequently formed as Win Depot, LLC,<sup>6</sup> and Winston Chiu and Henry Chiu would be members of the LLC. (*Id.*)<sup>7</sup>

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<sup>4</sup> Mr. Samuel testified that he edited several documents for Henry one night in May 1999 on Henry's computer in Henry's office at 318 Lafayette Street. He specifically recalled discussing with Henry the enforceability of the agreement entitled "Private Agreement and Understanding of Two Parties Henry Chiu and Alice Chiu", (R. 5647). (R. 669). Mr. Samuel also recalled working on several pages of documents. (R. 670). The clear inference is that he worked on the other agreements contained in the Closing Statement, at R. 5637-5650.

<sup>5</sup> As noted, the agreements were signed shortly before the LLC was formed. However, all the entity names in the agreement are close to the names of entities subsequently formed. For example, in addition to 42-52 Northern Blvd. LLC, there is Win Food Equipment Depot, which was presumably formed as Win Depot. The MCC Parties testified that the LLC went by several, similar names that sometimes had a different address or included the word "realty." (R. 132; R. 74.)

<sup>6</sup> Win Depot, LLC, was formed on May 26, 1999. (R. 1777).

<sup>7</sup> From October 1999 through December 2000, the LLC received a \$50,000 monthly deposit that appears to be rent from Win Depot. (R. 5853-66; R. 5669-72 (Profit and Loss Statements reflecting rental income); *see also* R. 6018-6058). This further demonstrates that the parties intended to, and did, abide by the agreements until their relationship soured, as discussed below.

b. **Winston Applies For And Guarantees The \$3.5 Million Mortgage**

On May 19, 1999, Winston applied at Eastbank, NA ("Eastbank") for a \$3.5 million mortgage for the purchase of the Property. (R. 5676). He also submitted an authorization to release information, (R. 5678), and a personal financial statement in support of the application, (R. 3905 and R. 5877), as did Henry. (R. 5876; *see also* R. 6016). Eastbank ran a credit check on Winston, as well as Henry, in connection with this mortgage, but not Man Choi. (R. 5885-5898). On September 8, 1999, at the closing for the Property, Winston further personally guaranteed the entire amount of the \$3.5 million mortgage. (R. 5518-19). The only other guarantors on the mortgage were Henry and two entities owned by Man Choi that could easily avoid any obligation by divesting themselves of assets and becoming judgment proof. (R. 5516-17; R. 5520-23).

All of the documents submitted by the LLC to Eastbank in order to obtain the mortgage, including the Loan Application, (R. 5676), were signed by Winston and identified Winston as a member of the LLC and as the one who was seeking the loan on behalf of the LLC. (R. 5492-5556). All the documents submitted at the closing for the Property, which Winston attended with Henry, while Man Choi did not, identified Winston as a member of the LLC. (*Id.*; *see also* R. 5359). In fact, one of the documents identified him as the only member of the LLC. (R. 5543).

The LLC's attorney at the closing, Mr. Fishman, issued an opinion letter to induce Eastbank to fund the \$3.5 million mortgage loan, which was required to purchase the Property, that opined that Winston's signatures, as a member of the LLC on the closing documents, were "duly authorized." (R. 5665-68).

c. **Winston's Financial Contribution Of \$193,854.51 And Loan Of \$60,000**

On May 10, 1999, an account was opened at Eastbank, account 41238, in the name of 1-9 Bondst Realty, Inc. ("1-9 Bondst"), an entity owned by Man Choi, and Winston deposited \$60,000 into that account for loan fees and other transaction expenses for the purchase of the Property by the LLC. (R. 5673-74; R. 5809-22). Man Choi acknowledged receipt of this \$60,000 and that it was used for the purchase of the Property. (R. 424).

Further, the claim that the \$60,000, although deposited into an account in the name of 1-9 Bondst at a time before the LLC was formed, was unrelated to the purchase of the building is refuted by bank records. These records show the funds coming in from a cash advance from Winston's Visa, with just under \$20,000 being used for expenses related to the purchase of the Property, and the remainder transferred to an account in the name of the LLC. (R. 5673-74; R. 5677; R. 5809-20).

On September 8, 1999, the LLC purchased the Property from Weeks Office Products, Inc. ("Weeks") for \$5,450,000. In addition to the \$60,000, Winston also

contributed \$193,854.51 towards the purchase of the Property at the closing, through his intermediary, Mr. Samuels. (E.g. R. 5659; R. 222; R.658-59; R. 730; R. 847-48). As reflected in the Closing Statement, Winston attended the Closing as a “Buyer.” (R. 5359). The other “Buyer” identified in the Closing Statement was Henry Chiu. (*Id.*)

The \$4,966,420.81 due Weeks at closing (after adjustments), was paid:

- (a) \$193,854.51 via certified check by Winston through Mr. Samuel as “Like Kind Exchange Agent.”
- (b) \$3,500,000.00 from EastBank, N.A., representing a mortgage loan to the LLC.
- (c) \$1,272,566.30 by certified check from the LLC, part of which represented proceeds obtained from the refinancing of 1-9 Bond Street of \$1,142,040, which was booked as a loan on the LLC’s records.<sup>8</sup>

(*Id.*; see also R. 5656-59).

d. **The LLC’s Own Documents, Including Sworn Tax Returns, Conclusively Demonstrate That Winston Is A 25% Member Of The LLC**

Numerous documents of the LLC reflect Winston’s membership and his contributions. First, the LLC’s Reconciliation of Initial Cash Through Building Acquisition, (R. 5338-46), prepared by Man Choi, gives a Summary of Capital contributions and Loans Payable on page 2 as follows:

Capital:

Man Choi Chiu	581,562.93	0.75
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<sup>8</sup> Significantly, the \$1,272,566.30, plus the \$535,000 contract deposit adds up to almost exactly the \$1.8 million 1-9 Bondst agreed to loan the LLC per the agreements, discussed above, included in the Closing Statement, at R. 5637-50.

Winston Chiu	193,854.51	0.25
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(R. 5339).

Second, the LLC's balance sheet as of December 31, 1999, (R. 5355) (Def's Ex. C), states under the Equity Interests of Members as follows:

Members Capital Man Choi Chiu	581,562.93
Members Capital Winston Chiu	193,854.00

These figures are in a 3:1 (75%/25%) ratio. Helen Chiu testified that she provided the information for the balance sheets to the accountants. (R. 138-39). The balance sheets for 2000 through 2002 also reflect figures that are in a 3:1 ratio. (R. 5350-54). The balance sheet as of December 31, 2007, shows, under Equity, the capital account of Man Choi as \$410,660.74 and that of Winston being \$136,866.88 for the years 2003 through 2007. (R. 4061-62). These figures are also in a 3:1 (75%/25%) ratio through 2007. There are no balance sheets for subsequent years.

Third, as discussed above, the tax returns for the LLC, for the years 1999 and 2000, sworn to by Man Choi Chiu on behalf of the LLC, contain a Schedule K-1 for Man Choi, indicating that he has a 75% interest as a member in the LLC, and a Schedule K-1 for Winston, indicating that he has a 25% interest as a member in the LLC, as discussed above. (R. 1778-1803).

**4. Both Appraisers Came To Nearly Identical Values For the Property**

Eric Haims, the MCC Parties' appraiser, determined that the "as is" value of the Property as of February 9, 2008, was \$13.7 million. (R. 372).

Henry Salmon, Winston's appraiser, determined that the value of the property as of February 9, 2008, in its present condition, was \$13.5 million. (R. 1371). He further determined that properties like the LLC were in high demand as of the Valuation Date, since there were not many similar properties on the market, a conclusion also supported by the substance of Mr. Haims' testimony. (R. 1390-92, R. 500-01).

Mr. Salmon estimated rental values of \$11.50, \$10.75, and \$10.00 per square foot for, respectively, 2008, 2007, and 2006. (R. 1393-94). Mr. Haims testified that the Property's arms'-length, triple net lease rental value was \$11.00, \$8.50, and \$7.50 per square foot for 2008 through 2006. (R. 382-83).<sup>9</sup> Mr. Salmon's figures are more reasonable than Mr. Haims', since rents did not increase as dramatically from 2007 to 2008 as Mr. Haims' figures would suggest.

**5. MCC Becomes Upset With Winston Due to Perceived Slight Following Henry's Death**

Man Choi testified on several occasions how he was angry with Winston due to Winston's behavior after Henry's death, but he was not angry in 1999 when the

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<sup>9</sup> Mr. Haims derived estimated rental values for modified gross leases, and then incorrectly converted the modified gross lease figures to a triple net figure. (R. 381). As Mr. Salmon testified, triple net leases are more common for this sort of property. (R. 1394). Mr. Haims stated the large difference between his estimated rental for 2008 and 2007 was due to increased real estate taxes. (R. 382). This explanation failed to equalize taxes, and should not be credited. (R. 1394-97).

closing occurred. (R. 399-400; R. 403-404; R. 235-236). Winston explained that he did not attend Henry's funeral because he was afraid of losing control of his emotions and because, in Chinese tradition, older people do not attend the funerals of the younger generation. (R. 739; R. 883). He also testified he informed Man Choi that he did not want Man Choi's daughters and wife involved in the LLC because of their improperly avoiding taxes by paying employees in cash. (R. 885-86). Prior to these perceived slights, Man Choi was grateful for all Winston had done for him, including sponsoring his immigration from China and lending him money to set him up in business. (R. 399-400). It was not until after these perceived slights that Man Choi started claiming that Winston was never a member of the LLC.

**6. The LLC's Precarious Financial Status In 2001**

The LLC financial status in 2001 was precarious. Although the building was purchased for \$5.45 million in September of 1999, (R. 5359), it was worth only \$4.2 million in March 2001, according to Mr. Haims. (R. 384). The LLC's balance sheet as of December 31, 2001, showed its assets as \$6.683 million and its liabilities as \$6.061 million. (R. 5352-53). With a \$1.2 million drop in the value of the property coupled with only a small amount of equity, it was not clear in 2001 that the LLC would be sustainable. It was at this point that Man Choi created LLC records showing that money he put in was loans. Later market conditions

were such that the Property had appreciated sharply in value so at trial Man Choi hired Mr. Nelson to testify that these loans were really contributions.

7. **Man Choi Owned Entities Occupied the Building at Less than Market Rent And Altered It To Meet The Needs of Man Choi's Businesses**

There is no dispute that the Property was occupied by entities owned by Man Choi, primarily Win Depot, Inc. and Win Depot, LLC. Further, although the Property was undergoing renovations from around the time of the closing through 2002, these renovations were for Man Choi's businesses and thus entities owned by Man Choi had occupancy during this period as well. (R. 76). Indeed, as Teresa, Man Choi's daughter, who was the LLC's COO and was in charge of overseeing the renovations, (R. 255-56; R. 5712), testified, "we had to do some extensive renovations in terms of making [the Property] usable for the Win Entities." (R. 256) (emphasis added). She continued that the alterations included a 15,000 square foot factory, retail space, offices and a showroom for restaurant equipment. (R. 257). Some of the \$1,233,014 spent on the alterations was for Win Depot signage, painting, shelving, and paving. (See R. 1809, 1812, 1815-20). These alterations are either unique to Win Depot's needs, and thus of no value to a potential purchaser, or routine maintenance expenses that should not be considered expenses to renovate the Property, or both. (R. 1511-12). Some of the \$1,233,014

was paid to Ronald Fishman and the LLC accountants and therefore were not spent on physical alterations to the Property. (R. 640-43; R. 3171-73; R. 3477-78).

The entities owned by Man Choi paid only the mortgage and operating expenses for the Property. (R. 160-168; R. 5669-72). Both Mr. Mercer and Mr. Nelson determined that the payments for the mortgage and expenses for the Property represented less than the market rent for the Property that the LLC could have obtained in an arm's-length transaction, and each calculated the amount of the shortfall, although Mr. Mercer concluded \$1,626,928, while Mr. Nelson arrived at an amount of \$988,347 by calculating the shortfall for only the years 2006-2008. (R. 1581-85; R. 5247 ("accounts receivable" line item); *see also* R. 6432-33).

#### **8. The MCC Parties Freeze Out Winston**

There is no doubt that the MCC Parties froze Winston out of the LLC. Helen, Teresa,<sup>10</sup> and Man Choi all testified that they do not view him as a member and have not provided him with any information concerning the LLC. (R. 264; R. 736; R. 886-90; R. 5712; R. 6148-51; R. R. 6164-6169; R. 6283-85). Indeed, the MCC Parties even changed Winston's password so he could no longer log in to view the LLC's records. (R. 889-90). To file his 1999 tax returns properly, Winston had to go to Eastbank to get the necessary information concerning the LLC. (R. 882).

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<sup>10</sup> Teresa, in apparent contradiction, testified both that Winston is not a member and also not the "sole" member. (R. 264, 270).

#### **D. The Trial Court's Memorandum Decision And Judgment**

In its post-trial memorandum decision, the Trial Court concluded that, initially, Man Choi was a 75% member of the LLC and Winston Chiu was a 25% member, based on their initial cash contributions of \$581,562.93 (Man Choi) and \$193,854.51 (Winston), the agreement of the parties, and the LLC tax returns for 1999 and 2000. (R. 30-31, 33). The Trial Court further concluded that the parties maintained this 75/25 ownership split for 1999 and 2000. (R. 31). In making this determination, the Trial Court found that the additional \$60,000 from Winston was a capital contribution from Man Choi, and that Man Choi received credit for this \$60,000 in his 75% interest per the agreement of the parties. (R. 25, 28). Ignoring the fact that Henry had few assets and the entities could easily become judgment proof,<sup>11</sup> the Trial Court also concluded that Winston's guarantee of the \$3.5 million mortgage on the Property was not a contribution since the mortgage was also guaranteed by Henry Chiu and two entities owned by Man Choi. (*Id.*).

The Trial Court further found that Man Choi paid \$1,233,014 for alterations to the Property, and concluded these payments represented a capital contribution by Man Choi, although these alterations were done *solely* to conform the Property

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<sup>11</sup> It is certain that Eastbank would have enforced Winston's guarantee in the event of a default on the Mortgage, since Henry's assets totaled only \$1.376 million, well less than the \$3.5 million mortgage. (R. 5876). Moreover, many of the assets on Henry's financial statement were unverified, including a \$650,000 asset relating to an investment in "Win Co." (*Id.*) Thus, Winston's contribution of an additional guarantee was a real contribution without which the purchase of the Property could not have occurred.

to the needs of Man Choi's businesses, as discussed herein. (R. 34-35). Indeed, the Trial Court erroneously concluded that this was a capital contribution by Man Choi that increased his membership interest in the LLC and diluted Winston's, although the Trial Court acknowledged at trial that it did not consider a unilateral change in ownership percentage to be proper. (R. 35; R. 1148-50) ("THE COURT: My problem is the unilateral nature of the contribution" and also stating one member cannot change capital contribution without permission of another and that it is possible equipment purchased or alterations to the building would not increase value of the LLC). The Trial Court also found that \$1,142,040 paid at the closing from the proceeds of the refinancing of 1-9 Bondst was a loan, as it was booked on the records of the LLC. (R. 33). Accordingly, the Trial Court concluded that Man Choi's interest in the LLC, as of the Valuation Date, was 90% and Winston's was 10% based on the amount of their capital contributions, including, for Man Choi, the \$1,233,014. (*Id.*)

In permitting this dilution of Winston's interest, the Trial Court refused to hear certain testimony concerning the agreements between Winston, Man Choi, and Henry Chiu, included in the Closing Statement discussed above and in

evidence as part of Defendant's Ex. D, (R. 5637-50), pursuant to CPLR 4519, including the "'Winston Chiu' and 'Henry Chiu' AGREEMENT.'"<sup>12</sup> (R. 29).

The Trial Court then went on to determine the fair value of Winston's interest as of the Valuation Date, pursuant to LLCL §§ 504 and 509. Based on the appraisal of Mr. Haims, the Trial Court concluded that the Property had a value of \$13,700,000. The Trial Court also accepted the Net Asset Value of Mr. Nelson, of \$10,449,739. Thus, the Trial Court determined that, as of the Valuation Date, Winston's 10% interest would be worth \$1,044,974. (R. 35-36).

The Trial Court also dismissed Winston's breach of fiduciary claims based on the erroneous conclusions that Winston did not prove that Man Choi breached fiduciary duties to Winston by causing the LLC to take unauthorized actions, that Winston did not suffer damages as a result of being frozen out of the LLC, and that any underpayment of rent by entities owned by Man Choi to the LLC was a derivative rather than a direct claim that Winston could not pursue because he did not bring the claim until after he withdrew from the LLC. (R. 37-38).

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<sup>12</sup> The Trial Court incorrectly notes that it sustained an objection to the admission of this agreement, since it was admitted, without objection, as part of Defendants Ex. D, R. 5637-50. Moreover, in so holding and refusing to consider this agreement, the Trial Court made the exact same error for which this Court cited Justice Blackburne in the 2007 Appellate Order. 38 A.D.3d at 621, 832 N.Y.S.2d at 92. In the 2007 Appellate Order, this Court wrote, "the trial court erred in refusing to receive as evidence offered by the defendants an operating agreement, purportedly entered into before the organization of the LLC (*see* Limited Liability Company Law § 417[c]), between Winston [and Henry]." (*Id.*) (emphasis supplied).

