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

New York Supreme Court

APPELLATE DIVISION-SECOND DEPARTMENT

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

App. Div. No.
2013-02792

-against-

WINSTON CHIU,
Defendant-Appellant.

WINSTON CHIU,
Counterclaim Plaintiff
/Third-Party Plaintiff-Appellant,

-against-

MAN CHOI CHIU,
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.

REPLY and RESPONDENTS BRIEF FOR DEFENDANT/COUNTERCLAIM PLAINTIFF/THIRD-PARTY PLAINTIFF/PLAINTIFF-APPELLANT WINSTON CHIU

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES, STATUTES AND OTHER AUTHORITIES

Winston Chiu ("Winston") respectfully submits this brief in further support of his appeal and in opposition to the cross-appeal by Plaintiffs-Respondents-Cross-Appellants Man Choi Chiu ("Man Choi") and 42-52 Northern Blvd. LLC (the "LLC" and with Man Choi, the "MCC Parties") 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").

PRELIMINARY STATEMENT

As set forth in Winston's Opening Brief, the Trial Court erred in determining that Winston owned only a 10% interest in the LLC as of the Valuation Date, and should have determined that he was a 25% member based on the LLC's tax returns and corporate records, signed or prepared by Man Choi, as well as the agreement of the parties.

The MCC Parties incredibly argue that the several corporate documents and sworn tax returns evidencing Winston's 25% interest are "erroneous" and that Winston's initial percentage interest at the formation of the LLC was 9%, which was diluted to 5.74% based on further capital contributions by Man Choi as of the Valuation Date. This argument fails for several reasons. First, the parties agreed that Winston was to be a 25% member of the LLC. Second, the Trial Court properly classified $1,149,920 paid at the closing on the Property as loans, rather than capital contributions. Third, as the Trial Court properly found, the MCC

Parties are estopped from arguing that Winston's initial interest at the formation of the LLC was less than 25%.

However, the Trial Court did not take the estoppel far enough, and reduced Winston's membership interest from 25% to 10% as of the Valuation Date. This was error because the parties agreed Winton would be a 25% member of the LLC, and because the $1.233 million paid by Man Choi and his entities to customize the Property for Man Choi's separate retail and light manufacturing operations, were loans or substitutes for rental payments and not capital contributions to the LLC by Man Choi that changed the ownership percentages of the two members. Even if they were contributions, they cannot alter the membership percentages set by agreement of the parties. Further, it is impermissible for one party to unilaterally dilute another under such circumstances. Lastly, the Trial Court ignored Winston's contribution of *personally* guaranteeing the $3.5 million mortgage.

The MCC Parties next argue that even if the Trial Court properly determined Winston's percentage interest to be 10%, it miscalculated the net asset value ("NAV") of the LLC by failing to reduce Joseph Nelson's NAV of $10,449,739 by $1,366,780, with the resulting reduction in the value of Winston's percentage interest, since the Trial Court properly treated the $1.366 million as debt while Nelson incorrectly deemed it a capital contribution by Man Choi. While the MCC Parties are correct that the LLC's NAV must be adjusted based on which funds the

Trial Court concluded were loans and which were contributions, they are incorrect as to what results from such adjustment. This Court should accept expert Z. