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New York Supreme Court

APPELLATE DIVISION— FIRST DEPARTMENT

KENNETH ROSENBLUM,

Plaintiff-Appellant-Respondent,

-against-

CRAIG TREITLER and STEVEN ROSENBLUM, Preliminary Executors of the Estate of BERNICE ROSENBLUM.

Defendants-Respondents-Appellants.

Case Nos.

2024-04525
2024-06869

BRIEF OF DEFENDANTS-RESPONDENTS-APPELLANTS

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Defendants-Respondents-Appellants Craig Treitler and Steven Rosenblum, Preliminary Executors for the Estate of Bernice Rosenblum, respectfully submit this brief on their appeal from certain aspects of (a) the Decision of the Supreme Court, New York County (Crane, J.) (the "Trial Court"), dated June 14, 2024, and entered on June 17, 2024 (JA7-14, the "Decision"); and (b) the Judgment based on the Decision, dated July 19, 2024, and entered on November 18, 2024 (JA20-22, the "Judgment"). This brief also responds to the Brief for Plaintiff-Appellant-Respondent Kenneth Rosenblum, filed on March 21, 2025 (cited as "Br.").[1]

INTRODUCTION

Kenneth Rosenblum was a 50% member in two LLCs that owned real estate in lower Manhattan. The other 50% member of the LLCs was his 90-year-old mother, Bernice Rosenblum. Their relationship deteriorated more than a decade ago, primarily because Kenneth took, for his own personal use, more than $14 million from another joint venture he shared with Bernice. In 2015, after failing to honor the $14 million settlement agreement he signed with Bernice, Kenneth commenced this action seeking a business divorce from his mother. Over the ensuing years, Kenneth and Bernice engaged in expensive and protracted litigation over different issues, including Kenneth's withdrawal from the LLCs. That withdrawal became effective

[1] Kenneth's brief is available at NYSCEF 10 in Case No. 2024-04525. All other NYSCEF citations are, unless otherwise noted, to the docket from the Trial Court, Index No. 654177/2015, of which this Court can take judicial notice.

in September 2019 after more than three years of litigation; since then, Kenneth and Bernice, and later, Bernice's Estate, have continued to litigate over the withdrawal, including on this appeal.

Before the Court today is the Trial Court's Decision and subsequent Judgment awarding Kenneth the "fair value" of his membership interests in the LLCs. Three main issues are being appealed. Kenneth has appealed the Trial Court's decisions (1) applying a 15% discount for lack of marketability to his fair value award; and (2) declining to award him interest on his withdrawal distribution. Both of those decisions should be affirmed. For its part, the Estate is appealing a third issue, (3), the Trial Court's refusal, in valuing the LLCs' real estate assets, to reflect the undisputed fact that the properties had declined as of September 2019. That decision should be reversed and a supplemental judgment or order of restitution should be made in the Estate's favor.[2]

First, on the 15% lack of marketability discount, the history of this case proves beyond doubt that Kenneth's membership interests in the LLCs were illiquid because they could not be *readily* converted to cash. This is true even though Kenneth had the statutory right to withdrew from the LLCs. The LLCs had no

[2] There is a fourth issue that only needs to be addressed if, contrary to the Estate's arguments herein on issue (2), this Court decides Kenneth may be awarded additional interest. As set forth below, any additional interest authorized by this Court should apply equally to the Estate under the same or similar theories.

operating agreements and, accordingly, Kenneth's *only* avenues to sell his interests were to either find a private buyer willing to partner with his 90-year-old mother or commence litigation. The Trial Court correctly decided that, in determining the "fair value" of Kenneth's interests, a 15% discount needed to be applied to reflect the illiquidity of his interests. The Trial Court's decision is well-supported in the record and consistent with multiple cases from the Court of Appeals and this Court, all of which approved the use of marketability discounts in similar cases involving other real estate holding companies, like the LLCs.

Second, on interest, Kenneth made the exact same legal and factual arguments to this Court on a prior appeal. He argued then that, even though the Trial Court had *not* addressed interest, this Court should take up the issue and decide the question in the first instance. And this Court did just that. It took up the issue itself and affirmed the zero interest award Kenneth sought review of: "The trial court also did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum v. Rosenblum*, 214 A.D.3d 440, 440 (1st Dep't 2023) ("*Rosenblum II*"). This Court did not remand the matter to the Trial Court so it could have a new opportunity to consider interest. It affirmed. That was a decision on interest that bound the Trial Court. And, when Kenneth ignored that ruling and tried to litigate the same interest issue a second time, the Trial Court correctly ruled it could not depart from this Court's prior ruling affirming the zero

interest award. For this, and the other reasons discussed below, Kenneth has no right to an award of interest on his withdrawal distribution.

Third, as for the Estate's appeal of the value of the real estate, Kenneth, the Estate, and both real estate appraisers admitted that the value of the LLCs' real estate had declined as of September 2019. Kenneth admitted in a sworn affidavit that, from December 2015 to March 2019, the value *declined* by about 20%. His expert likewise concluded that the market for real estate in New York declined *further* in June 2019, after New York enacted new, renter-friendly rent laws. And the Estate's expert also concluded that the new rent laws had a negative impact on the price of the real estate. The Trial Court ignored all of this evidence and concluded that the property value must have increased in 2019 as compared to 2016. Its decision is not supported by the record and should be reversed.

On these facts, and for the reasons more fully stated below, this Court should modify the Trial Court's Decision and Judgment to correct its error on the value of the real estate, and direct the issuance of a supplemental judgment or order of restitution in the Estate's favor. As modified, this Court should otherwise affirm the Decision and Judgment on the facts and the law.

###

COUNTER-STATEMENT OF QUESTIONS PRESENTED ON KENNETH'S APPEAL

Question 1: If an LLC has no operating agreement and its two 50-50 members have been engaged in expansive and protracted litigation over the management of the LLC, did the Trial Court reasonably conclude that a 50% membership interest in the LLC was illiquid and that, in determining the fair value of that interest, a 15% discount for lack of marketability should be applied?

Answer Below: Yes.

Question 2: If, on a prior appeal, plaintiff argues he is entitled to interest on his withdrawal distribution and the Appellate Division affirms a decision that awarded him no interest, on remand,

(a) should the Trial Court reject plaintiff's second attempt to make the exact same legal and factual arguments asking for prejudgment interest?

Answer Below: Yes.

(b) should interest have been denied in any event because, unlike numerous other comparable statutes, LLCL § 509 does not provide for an award of interest on a fair value distribution?

Answer Below: The Trial Court did not reach this question.

(c) should plaintiff be required to return distributions he had no right to receive?

Answer Below: Yes.

(d) after plaintiff submitted a proposed judgment to the Trial Court without requesting interest under CPLR 5002, did he knowingly, intentionally, and voluntarily waive his right to argue for such interest now?

Answer Below: The Trial Court did not reach this question.

(e) after plaintiff assigned the proceeds of the Judgment to a third-party, would any award of interest he might be entitled to under CPLR 5001(a) or CPLR 5002 now be zero because he is no longer awarded any sums in the Judgment?

Answer Below: The Trial Court did not reach this question.

QUESTIONS PRESENTED ON THE ESTATE'S APPEAL

Question 3: Where plaintiff, plaintiff's expert, and defendants' expert all agreed that real estate values had declined as of September 2019, should the Trial Court adopt real estate appraisals that captured the undisputed decline in value?

Answer Below: No.

Question 4: If any interest is authorized or awarded to Kenneth as part of his appeal, should additional interest also be authorized or awarded to the Estate under N.Y. U.C.C. § 3-122(4), CPLR 5001(a), and/or CPLR 5002?

Answer Below: The Trial Court did not reach this question.

COUNTER-STATEMENT OF FACTS AND OF THE CASE

I. Kenneth and Bernice's business relationships deteriorate leading to the commencement of this action in 2015.

Bernice was Kenneth's mother. They were 50-50 members in two LLCs. JA7. Each LLC owns, as its primary asset, a multifamily property in lower Manhattan. Neither of the LLCs has an operating agreement. JA10-11. In addition to the LLCs, Kenneth and Bernice also had a number of other joint business ventures. Specifically, as relevant to this appeal, they were 50-50 partners in a partnership that loaned the LLCs over $4.5 million, and they owned other real estate individually as tenants-in-common. JA11.

Over 10 years ago, Kenneth and Bernice's relationship soured. Although Kenneth attempts to blame "the influence of others" for the fall out, Br. at 7, the reality is that their relationship deteriorated because Kenneth improperly transferred $14.5 million out of the partnership he co-owned with his mother for his own personal use and deprived the partnership of business opportunities. *See Rosenblum v. Rosenblum*, 162 A.D.3d 608, 608 (1st Dep't 2018) ("*Rosenblum I*") (discussing Bernice's allegations). In 2013, "the parties entered into a settlement agreement" in which Kenneth agreed to pay $14 million "in full payment of the loans and business opportunities he [had] taken from [the partnership]." *Id.* As of December 2015, Kenneth had paid only $6 million of the amounts due under the settlement and, at that time, he commenced this action to divorce his business interests from his

mother. *Id.* at 609. Because the LLCs had no operating agreement, Kenneth's only ability to extricate himself from the LLCs was through judicial dissolution or statutory withdrawal. Accordingly, on June 13, 2016, Kenneth filed an amended complaint in which he sought, among other things, judicial dissolution of the LLCs or alternatively, withdrawal from the LLCs under Limited Liability Company Law ("LLCL") § 606. *See* NYSCEF 48. Bernice filed counterclaims against Kenneth for breach of the 2013 settlement agreement. *Rosenblum I*, 162 A.D.3d at 609.

II. The value of the LLCs' real estate declines from the end of 2015 to March of 2019.

There is no serious dispute that the value of the LLCs' real estate declined from the end of 2015 to March of 2019. In an affidavit, Kenneth swore: "I am informed and believe that during the pendency of this litigation the value of the buildings has decreased by about 20%." JA1441 at n.1. Then, in June of 2019, New York enacted new rent laws that significantly restricted real estate owners' ability to increase the profitability of their properties. In another affidavit, Kenneth admitted that the new rent laws "dramatically limit[ed] the landlords' ability to increase rent as a result of apartment renovations." NYSCEF 414 ¶ 4. He also cited with approval an article that described the "new laws as 'devastating' and 'disastrous' for New York City's real estate industry." *Id.* And finally, he conceded that, "as a result of the new rent regulations, the property owners need new strategies for operating their business." *Id.* ¶ 6.

On September 20, 2019, the Trial Court granted Kenneth's motion seeking to withdraw from the LLCs. NYSCEF 423 at 3. The Trial Court gave Bernice until the end of January 2020, to "buy out Plaintiff's interests" in the LLCs for "fair value." *Id.* Around this time, Bernice also demanded that Kenneth repay the loans made to the LLCs. *See* NYSCEF 542. The Estate and Kenneth were unable to agree on a fair value for Kenneth's interests in the LLCs. And Kenneth did not make any payments on the loans.

Beginning in late February 2020, the Trial Court began a 9-day bench trial. At this first trial, the Trial Court heard extensive expert testimony on the value of the LLCs and argument on the effective date of Kenneth's withdrawal, which would be the relevant timepoint to assess the fair value of his LLC interests. JA8. Kenneth argued that his withdrawal date was actually in December 2016, despite continuing his active involvement in the LLCs after that date. *See Rosenblum II*, 214 A.D.3d at 440. If his withdrawal date was in December 2016, then his membership interests would be valued *before* the full 20% decline in value he swore took place from December 2015 to March 2019. *See* JA1441 at n.1. Conversely, Bernice argued that Kenneth did not withdraw until September 2019. The Trial Court agreed with Bernice, holding that the proper date for withdrawal was September 20, 2019. JA7. Kenneth appealed, and this Court affirmed. *Rosenblum II*, 214 A.D.3d at 440.

On that appeal, Kenneth also argued he should be awarded prejudgment interest on his withdrawal distribution. He recognized "the Trial Court did not address the issue of interest," and he urged this Court to "rule on the issue" in the first instance. Brief for Plaintiff-Appellant-Respondent, No. 2022-00549, NYSCEF 22, at 20 (1st Dep't Sept. 16, 2022). This Court ruled on the issue and rejected Kenneth's argument: "The trial court also did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum II*, 214 A.D.3d at 440. It remanded the matter to the Trial Court to recalculate damages owed to the Estate but otherwise affirmed the Order and Judgment appealed from. *Id.*

III. The Trial Court conducts a second bench trial and renders the Decision and Judgment largely rejecting Kenneth's arguments.

A. The Second Bench Trial

Following *Rosenblum II*, the Trial Court conducted another bench trial to determine the fair value of Kenneth's 50% interest in the LLCs as of September 20, 2019, the date of his withdrawal. JA7. There were also other disputed issues that required the Trial Court's resolution, including Kenneth's obligation to repay the loans owed to the LLCs and whether Kenneth had a right to interest. JA11; JA13. Four expert witnesses testified live. The Estate presented the testimony of John Farrell, its real estate appraiser, and Hubert Klein, its business valuation expert.

Kenneth presented the testimony of John Feeney, his real estate appraiser, and Christopher Mercer, his business valuation expert.

Real Estate Appraisers. Both real estate appraisers used the income capitalization method, JA8, which requires determining two variables to value the real estate owned by the LLCs: (a) the net operating income of the real estate as of September 20, 2019; and (b) an appropriate capitalization rate, or expected rate of return on investment. JA8; JA915. Then, by dividing the net operating income by the capitalization rate, the appraisers were able to value the real estate. JA915. Because the cap rate is the denominator in this equation, there is an inverse relationship between the cap rate and value. If a cap rate increases and income remains steady, that means the value of the real estate has declined and vice versa. *See* JA154 at 117:13-18.

The real estate appraisers differed on the net operating income for both of the LLCs' buildings. The Estate "relied on *actual* contract rents" and "the actual historical expenses of the buildings" to determine their net operating income. JA10. Conversely, Plaintiff's expert, used "inflated and speculative" rents that "the units in the building were not currently achieving." JA9-10.

On the capitalization rates, the Estate's appraiser and Kenneth's appraiser *agreed* that the new rent laws enacted in New York in June 2019 negatively impacted the real estate market. As Kenneth's expert confirmed, "the new laws are almost

unanimously expected to result in higher capitalization rates"—and thus lower valuations—"for assets with a meaningful amount of rent regulated units." JA637. This included the LLCs' two properties. Rent regulated units made up 33% of one LLC property and 11% of the other. JA170-71 at 133:16-134:6. The two appraisers' main point of disagreement centered on how, if at all, to *capture* the impact of the new rent laws in the cap rate. The Estate's appraiser determined the appropriate capitalization rate by analyzing comparable sales transactions that closed *after* the new rent laws were enacted. JA935; JA1043. Kenneth's appraiser failed to account for the impact of the rent laws at all because his analysis relied exclusively on comparable sales transactions that closed *before* the new rent laws were enacted. A702. He did so despite admitting that the new rent laws had a negative effect on the market that necessitated a period of "price discovery." JA637.

Valuation Experts. As for the valuation of the LLCs themselves, the Estate's expert explained that members of an LLC, like Kenneth, have "no ready market for [their] interests where they might be converted to cash" because the interest are not "publicly traded." JA1308. Accordingly, he applied a 15% discount for lack of marketability to value Kenneth's interests in the LLCs to account for the fact that the LLC interests were illiquid. JA1309-13; JA1361-65. To arrive at this discount, the Estate's valuation expert relied on a number of factors, including the lack of operating agreements governing the LLCs and the fact that the two 50-50 members

had been engaged in protracted litigation for almost four years prior to the September 2019 valuation date. JA1309-13; JA-1361-65. Conversely, Kenneth's valuation expert "applied a zero percent marketability" discount, thus implying that the interests were entirely liquid. JA461 at 372:17-24.

B. The Decision and Judgment

In its Decision after trial, the Trial Court credited portions of the Estate's real estate appraisals and portions of Kenneth's. The Trial Court found that the value of the real estate should be determined using the Estate's net operating income but Kenneth's cap rates. A8-11. On the issue of a marketability discount, the Trial Court agreed with the Estate's valuation expert that Kenneth's interest in the LLCs were illiquid. According to the Trial Court, "a third-party investor … would be unlikely to risk buying into this business at all, much less without a discount," because the LLCs lacked an operating agreement and the two 50-50 members had been engaged in protracted litigation that "permeates every aspect of their relationship." JA12.

As for the loans made to the LLCs by Kenneth and Bernice's partnership, the Trial Court found that, even though the partnership was "insolvent, the loans are still fully collectible" because they "would be covered half from Kenneth and half from the Estate." JA 11. Finally, on interest, the Trial Court declined to award Kenneth interest on his withdrawal distribution because, in *Rosenblum II*, this Court "took up the issue" and decided it against Kenneth. JA14.

The Estate and Kenneth thereafter submitted competing proposed judgments implementing the Trial Court's Decision. JA30; JA34-36. Kenneth did not ask for interest under CPLR 5002 in his proposal. *See* JA30. The Trial Court signed the Estate's proposed judgment on July 19, 2024, and it was entered on November 18, 2024. JA22.

On December 18, 2024, after the Judgment was entered, Kenneth "assigned the proceeds of the Judgment, including post-Judgment interest thereon, to Royal Abstract Intermediary LLC." NYSCEF 685 at 1. The Estate was notified of the assignment and thereafter satisfied the Judgment in full. *Id.* at 2. This appeal followed.

ARGUMENT

The Estate's argument proceeds in four parts. In response to Kenneth's appeal, the Estate first shows why the Trial Court was correct in applying a 15% discount for lack of marketability on Kenneth's membership interests in the LLCs because the interests were illiquid. Second, the Estate shows why the Trial Court was correct in declining to award Kenneth interest on his withdrawal distribution. Third, as for its own appeal, the Estate shows why the Trial Court committed an error in valuing the LLCs' real estate that should be corrected. Fourth, and finally, if this Court decides to remand this matter to the Trial Court to consider additional interest owed to Kenneth, the Estate shows why it too should be entitled to additional interest.

I. The Trial Court's 15% discount for lack of marketability should be affirmed.

A. Because Kenneth's interests in the LLCs are not "entirely liquid," the Trial Court correctly applied a lack of marketability discount.

Applying binding precedent from the Court of Appeals, the Trial Court correctly observed that "[a] lack of marketability discount reflects 'the illiquidity of *petitioner's shares*, i.e., that a potential investor would pay less for shares in a close corporation because they could not *readily be liquidated for cash*.'" JA12 (quoting *Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 165 (1995)) (emphasis added). Kenneth agrees that *Beway* controls. Br. at 10. But he takes issue with the Trial Court's determination that his interests in the LLCs were illiquid. According to Kenneth, because he had "a 50% interest in *pre-1999 LLCs*, whose assets consist of *freely marketable* real estate and cash," he had "an entirely *liquid* interest." Br. at 11 (emphasis in original). Kenneth is wrong. His interests were not entirely liquid. Because his argument is based on a false premise, the Trial Court's application of a 15% discount for lack of marketability should be affirmed.

As *Beway* itself confirms, the liquidity of an asset is determined by whether it can "*readily* be liquidated for cash." 87 N.Y.2d at 165 (emphasis added); *see also Liquid*, Black's Law Dictionary (12th ed. 2024) (defined as: "(Of an asset) capable of being readily converted into cash"). As the Trial Court found, this case demonstrates the *illiquid* nature of Kenneth's interests. Even though Kenneth had

the statutory right to withdraw from the LLCs, that did not somehow give him the ability to *readily* convert his membership interests to cash. Instead, because the LLCs had no operating agreements, a prospective purchaser's ability to convert interests in the LLCs to cash could not be achieved without "protracted litigation," which severely limits marketability and thus requires a discount. JA11-12.

1. The Trial Court engaged in the exact analytical framework described by the Court of Appeals in *Beway*.

Kenneth claims that the Trial Court made an "error" by "ignoring the import of" *Beway*. Br. at 13. In reality, it is Kenneth who ignores *Beway*'s principles. Conversely, the Trial Court undertook the exact two-step process to value Kenneth's interest described in *Beway*. First, the Trial Court determined "the going concern value of the [LLCs] as a whole." 87 N.Y.2d at 168; JA8-11. Then, after making that determination, the Trial Court moved to "the *second step* of the evaluation process," – i.e., it determined whether to apply an "discount for unmarketability of *petitioners' shares*," or, as here, Kenneth's LLC interests. 87 N.Y.2d at 171 (emphasis added); JA11-13.

Kenneth tries to create reversable error in the Court's analysis by collapsing the "two-step evaluation process" into one. *Beway*, 87 N.Y.2d at 170. He argues that, because *Beway* requires the LLCs to be *valued* as a whole, that must mean the prospective purchaser would be *buying* the LLCs as a whole, not just Kenneth's interests. Br. at 14. Thus, as his argument goes, no marketability discount should

have been applied because the prospective purchaser would own 100% of the LLCs and could ignore any marketability issues associated with corporate ownership. Kenneth claims to apply *Beway* while in reality ignoring its teachings. The prospective purchaser is not *buying* 100% of the LLCs. It is buying Kenneth's 50% interests. That is why, as *Beway* requires, the Trial Court determined "the appropriate discount for unmarketability *of petitioners' shares*." *Beway*, 87 N.Y.2d at 171 (emphasis added); *see also Matter of Seagroatt Floral Co. (Riccardi)*, 78 N.Y.2d 439, 446 (1991) (valuation "should include consideration of any risk associated *with the illiquidity of the shares*") (emphasis added).

Kenneth tries to distinguish *Beway* because, on the facts, it concerned *corporate* ownership of shares instead of membership interests in LLCs. *See* Br. at 11. This distinction is irrelevant. The Court in *Beway* recognized that there are liquid interests in corporations that are "publicly traded" and illiquid interests that are not. *Beway*, 87 N.Y.2d at 171. Liquidity is not dependent on a statutory right to withdraw. And here, the existence of a statutory withdrawal right still left Kenneth without a straightforward path to convert his interests into cash—making those shares in reality illiquid. His interests are not publicly traded and there is no ready market for them. He first *sought* statutory withdrawal in 2016 but there was no easy way to convert that statutory right to cash. *See* JA12. Any prospective purchaser would understand it was buying illiquid interests in LLCs that had no operating agreements

and that, as of the September 2019 valuation date, had been in protracted litigation with no end in sight.

2. As *Beway* shows, a marketability discount is still warranted even though the LLCs are real estate holding companies.

Nor does the fact that the LLCs are real estate holding companies impact the application of a marketability discount. *Beway* itself involved real estate holding companies. 87 N.Y.2d at 164. The Court of Appeals still found it appropriate to apply a marketability discount to petitioners' shares in determining fair value. *Id.* at 171-72. *Beway* is hardly an outlier. This Court has also "applied discounts for lack of marketability" in other cases involving "real estate holding companies." *Levine v. Seven Pines Assocs. Ltd. P'ship*, 156 A.D.3d 524, 525 (1st Dep't 2017) (affirming 25% discount in a partnership case); *Giaimo v. Vitale*, 101 A.D.3d 523, 524-25 (1st Dep't 2012) (applying "a 16% DLOM against the assets of both corporations").

Kenneth's argument cannot be squared with *Beway*, *Levine*, or *Giaimo*, three directly applicable cases that each applied marketability discounts to real estate holding companies. He believes that real estate holding companies should be treated as "mere 'wrappers'" for their underlying real estate and that no discount should be applied because real estate can be readily liquidated. Br. at 15. Thus, according to Kenneth, the prospective purchasers in *Beway*, *Levine*, and *Giaimo* were really just buying 100% of the underlying real estate held by the companies, and the Court of Appeals and this Court erred by addressing the marketability issues associated with

the illiquid nature of the corporate shares or partnership interests at issue. Kenneth thus necessarily implies that those three cases were decided incorrectly. And his argument here is nothing more than his thinly-masked disagreement with the holdings from those controlling cases.

Kenneth's disagreement with *Beway*, *Levine*, and *Giaimo* is not a basis to reverse the Trial Court's well-supported finding that Kenneth's interests in the LLCs were illiquid and required a marketability discount. As this Court recognized in *Giaimo*, "[t]here are *increased costs and risks* associated with corporate ownership of the real estate … that would not be present if the real estate was owned outright." 101 A.D.3d at 524 (emphasis added). And "[t]hese costs and risks have a negative impact on how quickly and with what degree of certainty the corporations can be liquidated, which should be accounted for by way of a discount." *Id.* As this case shows, withdrawal from a pre-1999 LLC with no operating agreement requires drawn out litigation, including discovery, the retention of experts, trial, and appeals. That is an "increased cost[] and risk[]." *Id.* The Trial Court correctly and carefully considered these factors in applying a 15% marketability discount. JA10-13.

Kenneth also attempts to liken his 50% membership interests in the LLCs to his 50% tenant-in-common interests in other properties. But the two are fundamentally different. The Trial Court did not need to consider any marketability issues for the tenant-in-common interests because, as Kenneth admits, the properties

themselves were "successfully *liquidated* at a public auction." Br. at 11 n.5 (emphasis added). Unlike the hypothetical purchaser of Kenneth's 50% interest in the LLCs, the real-life purchasers of the tenant-in-common properties actually purchased 100% of the real property. The actual sales of the tenant-in-common properties have no bearing on the Trial Court's analysis of the fair value of Kenneth's distinct LLC interests.

3. The cases Kenneth cites in support of his position are contrary to *Beway* and other cases from this Court.

Finally, Kenneth's examples of cases that did not apply marketability discounts are distinguishable on their facts or in conflict with binding precedent from the Court of Appeals and this Court. Such cases cannot cast doubt on the Trial Court's reasoned decision to apply a discount here.

Kenneth only cites one case from this Court—*Vick v. Albert*, 47 A.D.3d 482 (1st Dep't 2008). But, in *Giaimo*, this Court later rejected the same expansive view of *Vick* Kenneth argues for here. According to *Giaimo*, *Vick* does *not* preclude discounts for lack of marketability "for real estate holding companies," and, in fact, in *Giaimo*, the Court itself adopted "a 16%" discount for real estate holding companies based on the "particular facts and circumstances" at issue. *Giaimo*, 101 A.D.3d at 524-25; *see also Giaimo v. Vitale*, 31 Misc. 3d 1217(A), *4 (Sup. Ct. N.Y. Cnty. Apr. 25, 2011), *aff'd in relevant part, vacated on other grounds*, 101 A.D.3d at 524 (rejecting same argument advanced here as "inconsistent with *Beway*").

Kenneth's reliance on cases from the Second Department likewise fails to support his argument against a marketability discount under the particular facts and circumstances of this case. In *Cinque v. Largo Enterprises of Suffolk County, Inc.*, for example, the Second Department held that a discount for lack of marketability "should *only* be applied to the portion of the value of the corporation that is attributable to goodwill." 212 A.D.2d 608, 609-10 (2d Dep't 1995) (emphasis added). This Court expressly rejected the same holding: "[The motion court] properly rejected petitioner's contention that" a discount for lack of marketability should only be applied "to goodwill." *Giaimo*, 101 A.D.3d at 524. The same is true of *Cohen v. Cohen*, 279 A.D.2d 599 (2d Dep't 2001). There, the Second Department held that "the Supreme Court properly determined not to apply a discount for lack of marketability" in real estate corporations and partnerships because "the subject real estate holdings consist solely of real property." *Id.* at 600. *Cohen* is inconsistent with the Court of Appeals' decision in *Beway* and this Court's decisions in *Levine* and *Giaimo*, three cases that approved of marketability discounts in cases involving real estate holding companies. *Beway*, 87 N.Y.2d at 164, 171; *Levine*, 156 A.D.3d at 525; *Giaimo*, 101 A.D.3d at 524-25. The Trial Court correctly applied controlling precedent in adopting a 15% discount in this case.[3]

[3] And, in *Kassab v. Kassab*, the Supreme Court, Queens County, did not apply a marketability discount because "the respondent did not proffer any competing valuation to controvert that of Mr. Mercer." *Kassab v. Kasab*, 56 Misc. 3d 1213(A),

* * *

In sum, valuating a corporate entity for purposes of a fair value determination "is not an exact science, and it is the 'particular facts and circumstances' of each case that will dictate the result." *Giaimo*, 101 A.D.3d at 524 (quoting *Beway*, 87 N.Y.2d at 167). The Trial Court applied the particular facts and circumstances at issue here and found that a 15% discount is appropriate. Its decision should be affirmed.

B. The Trial Court justifiably credited the Estate's valuation expert to determine the appropriate marketability discount, while Kenneth waived his right to argue for a lower discount.

The Trial Court credited the Estate's valuation expert and applied the 15% discount for lack of marketability he recommended. JA11-13. There is overwhelming factual support in the record supporting the Trial Court's decision. Kenneth's claim that "there is nothing in the record to support 15% as the appropriate marketability discount" is plain wrong and should be rejected. Br. at 18.

The Estate's expert explained in detail how he arrived at his 15% discount rate. JA1309-13; JA1361-65. He first noted that "there is no operating agreement" for either LLC and that the 50-50 members had "been in litigation since December of 2015, thus underscoring the inherent risks of the absence of an operating

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*9 (Sup. Ct. Queens Cnty. 2017), *aff'd as modified*, 195 A.D.3d 832 (2d Dep't 2021). Here, the Estate *did* controvert Mr. Mercer. The Estate showed why, under the law and facts, a discount was required because LLC interests are illiquid.

agreement." JA1309; JA1361. He then "considered various factors," including the private ownership of the LLCs, the lack of a dividend policy, the management of the LLCs, the holding period for the ownership interest, the LLCs' redemption policy, and the costs associated with making a public offering. JA1310; JA1362-63. He determined that all of these factors had a negative impact on marketability and required an increase to the discount. JA1310; JA1362-63. He also analyzed restricted stock studies because they "offer[] evidence of discounts related to lack of marketability as it has been quantified in market transactions." JA1311; JA1363-64. The Estate's valuation expert determined that the most relevant studies "have shown average discounts in the range of 13% to 25%." JA1311; JA1363-64. He then relied on his professional judgment and determined that a 15% discount was appropriate based on his assessment of these factors. JA521-27.

Against this record, Kenneth's claim that the Estate's valuation expert failed to give "any coherent explanation" does not withstand any level of scrutiny. Br. at 18. The valuation of an LLC, just like the valuation of a closely held corporation, "is not an exact science." *Giaimo*, 101 A.D.3d at 524. In *Giaimo*, this Court approved of an expert's use of "a number of studies of reported sales that bore some related characteristics to" the corporations at issue. *Id.* And, in *Beway*, the Court of Appeals also cited with approval the expert's decision to determine a marketability discount by "analyzing privately transacted sales of stock 'with restrictive sale provisions.'"

87 N.Y.2d at 171. That Estate's valuation expert applied the same techniques a reasonable investor would employ in valuing the LLCs. And the 15% discount he arrived at is *lower* than discounts approved by this Court in other real estate cases. *See Giaimo*, 101 A.D.3d at 524-25 (finding 16% discount for closely held real estate corporations); *Levine*, 156 A.D.3d at 525 (affirming 25% discount for real estate partnership). Compared to Kenneth's firm insistence on no discount at all, the Trial Court acted well within its discretion in crediting the Estate's expert over Kenneth's.

Nor is there any merit to Kenneth's argument that the Trial Court made a mistake when it found that "plaintiff does not argue that the discount is too high, but merely sticks to his guns that no discount should apply at all." Br. at 18 (quoting JA13). The record shows that Plaintiff's exclusive argument before the Trial Court was for no marketability discount at all. During trial, Kenneth's expert admitted he "applied a zero percent marketability" discount. JA461 at 372:19-24. Following his expert's lead, Kenneth took the same absolutist position in his post-trial briefs. He first argued to the Trial Court that "there is no factual or legal basis for applying any marketability discount … , and none should be applied." NYSCEF 649 at 28. And, in his reply, he reiterated that "the *only* appropriate marketability discount in this case is *zero*. NYSCEF 650 at 23 (emphasis added). Against this record, the Trial Court correctly found there was nothing "to contravene defendant's expert's application of a 15% discount." JA13.

In arguing that the Trial Court should have applied an alternative marketability discount of 3%-5%, Kenneth relies on the fact that page 93 of his expert's 186 page report referenced the possibility of such a discount. Br. at 18 (quoting JA1190). Yet Kenneth failed to elicit any live testimony on this type of discount at trial and then failed to argue in favor of such a discount in either of his post-trial briefs. Kenneth thus waived his right to press this argument now. It is improper to "raise[] [an issue] for the first time on appeal" that contradicts the "only position" he argued to the Trial Court. *Int'l Merch. Grp. Ams., Inc. v. Segerman Int'l Inc.*, 277 A.D.2d 168, 168 (1st Dep't 2000). It was not incumbent on the Trial Court to comb through a 186 page report to find a vague reference at the halfway mark to an alternative 3%-5% marketability discount.

Waiver aside, the expert's mention of a 3%-5% discount fails for another reason: it does *not* address the factors the Trial Court relied on in finding that Kenneth's interests in the LLCs required a marketability discount, "the lack of an operating agreement" and "the protracted litigation" involving the LLCs. JA11. Instead, the report makes vague reference to the idea that a marketability discount could be made by reference to the transaction costs associated with a hypothetical future sale of the LLCs, which might be "3% to 5%, plus or minus a bit." JA1189. As a threshold matter, the report is unsourced and there is no elaboration on what "plus or minus a bit" might mean in practice. The cost of a *future* transaction assumes

"the remaining shareholders" will be able to agree on a sale of the company "in the future" and thereby incur "brokerage fees, legal and accounting fees, and other costs associated with selling the company." *Id.* But more fundamentally, it makes no attempt to include in this discount the costs associated with the factors relevant to the Trial Court's illiquidity finding: that there is no operating agreement for the LLCs and thus no mechanism to govern a future desire to sell. There is therefore no ability to predict "how quickly and with what degree of certainty" the LLCs could be liquidated, assuming they could be liquidated at all. *Giaimo*, 101 A.D.3d at 524. That reality requires a discount far greater than "3% to 5%, plus or minus a bit."

C. There is no basis to apply the marketability discount to Kenneth's repayment of loans he owed to the LLCs.

As a last-ditch effort, Kenneth argues that the 15% marketability discount on his membership interests in the LLCs should also be applied to the loans he owed to the LLCs and had to repay. Other than a desire to extract more cash for himself, Kenneth does not explain any connection between the marketability discount and the loans. They are clearly apples and oranges. The marketability discount accounts for the illiquid nature of Kenneth's interests in the LLCs. It has nothing to do with the identity of the person that might owe the LLCs money. If, for example, the LLCs had loaned John Doe $100,000, Kenneth's fair value of that loan would be half of the loan less the 15% marketability discount, or $42,500. No one would argue that John Doe only owed the LLCs $85,000. The result is no different because Kenneth

happened to owe the money instead of a third-party. There is no merit to Kenneth's attempt to link these two distinct issues.