Accordingly, Winston was declared to have owned a 10% membership interest in the LLC as of the Valuation Date on Man Choi's First Cause of Action, and the remainder of Man Choi's First Cause of Action and remaining causes of action, to the extent not previously dismissed, were dismissed. (R. 16). The Judgment also declared that Winston held a 10% membership interest in the LLC as of the Valuation Date on Winston's First Cause of Action in the Winston Action, and that, on Winston's Second Cause of Action, Winston withdrew as of the Valuation Date and awarded a money judgment against Man Choi in favor of Winston in the amount of \$1,044,974, plus pre-judgment interest from the Valuation Date, for a total of \$1,514,954.63. (R. 16-17). Winston's Eight Cause of Action for breach of fiduciary duty was dismissed. (*Id.*) On April 3, 2013, Man Choi filed an Undertaking on Appeal.

### **ARGUMENT**

This Court must conclude that Winston was, based on the LLC's own admissions and records, a 25% member of the LLC and require the MCC Parties to pay out to Winston the fair value of his 25% interest as of the Valuation Date. "As this case was tried without a jury, this Court's authority is as broad as that of the [T]rial [C]ourt, and this Court may render a judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses." *A-Tech Concrete Co., Inc. v. Tilcon New York,*

*Inc.*, 60 A.D.3d 603, 604, 874 N.Y.S.2d 565, 566 (2d Dep't 2009) (citing *State Farm Mut. Auto. Ins. Co. v. Stack*, 55 A.D.3d 594, 595, 869 N.Y.S.2d 536 (2d Dep't 2008), and *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499, 470 N.Y.S.2d 350 (1983)).

**I. THE TRIAL COURT ERRED IN DETERMINING THAT WINSTON OWNED ONLY A 10% MEMBERSHIP INTEREST IN THE LLC AS OF THE VALUATION DATE AND SHOULD HAVE CONCLUDED HIS INTEREST WAS 25%**

The Trial Court should have concluded that Winston owned a 25% membership interest in the LLC as of the Valuation Date. First, the LLC's own tax returns and corporate documents state that Winston is a 25% member and this Court directed the Trial Court to rely primarily on such documents. Second, the MCC Parties should have been estopped from arguing that Winston's percentage interest was anything but 25%. Third, the Trial Court was incorrect both that the \$1,233,014 Man Choi or entities owned by him unilaterally paid to alter the Property to suit their needs was a capital contribution and that, even if it was a capital contribution, they could dilute Winston's interest.

**A. The MCC Parties Admit That Winston Is A 25% Member Of The LLC And The MCC Parties Are Estopped From Arguing Otherwise**

The MCC Parties admit that Winston is a 25% Member of the LLC, as the LLC's own tax returns and corporate documents demonstrate that Winston is a 25% member of the LLC. This Court expressly held in the 2007 Appellate Order

that the trial court's determination should be "based primarily on the LLC's own records..." 38 A.D.3d at 619-20, 832 N.Y.S.2d at 92 (citation omitted) (emphasis added). In looking at the LLC's own records the MCC Parties have admitted repeatedly that Winston is a 25% member of the LLC, and are estopped from arguing otherwise.

First, the MCC Parties make this admission in the LLC's tax returns for 1999 and 2000 (the only years for which the LLC filed tax returns), sworn to by Man Choi himself. (R. 1778-1803). It is black letter law that "[a] party to litigation may not take a position contrary to a position taken in an income tax return ... We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422, 881 N.Y.S.2d 369 (2009) (citations omitted). In *Romano v. Romano*, 139 A.D.2d 979, 30 N.Y.S.2d 155 (2d Dep't 1987), which this Court relied upon in the 2007 Appellate Order, 38 A.D. 3d at 621, 832 N.Y.S.2d at 92, this Court cited solely the corporation's tax returns in determining that the husband owned 51% of the corporation. *Id.* at 980. Indeed, this Court wrote "the determination of the husband's percentage ownership of the business was not solely a matter of the parties' credibility, because the corporation's tax returns for the five-year period

preceding the trial consistently indicated that the husband was only a 51% shareholder.” *Id.*

Below, the MCC Parties argued that Winston’s interest should be less than 25%, and attempted to enrich themselves by avoiding what was clearly reported on the LLC’s tax returns. Their attempt to recant statements on sworn tax returns, which Man Choi signed under oath and penalty of perjury and which they have never sought to amend, to further exclude Winston from the LLC cannot be countenanced. *See also Capizola v. Vantage Intern., Ltd.*, 2 A.D.3d 843, 770 N.Y.S.2d 395 (2d Dep’t 2003) (“respondents were estopped from claiming that the petitioner was not a shareholder”, notwithstanding that his consideration for stock was not monetary, where, *inter alia*, “[t]he 1999 Subchapter S corporate tax return provided a Schedule K-1 reporting the petitioner as a 20% shareholder, and the 1999 New York State S Corporation Franchise Tax Return listed the petitioner, among all the shareholders, as holding a 20% interest in the corporation”); *Czernicki v. Lawniczak*, 74 A.D.3d 1121, 1125, 904 N.Y.S.2d 127 (2d Dep’t 2010) (“the parties are bound by the representations made in the partnership tax returns” and concluding that the parties were equal 50% partners, as demonstrated by their tax returns); *Naghavi v. N.Y. Life Ins. Co.*, 260 A.D.2d 252, 252 (1st Dep’t 1999) (In affirming the trial court’s dismissal of the plaintiff’s claim, the Court held that

the plaintiff was precluded from asserting that his income was more than that which he had declared on his tax returns).

Second, another record of the LLC, the very list that the 2007 Appellate Order called for, also denominates Winston as a 25% member. (R. 5349). Helen Chiu admitted she prepared the list and provided a copy of it to the LLC's accountants knowing full well that they would rely on it to prepare the LLC's tax returns. (R. 6118-22).

Third, numerous business records of the LLC, including financial statements for the LLC prepared at Helen's direction, demonstrate that Winston's capital account was in a 3:1 ratio with that of Man Choi, demonstrating a 25% interest, as set forth above. (R. 1786-89, 1797-1800, 5339, 5350-55). Further, the MCC Parties entered into evidence a balance sheet as of December 31, 2007, which contained the same ratio as of December 31, 2003, December 31, 2004, December 31, 2005, and December 31, 2006. (R. 4061-62).

Fourth, Man Choi cannot credibly claim to be the sole member of the LLC. He submitted two affidavits in the prior action where he admitted he was only the majority member of the LLC. (R. 5766, 5773). Moreover, he signed a corporate resolution and signature cards concerning two LLC bank accounts at Eastbank as an "Authorized Signer" while Winston and Henry signed as "Members". (R. 5708-11). He never took any deductions for LLC expenses on his tax returns. (R.

5688-5705). Other witnesses called by the MCC Parties, including the LLC's attorney, Mr. Fishman, and its accountant, Mr. Miller, admitted to their understanding that Winston was a member of the LLC. (R. 355, 1048-50, 5867). Such admissions that there was more than one member of the LLC, coupled with all the documents demonstrating the percentage of the interest for Winston, cannot be overcome by *post hoc* explanations.

**B. The Estoppel Applies To The Entire Time Period At Issue, Not Just 1999 And 2000**

The Trial Court erred in holding that the estoppel created by the LLC's tax returns applied only to 1999 and 2000. (R. 30-31) Indeed, it cannot be the case that, because the MCC Parties stopped filing tax returns for the LLC, which they almost certainly did so as to not create more evidence than they already had that Winston was a 25% member, the estoppel vanishes as the Trial Court would have it. *See Romano*, 39 A.D.2d at 980, 30 N.Y.S.2d 155 (looking to tax returns for five-years period prior to trial); *see also Capizola*, 2 A.D.3d at 845, 770 N.Y.S.2d 395 (relying on 1999 tax returns in 2003 decision). If this were the law, it would create a perverse incentive for individuals and entities involved in lawsuits not to file tax returns to avoid any estoppel issues that might affect their litigation position. This Court should not countenance such a policy.

**C. The Trial Court Erred In Determining That The \$1,233,014 Expended On Alterations Was A Capital Contribution And Permitting The Mcc Parties To Unilaterally Dilute Winston On This Basis**

Even if estoppel does not apply, which it does, the Trial Court nevertheless erred in concluding that the \$1,233,014 paid by Man Choi or entities owned by him for alterations to the Property solely for the benefit of Man Choi owned entities was a capital contribution and in permitting them to unilaterally dilute Winston's percentage membership interest as a result.

**1. The \$1,233,014 Is, At Best, Debt**

**a. The Clear Agreement Of The Parties Supersedes Roth Steel And Other Cases Cited By The Court**

First, in concluding that the \$1,233,014 was a capital contribution, the Trial Court relied primarily on the Sixth Circuit's decision in *Roth Steel Tube Co. v. Comm'r of Internal Revenue*, 800 F.2d 625 (6th Cir. 1986), a case never cited in any New York state court for any purpose until the Trial Court cited it in its post-trial memorandum decision, to support the characterization. In *Roth Steel*, the Internal Revenue Service objected to the taxpayer's classification as a loss of advances it made. The case concerned only the tax liability of the taxpayer, *id.* at 628, 632, and nowhere discussed how the percentage ownership of a company should be determined and the appropriateness in a context such as the case at bar of

characterizing monies expended as either loans or as capital contributions to change ownership reported on, *inter alia*, sworn tax returns.<sup>13</sup>

Moreover, to the extent the Trial Court relied on this Court's decisions in 38 *Town Associates v. Barr*, 225 A.D.2d 613, 639 N.Y.S.2d 442 (2d Dep't 1996) and *Hynes v. Barr*, 225 A.D.2d 588, 639 N.Y.S.2d 443 (2d Dep't 1996), related cases decided in conjunction with one another, they merely stand for the proposition that one looks to the surrounding circumstances to determine if certain funds are loans or contributions. When one looks at the surrounding circumstances it is clear that the funds at issue here were intended to be loans because, just as Man Choi did with other payments at the time, he would have structured them as loans due to the precarious financial condition of the LLC, so as to be given the priority treatment afforded to creditors over equity holders like Winston in any dissolution, and because the parties had agreed that Winston would be a 25% owner. The LLC's balance sheet for 2002 reflects a loan by Win Restaurant Supplies in the amount of \$1,256,689.30, which includes the \$1,233,014 expended for the alterations, as Mr. Mercer demonstrated. (R. 1584; R. 5351). Thus, the payments of the \$1,233,014 were, at best for Man Choi, debt and should not have been viewed as contributions.

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<sup>13</sup> Even assuming the *Roth Steel* factors apply, some would strongly indicate that the payments from Man Choi and his entities to the LLC, which the LLC recorded as loans, were also loans for tax purposes under *Roth Steel*. The documentary evidence and the parties' conduct further demonstrate that the payments were loans.

Indeed, Mr. Nelson admitted that it would be error to base membership interest solely on cash contributed if there were an agreement, (R. 1150-1151); *see also* LLCL §§ 504 and 509) (operating agreement, if there is one, determines right to share in distributions), and there is ample evidence of the agreement of a 75%/25% split, not the least of which is the “‘Winston Chiu’ and ‘Henry Chiu’ AGREEMENT”, (R. 5645-46), together with the LLC’s tax returns and corporate records evidencing the 75%/25% split, discussed at length above.

i. **The Trial Court Should Have Considered The Agreements In The Closing Statement And Related Testimony**

The MCC Parties objected to portions of testimony by Winston as well as their own designated testimony concerning the agreements included in tab 13 to the Closing Statement, (R. 5637-50), pursuant to CPLR 4519, and the Trial Court sustained the objections to Winston’s testimony and improperly failed to consider them. (R. 833-36; R. 29-30). As discussed above, the agreements set forth a structure whereby an entity owned by Man Choi, 1-9 Bondst, would loan the LLC \$1.8 million dollars for use in paying the contract deposit and the down payment at the closing for the Property, the LLC would rent out the building to an entity to be formed and owned by Man Choi and Henry, which was subsequently formed as Win Depot, LLC, and Winston Chiu and Henry Chiu would be members of the LLC.