II. The Trial Court's decision declining to award Kenneth prejudgment interest should be affirmed.

A. This Court's prior decision barred the Trial Court from re-examining Kenneth's entitlement to prejudgment interest.

This Court already considered whether a zero interest award was appropriate in this case and it concluded it was: "The Trial Court did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum II*, 214 A.D3d at 440-41. Now that the same issue is back before this Court based on the same facts and the same law, the result should be the same. This Court should again affirm the zero interest award Kenneth received.

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law." *Apollo Asset Mgmt., Inc. v. Cernich*, 226 A.D.3d 466, 466 (1st Dep't 2024). Applying this settled principle, the Trial Court acted well within its discretion by refusing to give Kenneth a second opportunity to litigate an issue he had already lost. JA13-14; *see also Bank of N.Y. Mellon v. Singh*, 205 A.D.3d 866, 868 (2d Dep't 2022) (law of the case doctrine "directs a court's discretion").

In arguing for reversal, Kenneth claims this Court did not resolve the interest issue in *Rosenblum II* at all, but instead left the question of interest for the Trial Court to address on remand. Br. at 21-24. But that argument cannot be reconciled with the actual language used in the decision. This Court *considered* the question of interest and *affirmed* the zero interest order Kenneth appealed from. *Rosenblum II*, 214 A.D3d at 440-41. It did *not*, as Kenneth suggests, remand the matter to the Trial Court to "exercise[] its discretion anew" at some point in the future. Br. at 24. In fact, when this Court intended to remand matters to the Trial Court to consider anew, it did just that. It "remand[ed] the matter to the trial court for recalculation of damages on [the Estate's] counterclaim, *and otherwise affirmed*." *Rosenblum II*, 214 A.D3d at 440 (emphasis added). If this Court intended to also remand the question of interest to the Trial Court, it would have said so. It did not because it "affirmed" the zero interest order Kenneth appealed.

It is of no moment that the Trial Court did not itself address interest before this Court decided *Rosenblum II*. That was no secret. The Trial Court's silence on the issue was part of Kenneth's argument to this Court on the last appeal. He argued then that "the Trial Court did not address the issue of interest," and he urged this Court to "rule on the issue" in the first instance. Brief for Plaintiff-Appellant-Respondent, No. 2022-00549, NYSCEF 22, at 20 (1st Dep't Sept. 16, 2022). At Kenneth's request, this Court ruled on the issue; it affirmed the zero interest award.

See Rosenblum II, 214 A.D3d at 440-41. The Trial Court was not free to ignore that ruling. It correctly held that whatever discretion it might have had was now limited by *Rosenblum II*. *See* JA13-14; *see also Apollo*, 226 A.D.3d at 466.

Kenneth's current appeal is nothing more than an attempt to re-litigate the same issue this Court already resolved against him because he is unhappy with the result. He has not come forward with any new facts or legal arguments in support of his claimed right to interest. Kenneth cites the exact same cases he relied on during the last appeal. And he makes the exact same factual arguments. *Compare* Br. at 24-29 *with* Reply Brief for Plaintiff-Appellant-Respondent, No. 2022-00549, NYSCEF 28, at 20-25 (1st Dep't Nov. 30, 2022). Portions of his current argument were, in fact, copied and pasted from his prior briefing. *Compare* Br. at 27-29 *with* Reply Brief for Plaintiff-Appellant-Respondent, No. 2022-00549, NYSCEF 28, at 23-25 (1st Dep't Nov. 30, 2022) (each containing the same two identical paragraphs). Preventing parties from relitigating the same issues based on the same case law, the same facts, and the same arguments is the precise scenario the law of the case doctrine is designed to prevent. *See Apollo*, 226 A.D.3d at 466.

In short, Kenneth already had a full and fair opportunity to litigate his right to prejudgment interest. This Court considered Kenneth's legal and factual arguments and affirmed the lack of an award of prejudgment interest. Now that Kenneth is making the same arguments again, this Court should reach the same result. It should

again affirm the Trial Court's decision "declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum II*, 214 A.D3d at 440-41.

B. Kenneth has no legal entitlement to prejudgment interest.

Putting aside this Court's prior resolution of Kenneth's claim for interest, Kenneth is also incorrect in arguing that CPLR 5001(a) authorizes an award of interest in his favor. Under settled law, "interest is purely a creature of statute." *Matter of Bello v. Roswell Park Cancer Inst.* 5 N.Y.3d 170, 172 (2005). Because no statute gives Kenneth a right to interest on his statutory claim for fair value, no interest should be awarded.

Kenneth argues that CPLR 5001(a) can act as "the statutory basis for an award of interest" in this case because his statutory fair value claim is either (a) an action based on "possession or enjoyment of property"; or (b) "an action of an equitable nature." Br. at 26. But analyzed properly, Kenneth's statutory claim does not fall within either of those categories of actions. And none of the cases Kenneth's cites supports an award of interest here. Kenneth is thus not entitled to interest under CPLR 5001(a).

Kenneth's statutory claim for fair value cannot be understood to fall into the first category, as a claim based on possession or enjoyment of property, because such claims are subject to mandatory interest under CPLR 5001(a). Yet, at a minimum,

this Court already determined that interest is *not* mandatory here because it already affirmed a zero interest award. *See Rosenblum II*, 214 A.D3d at 440-41.

Nor is Kenneth's statutory claim of an "equitable nature," the second category under CPLR 5001(a). In arguing otherwise, Kenneth states: "The Court of Appeals has definitively held that 'a determination of the fair value of [plaintiff's] shares and an order directing defendants to pay that value for them … is equitable in nature.'" Br. at 27 (quoting *Loengard v. Santa Fe. Indus., Inc.*, 70 N.Y.2d 262, 266 (1987)). But Kenneth misinterprets *Loengard*. That case drew a clear distinction between enforcing a statutory right and bringing an extra-statutory claim for equitable relief. Understood in its proper context, *Loengard* only serves to demonstrate that Kenneth's statutory claim is *not* equitable in nature.

Loengard stands for the proposition that, in cases where shareholders demonstrate that their statutory remedy is inadequate, they might still pursue actions of an equitable nature. There, the minority stockholders showed that their "statutory right of appraisal"—usually their "exclusive remedy"—was inadequate because the majority engaged in "fraud, misrepresentation or self-dealing." 70 N.Y.2d at 266-27 (internal citations omitted). Because the minority stockholders alleged that their statutory remedy was inadequate, they presented an "exceptional case" allowing them to bypass their statutory rights and instead seek relief that was "equitable in nature." *Id.* at 267.

In stark contrast to *Loengard*, Kenneth has never argued—much less shown—that his statutory claim for fair value is an inadequate legal remedy, nor has he pursued any extra-statutory equitable relief. Quite the opposite. Kenneth exclusively pursued statutory relief, and the statute he relied on gave him an adequate legal remedy: a money judgment. *See Boyle v. Kelley*, 42 N.Y.2d 88, 91 (1977) (claim is not of an "equitable nature … where there is an adequate remedy at law"); *see also Ansonia Assoc. v. Ansonia Residents' Ass'n*, 78 A.D.2d 211, 214 (1st Dep't 1980) (availability of "an adequate remedy at law is determinative of the issue of [party's] right to equitable relief"). Accordingly, *Loengard* supports the Estate's position and refutes Kenneth's. Kenneth cannot seek interest under the "equitable nature" prong of CPLR 5001(a) because the relief he seeks is statutory, not equitable.

That CPLR 5001(a) does *not* grant Kenneth a right to interest is further confirmed by the fact that several *other statutes* expressly grant courts discretion to award interest in similar corporate situations *but not here*. Kenneth's award is governed by LLCL § 509, a statute that does *not* authorize interest. In several other statutes dealing with similar corporate matters, the Legislature authorized courts to award interest. The Legislature's decision *not* to also grant courts similar discretion in LLCL § 509 "is a significant indication that its exclusion was intended." *Commonwealth of N. Mariana Islands v. Canadian Imperial Bank of Com.*, 21 N.Y.3d 55, 60 (2013). For example, the Legislature enacted LLCL § 509 and LLCL

§ 1005(b) at the same time. 1994 N.Y. Sess. Laws, ch. 576, § 1. In section 1005(b), the Legislature incorporated the procedures of BCL § 623(h) and thus gave courts express discretion to award an LLC member who dissents to a merger "an allowance for interest as such rate as the court finds equitable." BCL § 623(h); *see also* LLCL § 1005(b) (incorporating procedures of BCL § 623(h)). The Legislature's intentional decision to authorize interest under LLCL § 1005(b) but not LLCL § 509 should not be overridden by resort to CPLR 5001(a). *See Nadkos, Inc. v. Preferred Constrs. Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 10 (2019) (in interpreting statutes, "words must be harmonized and read together to avoid surplusage") (cleaned up).