Although CPLR 4519 disqualifies the testimony of certain witnesses, it is inapplicable to documentary evidence. Thus, an adverse party's introduction of a document written or signed by the decedent is not, standing alone, "testimony" against a party protected under CPLR 4519. *Acevedo v. Audubon Management, Inc.*, 280 A.D.2d 91, 95, 721 N.Y.S.2d 332, 335 (1st Dep't 2001) (permitting reliance on summary judgment of receipt signed by decedent where decedent's daughter acknowledged the signature at deposition). As in *Acevedo*, Man Choi authenticated the signatures on the agreements, both at trial and during deposition. (R. 427; R. 429-30; R. 6175-83; R. 6196-6204; R. 6242-46; R. 6266-68). Also, CPLR 4519 does not apply to the MCC Parties' testimony.

Moreover, the MCC Parties waived any objection to testimony concerning not only the agreements but also the entire transaction regarding the LLC's purchase. N.Y. C.P.L.R. 4519 (McKinney's Practice Commentary) ("once a portion of a transaction with a decedent has been elicited by an executor from an interested witness, that witness must be permitted to testify to the whole of the transaction. This equitable result flows from the common law 'rule of completeness' and underscores the principle that the Dead Man's Statute may be used only as a shield, not a sword.") Man Choi testified on several occasions that Henry was not intended to be a member of the LLC and signed documents at the closing only because Man Choi did not speak English well, (R. 212-13; R. 222-24),

thereby opening the door for Winston's testimony. Furthermore, the explanation as to why Henry participated in the purchase of the Property was decisively refuted, since Man Choi had no trouble signing other documents in English, including loan documents relating to 1-9 Bondst signed shortly before the closing for the Property. (R. 1849-81; R. 5779-5804).

As to any testimony from Winston concerning the transaction and Henry in the transcript not objected to, the MCC Parties have waived any ability to rely on CPLR 4519. *Matter of Mastrianni's Estate*, 55 A.D.2d 784, 785, 389 N.Y.S.2d 914, 917 (3d Dep't 1976) ("The petitioner and the rest of the interested parties failed to make appropriate objections in a timely fashion to the respondent's testimony as to spending money in accordance with her father's wishes...If it is assumed that CPLR 4519 applies, on this record the court would be obligated to conclude that there had been a waiver.") (internal citations omitted). Accordingly, this Court may and should consider the agreements, and corroborating testimony by Winston concerning the transaction, as well as Winston's designations of prior testimony containing admissions from the MCC Parties. (See R. 6196-6204; R. 6242-46; R. 6266-68).

Finally, as discussed above, this Court found that it was error for Justice Blackburne not to have received as evidence the agreement entered into between Henry Chiu and Winston Chiu. 38 A.D.3d at 621, 832 N.Y.S.2d at 92.

The agreements in the Closing Statement are further evidence that Winston was, and was intended to be, a 25% owner of the LLC and that it was error for the court to adjust his membership interest downward based on money expended by Man Choi and his entities to customize the Property to their needs.

**b. The MCC Parties Had Occupancy of the Property At Below-Market Rents**

Second, the Trial Court's rationale in concluding the \$1,233,014 was a contribution by Man Choi completely ignores the fact that entities owned by Man Choi had occupancy of the Property since September 8, 1999 at below-market rents, and thus received a significant benefit for making the mortgage payments and payments on other operating expenses. Even giving Man Choi credit for alteration costs as rental payments, there is still a significant underpayment of rent that Mr. Mercer calculated was \$1,626,928.

Furthermore, the alterations were done to conform the Property to the needs of the Man Choi-owned entities occupying it and in such cases the occupying entity is responsible for alteration costs. As Teresa, who was the LLC's COO and was in charge of overseeing the renovations, (R. 255-56; R. 5712), testified, "we had to do some extensive renovations in terms of making [the Property] usable for the Win Entities." (R. 256) (emphasis added). She continued that the alterations included a 15,000 square foot factory, retail space, offices and a showroom for restaurant equipment. (R. 257). Some of the \$1,233,014 was for Win Depot

signage, painting, shelving, and paving. (*See* R. 1809, 1812, 1815-20). These alterations are either unique to Win Depot's needs, and thus of no value to a potential purchaser, or routine maintenance expenses that should not be considered expenses to renovate the Property, or both. (R. 1511-12). Some of the \$1,233,014 was paid to Ronald Fishman and the LLC accountants and therefore were not spent on physical alterations to the Property. (R. 640-43; R. 3171-73; R. 3477-78). Mr. Salmon also testified, without contradiction, that renovations might not increase the value of a Property. (R. 1511-12; *see also* R. 1378).

The Trial Court's rationale also ignores that in cases of triple net leases, which Mr. Salmon testified are the type of lease commonly used for properties similar to the Property, the tenant is responsible for all alteration and maintenance expenses and thus would not get credit for the costs of the work done to the Property. (R. 1511-12; R. 1363; R. 1394). The Trial Court ignored this testimony in favor of an unspecified article on Wikipedia, which it used to support its conclusion that a tenant would be responsible only for maintenance and repairs, not structural renovations. (R. 34).<sup>14</sup> By ignoring Mr. Salmon's uncontradicted statement that the occupying entity would be responsible for modifying the

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<sup>14</sup> It is respectfully submitted, and with all due deference to the Trial Court, that, in addition to the testimony of Mr. Salmon, this Court can take judicial notice of the fact that most new tenants pay for structural changes to their premises to accommodate their needs.

building to its needs, particularly where it was paying well-below market rent, the Trial Court committed error.

Moreover, as discussed above, the LLC treated these payments as loans on its books and records.

Thus, the payments totaling \$1,233,014 were, at best for Man Choi, debt owed to him by the LLC and should not have been viewed as contributions.