The Court of Appeals decision in *Brodsky v. Murphy*, 25 N.Y.2d 518 (1969), reinforces that interest under CPLR 5001(a) cannot be used to overcome a comprehensive statutory regime that authorizes interest in some situations but not in others. *Brodsky* involved the overpayment of taxes to the State. Like Kenneth, the taxpayer argued it was entitled to interest under CPLR 5001(a) even though the statute it was proceeding under did not authorize interest. The Court rejected this claim because unlike the statute at issue in that case, *other* tax statutes authorized an award of interest. *Brodsky*, 25 N.Y.2d at 521-22. The Court held that, because other tax statutes expressly provide for interest, tax statutes that are silent on interest should *not* be interpreted as allowing for such an award. *Id.* at 522-23. And, because

there was an intentional decision to award interest in some statutes but not in others, CPLR 5001(a) could not be used as an end run around the Legislature's decisions.

The same is true here. There are numerous statutes dealing with payments to shareholders, LLC members, and partners in different situations. Some provide for an award of interest. *See* LLCL § 1005(b); BCL §§ 623(h)(6), 1118(b); Partnership Law § 73. Others, like the statute at issue here—LLCL § 509—do not. As in *Brodsky*, the question of interest should *not* be considered "covered by" the general provisions in CPLR 5001(a) and 5002 because "[t]here are just too many … statutes that cover the issue expressly, one way or the other." 25 N.Y.2d at 523.

The fact that other cases have awarded interest even absent a statutory grant of authorization does not mean this Court should do the same. *See, e.g.*, *PFT Tech., LLC v. Wieser*, 181 A.D.3d 836 (2d Dep't 2020); *Chiu v. Chiu*, 125 A.D.3d 824 (2d Dep't 2015). It is the Legislature's prerogative to decide in which cases interest should be allowed. It has spoken clearly when it intended to authorize interest. The Legislature's decision *not* to authorize interest on a claim under LLCL § 509 should control.

C. The Trial Court correctly ordered Kenneth to return the *post*-withdrawal distributions he continued to receive from the LLCs.

Even after Kenneth withdrew from the LLCs as of September 2019, he continued his active involvement in managing the LLCs and continued to receive distributions as if he still had a member interest. JA21; JA25. The Estate objected to

Kenneth's receipt of the distributions and, *in August 2022*, the Trial Court found that Kenneth's post-withdrawal distributions would be "a credit to be taken into account when plaintiff is paid for his withdrawal." JA25. Kenneth *admitted* he would need to credit those amounts to the Estate as part of his statutory fair value award. *See* NYSCEF 649 at 32 n.14. But now, he wants those distributions back. Kenneth knew he was receiving distributions he was not entitled to and admitted he would need to pay those amounts back to the Estate. That is what the Trial Court required. JA21. Kenneth has no justifiable basis to complain now, almost three years later.

D. Kenneth waived any right to interest he might have under CPLR 5002.

Whatever right Kenneth might have had to interest under CPLR 5002, he waived that right when he failed to include such interest in the proposed judgment he submitted to the Trial Court in 2024. *See* JA30. The law is clear that parties can waive constitutional and statutory rights so long as the "waiver was voluntary, knowing and intelligent." *L.K. Comstock & Co., & Luis Elect. Corp., a Joint Venture v. N.Y. Convention Ctr. Dev. Corp.*, 179 A.D.2d 322, 331 (1st Dep't 1992).

Kenneth never asked the Trial Court for an award of interest under CPLR 5002, so the Trial Court never awarded it. Kenneth fails to explain why he waited until this appeal to request such interest. Kenneth should have requested CPLR 5002 interest after the Trial Court issued the Decision on his fair value distribution. As he admits, at that point, he was able to calculate the "total sum" he claims he was due.

Br. at 31. The Trial Court also gave Kenneth the opportunity to request such interest. In the Decision, it instructed the parties to "file and email a proposed judgment that confirms to this decision within 30 days." JA14. Yet, for unexplained reasons Kenneth failed to request interest under CPLR 5002. JA30. Under these circumstances, where interest has been hotly contested in the Trial Court and in this Court for years, Kenneth's failure to request interest under CPLR 5002 despite having multiple opportunities to do so should be deemed a voluntary, knowing, and intelligent waiver of his right to request it now.

If this Court disagrees, the amount of interest due Kenneth under CPLR 5002 should be limited to interest from the date the Trial Court signed the Judgment through the date the Judgment was entered and it should be calculated based on the sum actually awarded in the Judgment. As Kenneth concedes, the date the Trial Court signed the Judgment "constituted the Trial Court's 'decision' that 'awarded' Kenneth the 'total sum' of $19,253,095.51." Br. at 31. Any interest that might be due under CPLR 5002 should start to run then and on that amount.

Accordingly, this Court should reject Kenneth's late plea for interest under CPLR 5002 as waived. Alternatively, this Court should limit the calculation of interest to the actual sum awarded Kenneth in the Judgment signed on July 19, 2024.

E. Kenneth lost any entitlement to interest under CPLR 5001(a) and 5002 when he assigned the Judgment proceeds to a third-party.

Even if this Court disagrees with the points raised above, and concludes that Kenneth would have had a right to interest on the sums awarded him under either CPLR 5001(a) or 5002, he gave up his rights when he assigned those sums to Royal Abstract Intermediary LLC. On December 18, 2024, "Kenneth assigned the proceeds of the Judgment, including post-Judgment interest thereon, to Royal Abstract." NYSCEF 685 at 1. Interest under CPLR 5001(a) and 5002 is only recoverable "upon a sum awarded" or "upon the total sum awarded." Here, following the assignment, *Kenneth* was no longer awarded any sums in the Judgment because "the assignee steps into the assignor's shoes and acquires whatever rights the latter had." *Matter of Stralem*, 303 A.D.2d 120, 123 (2d Dep't 2003). On this point, it does not matter that Kenneth claims he "fully reserved … his right to seek, on appeal, … additional interest pertaining to any time period." NYSCEF 685 at 1. Assuming that is true, the reservation only begs the question of what rights are actually covered by it. The right Kenneth claims he reserved can only be the right to seek interest on the sums awarded *him* in the Judgment. And, following the assignment to Royal, that amount is now $0 because the $19.2 million in Judgment proceeds was assigned to Royal. Regardless of the interest rate applied, the resulting amount of interest *due to Kenneth* is the same: zero.

F. If this Court decides Kenneth might be entitled to additional interest, it should remand the matter to the Trial Court.

Kenneth should not be entitled to any interest under CPLR 5001(a) for all the reasons discussed above. If, however, this Court decides that such interest is awardable, the Estate agrees with Kenneth that "this Court should remand the matter to the Trial Court" to address interest in the first instance. Br. at 29. In that scenario, the Trial Court should be given discretion to both set the appropriate start date for interest and then consider all facts and circumstances bearing on interest, including the appropriate interest rate to apply, if any.

On the date to start any interest award under CPLR 5001(a), interest should not begin to run until January 31, 2020, at the earliest. That is the date the Trial Court gave Bernice to "buy out Plaintiff's interests" in the LLCs. NYSCEF 423 at 3. There is no justification for interest to start on September 20, 2019, as Kenneth argues.

As for the rate, the equities do *not* favor Kenneth. He dragged this litigation out unnecessarily by making factually disingenuous arguments, including the argument that he withdrew as of December 2016, even though, as this Court found, he "continued his active involvement in managing the LLCs and their properties." *Rosenblum II*, 214 A.D.3d at 440. In deciding an equitable rate of interest, if any, the Trial Court should also take into consideration that: (a) from 2020 through June 2022, interest rates were at historic lows; and (b) during the time *Kenneth* was managing the LLCs, the properties were returning 2.5%. JA1441-42 ¶ 4. And the

Estate should be given a fair opportunity to probe the nature of Kenneth's assignment to Royal Abstract and how it might bear on his right to interest or the appropriate interest rate.

Finally, the fact that this Court awarded prejudgment interest to the Estate in *Rosenblum II* does not mean the Trial Court should also award Kenneth interest as a matter of equity. *See* Br. at 29. This Court awarded the Estate "statutory prejudgment interest" on its "breach of contract counterclaim" because "such an award is mandatory in the breach of contract context." *Rosenblum II*, 214 A.D.3d at 442 (citing CPLR 50001(a)). In the same decision, this Court affirmed a zero interest award "on plaintiff's withdrawal distribution." *Id.* at 440-41. The Trial Court applied both holdings, as required, when on remand, it awarded the Estate interest on its breach of contract claim and declined to award Kenneth interest on his withdrawal claim.

III. As for the Estate's appeal, the Trial Court erred by using Kenneth's cap rates to value the LLCs' real estate.

The Estate also seeks appeal of the Decision and Judgment because the Trial Court committed reversible error in valuing the real estate properties owned by the LLCs, specifically, in its decision to adopt Kenneth's capitalization (or cap) rate.

In valuing the LLCs' real estate, the parties agreed that the income capitalization approach was the most reliable method to use. JA8. Under that approach, the appraiser needs to determine two key values: (a) the real estate's net

operating income; and (b) the appropriate cap rate for the property. JA8; JA915. A cap rate is a percentage that fairly represents a buyer's expected rate of return on an asset. JA149 at 112:2-8. To calculate the real estate's value, the appraiser divides the net operating income by the cap rate. JA915. The cap rate thus has an inverse relationship to value: the higher the cap rate, the lower the value. JA154 at 117:13-18. Even small changes in cap rates lead to large variations in appraisal value. If, for example, a building has $1 million in net operating income and an appraiser uses a 3% cap rate, the building would be valued at $33.3 million (1,000,000 / 0.03). But, if the appraiser uses a 4% cap rate, the same building would be valued at $25 million (1,000,000 / 0.04)—a $8.3 million differential.

Kenneth's appraiser and the Estate's appraiser disagreed on both net operating income and the appropriate cap rate, or rate of return, to use for the LLCs' real estate. The Trial Court correctly rejected Kenneth's net operating income for both buildings as "inflated and speculative" because Kenneth's appraiser used overstated rents that the properties' had not "actually collected or even billed." JA10. The Trial Court accepted the Estate's net operating income calculation because the Estate's appraiser appropriately used the properties' "*actual* contract rents, not some theoretical higher amount the market clearly would not bear." *Id.*

But the Trial Court erred in reaching the opposite conclusion on the cap rates, where it improperly rejected the Estate expert's cap rate calculation. It offered two

grounds to support that cap rate decision, but neither withstand scrutiny. First, the Trial Court considered it "suspicious" that the real estate declined in value in 2019 as compared to 2016, despite overwhelming evidence of just such a decline. *Id.* Second, the Trial Court drew distinctions between the LLCs' real estate holdings from the comparable properties used in the Estate's expert's analysis, but these distinctions ignored critical facts about the timing of the relevant sales. JA9.

A. Overwhelming evidence established that the value of the LLCs' real estate declined from 2016 to 2019.

In deciding to use Kenneth's cap rates instead of the Estate's, the Trial Court ignored without comment the overwhelming evidence—from *both sides* of this dispute—showing that the value of the LLCs' real estate declined from 2016 to 2019.

First, Kenneth himself conceded, under oath, that over a similar time period, the value of the real estate declined by 20%. In a sworn affidavit, signed by Kenneth in March 2019, just six months before the September 2019 valuation date, Kenneth admitted: "I am informed and believe that during the pendency of this litigation the value of the buildings has *decreased by about 20%*." JA1441 n.1 (emphasis added). Kenneth began this litigation in December 2015. Accordingly, the period Kenneth referenced in his affidavit matched almost identically to the period the Trial Court focused on—December 2016 to September 2019. JA8-9. But, without comment, the Trial Court ignored Kenneth's own assessment of the declining value of the

buildings, an assessment that *supported* the Estate's valuation and refuted his own expert's. JA10-11.

Second, Kenneth's appraiser also confirmed that market factors present in 2019, but not 2016, had a negative impact on the value of real estate in New York. Specifically, in June 2019, a mere three months before the September 2019 valuation date, New York "passed significant reforms" to its existing rent laws. JA637. According to Kenneth's appraiser, "the new laws are almost unanimously expected to result *in higher capitalization rates* for assets with a meaningful amount of rent regulated units." *Id.* (emphasis added). The LLCs' properties had a meaningful amount of rent regulated units—33% and 11%, respectively. JA170-71 at 133:16-134:6. And, lest there be any doubt, Kenneth's appraiser agreed that the new "rent regulations *decreased* the value of the properties that [he] appraised." A154 at 117:19-23 (emphasis added). Based on Kenneth's appraiser's own assessment of the market and declining values, the Trial Court should have agreed with the Estate that the cap rates would have increased after June 2019 and, as a result, the value of the LLCs' buildings would have decreased. Again, without comment, the Trial Court ignored the testimony of Kenneth's appraiser. JA10-11.

Third, the Estate's appraiser, like Kenneth's appraiser, concluded that the new rent laws had a negative impact on the value of the LLCs' real estate. According to the Estate's appraiser, the new rent laws had a "chilling effect" on the real estate

market in New York because they limited owners' ability to raise rents, vacate apartments, and redevelop properties. JA333 at 269:7-25. Kenneth's appraiser shared the Estate's appraiser's assessment of the negative aspects of the new rent laws. *See* JA638-39. And both appraisers' commonly-held views were also shared by the larger broker community. They reported that (a) "New rent regulations will negatively affect multifamily / apartment building sales"; and (b) "The rent laws have turned every multi-family building into a liability." JA1431. Once more, without comment, the Trial Court ignored this evidence. JA10-11.

Based on these factors and his analysis of the market, the Estate's appraiser concluded that the cap rate, or expected rate of return, for both LLC properties was 4.75%. JA936; JA1044. *Kenneth* confirmed the reasonableness of the Estate's 4.75% cap rate. He admitted, in March 2019, that "the usual rate of return" for real estate investments "is about 5%." JA1441-42 ¶ 4. The Estate's assessment of the real estate thus matched—almost exactly—to Kenneth's own understanding of the market. As with the rest of the evidence discussed herein, the Trial Court ignored the fact that Kenneth's testimony supported the Estate's cap rate. JA10-11.

Measured against ample evidence showing a decline in market value as of September 2019—Kenneth's testimony, his appraiser's testimony, the Estate's appraiser's testimony, and the views of brokers—the Trial Court's near-exclusive reliance on the Estate's 2016 appraisal was unwarranted. An appraised value is the

product of just two variables, net operating income and cap rates. JA915. There is no question that the Estate's appraiser used the correct net operating income. JA9-10. Accordingly, assuming a comparison of the two appraisals is appropriate, the only relevant inquiry is whether the Estate was justified in determining cap rates increased in 2016 as compared to 2019.

There is nothing "suspicious" about an increase in cap rates in 2019 as compared to 2016. In fact, both appraisers from the 2023 trial agreed on this point. Kenneth's appraiser confirmed that cap rates were increasing from 2016 through 2018. *See* JA642 (dark blue line in the graphic showing cap rates for Manhattan elevator buildings increasing towards 4% between 2016 and 2018).[4] And Kenneth's appraiser also admitted that cap rates increased *further* in June 2019 after the new rent laws were enacted. *See* JA164 at 127:5-11; JA637. Kenneth's appraiser's analysis of the market is consistent with the Estate's cap rates in 2016 and 2019. According to Kenneth's appraiser, cap rates increased slightly from 2016 to the end of 2018 and then again in June 2019 to September 2019. The Estate's two independent appraisals conform to that understanding of the market, which is why the Estate's initial 2016 cap rates of 3.75% and 4% increased to 4.75% in 2019.

[4] In his report, Kenneth's appraiser wrote that, "in the last two years … cap rates have flattened." JA642. But the only actual evidence he offers to support that statement is a graph comparing Manhattan Cap Rates to 10-year Treasuries, which shows a slight increase from 2016 to 2018. *Id.*

Nor was there any basis to support the Trial Court's speculation that the Estate "decided at some point after the first trial that it was somehow to their advantage that the properties be worth less, perhaps because they now have to buy out plaintiff, rather than the other way around." JA9. The Estate was *always* the member "buying out" Kenneth's interest in the LLCs; Kenneth, not the Estate, withdrew from the LLCs. If an assessment of motives is warranted, it would only show that, by the time of the second trial, *Kenneth* had a motive to inflate value in 2019. Kenneth argued to the Trial Court *and* this Court that his withdrawal date should have been December 2016; he opposed the September 2019 date. *See Rosenblum II*, 214 A.D.3d at 440. Why did he favor December 2016 over September 2019? Because, as he admitted in a sworn affidavit filed in March 2019, he knew the value of the LLCs' real estate had declined by 20% over that period. JA1441 n.1. His motive changed after *Rosenblum II*, when this Court affirmed the September 2019 withdrawal date. All of a sudden, contrary to his prior testimony, he started claiming real estate values had increased from 2016 to 2019.

* * *

In short, Kenneth admitted the LLCs' real estate declined in value from December 2015 to March 2019. The two real estate appraisers agreed that, after the new rent laws were enacted in June 2019, market conditions got worse, not better. The Estate's 2019 appraisal accurately captured these undisputed market conditions.

And the Estate also chose a cap rate that matched Kenneth's own expected rate of return for the properties. Under these circumstances, the Trial Court committed reversible error by ignoring these facts and discarding the Estate's thorough cap rate analysis over little more than its "suspici[ons]" about why the Estate concluded "the property declined in value."