## **2. The MCC Parties Cannot Unilaterally Dilute Winston**

Nor can, as even the Trial Court recognized, the MCC Parties unilaterally dilute Winston's interest. (R. 1148-50). ("THE COURT: My problem is the unilateral nature of the contribution" and also stating one member cannot change capital contribution without permission of another and that it is possible equipment purchased or alterations to building would not increase value of the LLC). See *Collins v. Telcoa Intl. Corp.*, 283 A.D.2d 128, 133-34, 726 N.Y.S.2d 679, 683-84 (2d Dep't 2001) (alleged additional issuance of shares for the purpose of diluting plaintiff's percentage of ownership states a claim against majority shareholders); *Goldberg v. Goldberg*, 139 A.D.2d 695, 696, 527 N.Y.S.2d 451, 452 (2d Dep't 1988) (denying majority shareholders' motion for summary judgment on claim that majority shareholders breached fiduciary duty when they "issued stock options and bonuses to themselves without at the same time granting [minority shareholder] the opportunity to purchase shares on the same terms in proportion to his shares");

*Hammer v. Werner*, 239 A.D. 38, 265 N.Y.S. 172 (2d Dep't 1933) (plaintiff shareholder could maintain an individual action against directors of the corporation based on allegations that treasury stock had been issued to directors at an inappropriate price and without affording the plaintiff the right to purchase his proportionate part of the shares); *Dingle v Xtenit, Inc.*, 20 Misc.3d 1123(A) (Sup. Ct. N.Y. Co. 2008) (denying defendant's summary judgment motion in action by minority shareholder alleging that controlling shareholder breached fiduciary duty by authorizing and issuing to himself additional shares without business justification, thereby diluting plaintiff's stock interest); *see also Telstra Corp. v. Dynegey, Inc.*, 2003 WL 1016984 (Del. Ch. Mar. 4, 2003) (unilateral capital contribution made by a partner in order to dilute another shareholder was invalid).

The testimony at trial was that the alterations to the Property were not done for any business purpose of the LLC, but to meet the needs of the Man Choi entities occupying the Property (at below market rent), as discussed in the preceding sub-section.

Despite recognizing the black letter law on this issue, the Trial Court nevertheless improperly permitted Man Choi unilaterally to dilute Winston after the fact and despite his and the LLC's decisive admissions and records. Thus, even assuming the \$1,233,014 was a contribution, which it was not, it was error for the Trial Court to decrease Winston's percentage interest from 25% to 10% on this

basis. Further, even if there was a legitimate reason for contributions to alter the Property, the alterations benefitted primarily Man Choi by permitting him to operate his businesses out of a customized building at well below market rent. In essence, the Trial Court ruled that Man Choi could customize the Property for his own use but at Winston's expense, an injustice of the highest order. Even a cursory review of these motives requires the conclusion that, 10 years after the renovations were complete, this Court cannot permit Man Choi unilaterally to dilute Winston's interest when the alterations to the Property were not undertaken with any business purpose related to the LLC; rather they were done to permit Man Choi to reap greater profit from entities owned by him by permitting them to occupy the Property, modified to suit their needs, at well below market rent. *See Goldberg*, 139 A.D.2d at 697 (actions not taken in good faith improper); *Dingle*, 20 Misc. 3d 1123(A), at \*4 (same).

The Trial Court tried to rationalize this unique result by noting that Winston did not oppose the renovations, (R. 34), but the evidence demonstrates that Winston was frozen out by 2000, after Henry passed away, and this is when the alterations were undertaken. (R. 1829-30). Since he was frozen out, the Trial Court erred, despite noting its concern about dilution via unilateral contributions, in concluding that Winston's failure to oppose the renovations makes any difference.

Moreover, that the renovations may have increased the value of the Property, as the Trial Court suggested, (R. 34) is irrelevant to the question whether such renovations could dilute Winston's membership. Even if dilution were acceptable, which it is not as the Trial Court recognized even after Mr. Nelson argued Winston's membership value might go up even if his percentage interest decreased, (R. 1150), any increase in the value of Winston's membership interest in such a scenario was merely coincidental. Mr. Nelson admitted that Man Choi's membership percentage would increase based on his purported contributions regardless of whether his contributions led to an increase in the value of the LLC. (R. 1143). Mr. Salmon testified that renovations might not increase the value of a property. (R. 1378; *see also* R. 1511-12). Thus, the fact that Winston's smaller membership percentage could possibly be worth more than an earlier, larger percentage interest, due to an increase in the value of the LLC, cannot be a basis to accept such unilateral dilution.

Accordingly, the Trial Court erred in both deeming the \$1,233,014 as a capital contribution and by ignoring clear law that prohibits unilateral dilution.

**D. The Trial Court Erred In Not Taking Into Account Winston's Guarantee Of The Mortgage**

Even if Man Choi is not estopped from contesting the percentage of Winston's interest post-2000, which he is, the Trial Court erred in determining that

Winston's guarantee of the \$3.5 million mortgage should not be used in calculating the ownership interests of the members

Guaranteeing a mortgage is a contribution under LLC law and should have been another basis to determine that, at all times, the parties intended Winston to be a 25% member of the LLC. *Sachs v. Adeli*, 26 A.D.3d 52, 804 N.Y.S.2d 731 (1st Dep't 2005) (noting Plaintiff's interest in LLC increased based on guarantees he issued on two occasions); *see also* LLCL § 501 ("The contribution of a member to the capital of a limited liability company may be in cash, property or services rendered or a promissory note or other obligation to contribute cash or property or to render services, or any combination of the foregoing"). It was thus error for the Trial Court to conclude that this guarantee was irrelevant since there were other guarantees. As an initial matter, if the bank were willing to grant the mortgage without Winston's guarantee, then there would have been no need for Winston to sign it. Thus, it is evident that the mortgage, and the Property, could not have been obtained without this guarantee. Moreover, the only other guarantors on the mortgage were Henry, who had inadequate assets according to his financial statement, (R. 5876), and two entities owned by Man Choi that could easily avoid any obligation by being judgment proof.

For all the reasons set forth above, this Court should modify the Judgment to declare that Winston owned a 25% membership interest in the LLC as of the Valuation Date.

**II. WINSTON SHOULD HAVE BEEN GRANTED JUDGMENT ON HIS CLAIMS FOR BREACH OF FIDUCIARY DUTY**

The Trial Court erred in dismissing Winston's breach of fiduciary duty claims.