B. The Trial Court ignored significant issues with Kenneth's cap rates.

The Trial Court also ignored significant issues with the cap rates selected by Kenneth's appraiser. Kenneth's appraiser admitted that, following New York's enactment of the new rent laws in June 2019, there was a period of "price discovery" that "begun when the law was passed" and then continued into "the middle of September 2019," the same valuation date used in his appraisal. JA156 at 119:9-13. But, to arrive at his cap rates, Kenneth's appraiser chose sales that closed before, or at the same time as, the enactment of the new rent laws. A702. The sales Kenneth's appraiser used therefore failed to capture the outcome of the "price discovery" period that he confirmed was occurring from June to September 2019. This was no harmless error. Kenneth's appraiser admitted "that the cap rates for those sales *would have been higher* if the sales had occurred in September of 2019." JA164 at 127:8-11 (emphasis added). Because of the inverse relationship between cap rates and value, this concession means that the prices would have decreased.

The pre-rent law sales Kenneth's appraiser analyzed had an average cap rate of 3.58%. JA702. Because Kenneth's appraiser admitted that the cap rates for these comparable sales would have been *higher* if they had occurred in September 2019, he should have used a cap rate *higher* than 3.58% to value the LLCs' real estate as of September 2019. Instead, he chose cap rates that were *lower* and thus inflated the value of the LLCs' real estate. *See* JA704 (using range of 3.25% to 3.5% for Thompson Street); JA830 (using 3.5% for Christopher Street).

Realizing that there was an inherent contradiction in his analysis, Kenneth's appraiser attempted to draw a distinction between the comparable properties he analyzed and the LLCs' real estate. According to him, the comparable properties had a meaningful amount of rent regulated units, which is why the new rent laws would have impacted those sales, but, by contrast, Kenneth's appraiser claimed the LLCs' properties did *not* have a meaningful amount of such units. *See* JA170-71 at 133:1-134:6. The appraiser's attempted distinction failed. *All* of the buildings had similar percentages of rent regulated units. Between 15% and 38% of the units at the comparable properties Kenneth's appraiser considered were rent regulated. JA677.[5] The LLC properties had 33% and 11%, respectively. JA170-71 at 133:16-134:6.

[5] The percentages are calculated from descriptions in the "Comments" column of the chart: 15% of units at 35 Bedford Street (5 of 33); 17% of units at 106 West 15th Street (5 of 30); 23% of units at 266 East 5th Street (7 of 30); and 38% of the units at 29 Fifth Avenue (5 of 13). *See* JA677.

Kenneth's appraiser *admitted* the new rent laws would have had a negative impact on the value of the comparable properties if they were sold after June 2019. JA164 at 127:8-11. His admission proves the value of the LLC properties should have declined because they had the same percentage of rent regulated units and, unlike the comparable properties, they *were* valued after June 2019.

C. The Trial Court ignored the primary purpose of a cap rate in analyzing the Estate's appraiser's comparable properties.

The Trial Court disregarded the comparable sales used by the Estate's appraiser because of perceived differences between the properties' relative location, size, and dates of renovations. JA9. By focusing exclusively on the unique characteristics of each individual property, the Trial Court ignored the fact that, as Kenneth's appraiser confirmed, a "cap rate indicates [a buyer's] expected rate of return" on their investment. JA149 at 112:2-4. Because of the critical impact the new rent laws had on the New York City real estate market, the Estate's appraiser chose sales for comparable properties that all closed *after* the new rent laws were enacted. JA935; JA1043. As he explained, "given the changes in the rental regime in the summer of 2019," one of the most "critical" factors in selecting comparable sales for a cap rate analysis was the "approximate time" of the sale because the new rent regulations had "a downward impact on the valuation of properties" like the LLCs' "that contain[ed] rent regulated apartments." JA190 at 153:5-18.

The Trial Court also ignored the indisputable period of "price discovery" that was still ongoing as of the September 2019 valuation date. A637. This led to a decrease in sales activity between June 2019 and September 2019 as all relevant market participants were still trying "to understand the impact of the new laws." *Id.* Brokers in New York reported "a lack of urgency from buyers and an expectation of higher negotiation rates and price cuts, leaving buyers cautious to hurry into deals." A1430. This all resulted in a limited pool of comparable sales to chose from that would actually and accurately capture the impact of the new rent laws. The Estate's appraiser thus needed to balance *all* relevant factors in selecting comparable sales to use in his cap rate analysis, including the "very critical" factor of "approximate time" of the sales. A190 at 153:5-11.

By ignoring the timing element of the sales used by the Estate, as compared to Kenneth's appraiser, the Trial Court assumed that, in the aftermath of the new rent regulations, a reasonable investor would have accepted a 3.5% rate of return on the LLCs' properties even though they required higher rates of return for different buildings in other parts of Manhattan. But appraisers are not limited by specific neighborhoods when performing a cap rate analysis. Investors in the same real estate asset class in Manhattan would expect similar rates of return on their investment regardless of where a particular property is located. JA317-18 at 153:5-18. Kenneth's expert agreed: "Investors' return requirements are a benchmark by which

real estate asserts are bought and sold." JA701. And the record conclusively establishes Kenneth would not have accepted the 3.5% rate of return his appraiser used. According to him, the "usual" rate "is about 5%." JA1441-42 ¶ 4. Just as Kenneth would not have accepted a 3.5% rate of return on the properties, neither would any other reasonable investor.

Given all of the facts discussed above but ignored by the Trial Court, the Estate respectfully submits that this Court should reverse the Trial Court's decision and remand for instructions to re-calculate the value of the LLCs using a 4.75% cap rate. Upon re-calculation, the Trial Court should enter a supplemental Judgment or order of restitution in favor of the Estate totaling $5,633,140.45, an amount that includes the accrued and paid post-judgment interest on the sums incorrectly awarded in the Judgment. *See* CPLR 5523.

IV. If this Court decides Kenneth might be awarded interest under CPLR 5001(a) or 5002, the Estate should also be awarded additional interest.

As discussed above, this Court should affirm the Trial Court's decision declining to award Kenneth interest on his withdrawal distribution. *See supra* at 27-37. If, however, this Court decides Kenneth might be awarded interest under CPLR 5001(a) or 5002, then, under the same or similar theories, the Estate should likewise be entitled to additional interest on (a) the loans Kenneth owed to the LLCs; and (b) the LLC distributions he continued to receive even after his withdrawal.

First, the LLCs demanded Kenneth repay the loans owed to the LLCs, *plus interest*, on February 13, 2020. NYSCEF 542. That makes February 13, 2020 the date of demand—and under N.Y. U.C.C. § 3-122(4)—"interest runs at the rate provided by law for a judgment … from the date of demand." Yet Kenneth did not repay his portion of the loans until the Court entered the Judgment on November 18, 2024. JA21. And no interest was included on the amounts Kenneth repaid. If the Court decides Kenneth might be awarded interest on his fair value award, the Estate should likewise be entitled to additional interest on Kenneth's share of the loans from the date of demand through November 18, 2024. That amount is $1,023,031.98.

Second, Kenneth did not pay interest on the distributions he continued to receive even after his withdrawal from the LLCs. He previously admitted he would pay interest on those amounts. *See* NYSCEF 649 at 32 n.14. But, because the Court did not award Kenneth interest on his fair value distribution, it did not award the Estate interest on the distributions Kenneth wrongly received. If this Court reverses the Trial Court's decision as to Kenneth on interest, it should also instruct the Trial Court to award the Estate interest at the same rate as any interest awarded Kenneth on his fair value award.

CONCLUSION

For all the foregoing reasons, the Estate respectfully submits this Court should:

a) Affirm the Trial Court's application of a 15% discount for lack of marketability on the fair value of Kenneth's interest in the LLCs.

b) Affirm the Trial Court's decision to *not* reduce Kenneth's obligation to repay his 50% share of the loans owed to the LLCs by 15%.

c) Affirm the Trial Court's decision declining to award Kenneth interest on his withdrawal distribution.

d) Affirm the Trial Court's decision requiring Kenneth to return the post-withdrawal distributions he received from the LLCs.

e) Award, or direct the Trial Court to award, the Estate a supplemental judgment or order of restitution in the amount of $5,633,140.45 based on the Trial Court's improper use of a 3.75% cap rate.

f) To the extent any interest is authorized or awarded to Kenneth, (i) return the matter to the Trial Court with instructions to consider all relevant factors, including Kenneth's assignment, in deciding how much interest, if any, Kenneth might be entitled to on his withdrawal distribution; (ii) award, or direct the Trial Court to award, the Estate $1,023,031.98 in interest on Kenneth's half of the loans owed to the

LLCs under N.Y. U.C.C. § 3-122(4); and (iii) award, or direct the Trial Court to award, the Estate interest under CPLR 5001 and 5002 on the post-withdrawal distributions Kenneth received from the LLCs.

g) Grant such other and further relief to the Estate as this Court deems just and equitable.

Dated: New York, NY
April 24, 2025

Respectfully submitted,

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Respectfully submitted,

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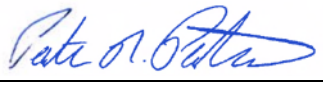
By: 

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