**A. Winston Is Entitled To Judgment On His Direct Breach Of Fiduciary Duty Claim**

There is no dispute that Man Choi froze Winston out of the LLC by failing fully to disclose all material facts referable to the operation and management of the LLC, even after the 2007 Appellate Order, in which this Court determined that Winston was a member. The "freeze out" of a minority member is a breach of fiduciary duty. *See Aranki v. Goldman & Assoc. LLP*, 34 A.D.3d 510, 825 N.Y.S.2d 97 (2d Dep't 2006); *Winston Chiu v. Man Choi Chiu*, 71 A.D.3d 621, 623, 896 N.Y.S.2d 132 (2d Dep't 2010).

Although the Trial Court rightly determined that Winston had been frozen out of the LLC, it incorrectly dismissed Winston's claim to the extent it related to the freeze out on the ground that Winston had not proven any damages resulting from his deprivation of an opportunity to participate in the LLC's affairs. (R. 37-38). As an initial matter, Winston indisputably was harmed because his forced

lack of participation permitted the MCC Parties to operate the LLC at a loss. Accordingly, in being frozen out, and in not being paid any share of what could have been the LLC's profits, Winston has indeed been directly injured and is entitled to the damages sought. Moreover, to the extent such damages are encompassed in the NAV of the LLC, since the NAV calculation includes "foregone" cash, the Trial Court should have awarded nominal damages, as well as punitive damages and attorneys' fees. *Weiss v. Miller*, 166 A.D.2d 283 284, 564 N.Y.S.2d 110 (1st Dep't 1990) (upholding award of nominal damages for breach of fiduciary duty and stating "nominal damages will be awarded to a plaintiff where the law recognizes a technical invasion of [its] right or a breach of defendant's duty, but where the plaintiff has failed to prove actual damages or a substantial loss or injury to be compensated"), *aff'd*, 78 N.Y.2d 979, 574 N.Y.S.2d 932 (1991); *see also Action House, Inc. v. Koolik*, 54 F.3d 1009, 1013 (2d Cir. 1995) ("Had nominal damages been awarded [with respect to breach of fiduciary duty and misappropriation claims], we believe that an award of punitive damages would have been consistent with New York law").

As set forth at length above, there is no doubt that the MCC Parties maliciously and willfully froze Winston out of the LLC, even after this Court held in the 2007 Appellate Order that Winston was a member of the LLC. They then lied during their testimony at the Trial Court, claiming, despite their admissions

including sworn tax returns, business records and affidavits from Man Choi, that Winston had never been a member of the LLC. Accordingly, an award of punitive damages is appropriate even on the basis of nominal damages. *See Reinah Dev. Corp. v. Kaaterskill Hotel Corp.*, 59 N.Y.2d 482, 488, 465 N.Y.S.2d 910 (1983); *White Eagle Market, Inc. v. Gonzalez*, 36 A.D.2d 864, 321 N.Y.S.2d 1019 (2d Dep't 1971); *see also Local Union No. 38, Sheet Metal Workers' Int'l Assn. AFL-CIO v. Pelella*, 350 F.3d 73, 88 (2d Cir. 2003).

Finally, Winston is entitled to attorneys' fees on this claim. Winston requested that the Trial Court schedule a hearing on the fees issues, but it did not since it incorrectly dismissed this claim. Should this Court reverse the dismissal of the cause of action for breach of fiduciary duty, it should remand for a hearing on the fees issue.

**B. Winston Should Be Granted Judgment On His Derivative Counterclaim And Third-Party Claim**

Winston's derivative breach of fiduciary duty claim is premised on the MCC Parties' failure to rent the Property at market value. The Trial Court improperly dismissed this derivative claim on the ground that Winston withdrew from the LLC as of February 9, 2008, but did not bring the derivative claim until May 30, 2008. However, until Winston is paid the fair value of his interest as of February 9, 2008, and certainly to the extent his derivative claim concerns damages up to February 9, 2008, he has standing to pursue them. *See Arfa v. Zamir*, 63 A.D.3d 484, 485, 880

N.Y.S.2d 635, 636 (1st Dep't 2009) (LLC member does not lose membership status by exercising a put until put transaction is consummated).

Judgment should plainly have been awarded on this derivative claim, had it not been incorrectly dismissed. Both experts, in arriving at the LLC's NAV, included what they believed to be the difference between the rent paid and what the LLC could have earned in an arms'-length transaction, the "foregone cash." This Court should also remand and order a hearing concerning the amount of attorneys' fees to be awarded for the derivative claim.<sup>15</sup>

### **CONCLUSION**

As has been demonstrated at trial, the MCC Parties admit that Winston is a 25% member of the LLC. This Court should declare Winston to be a 25% member of the LLC based on the MCC Parties' own admissions and documents, with a fair value of \$2,612,434.75.<sup>16</sup> This Court should also grant Winston judgment on his breach of fiduciary duty claims, together with any nominal damages, punitive damages, attorneys' fees, and pre-judgment interest, as well as any other relief the Court deems just and proper.

Dated: New York, New York  
September 19, 2013

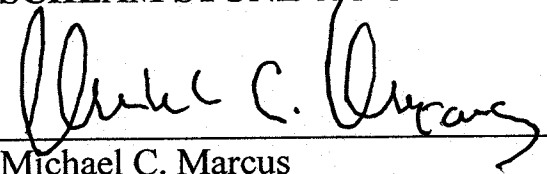
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<sup>15</sup> In the Prior Action, Winston was required to pay a portion of Man Choi's attorneys' fees.

<sup>16</sup> The fair value of Winston's interest is calculated by multiplying the LLC's NAV by his percentage interest. This figure is arrived at by taking 25% of Mr. Nelson's NAV of \$10,449,739, with a 0% marketability discount. The trial court correctly determined that a 0% marketability discount was proper in this case of a single asset LLC. (R. 36).

**Respectfully submitted,  
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## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer.

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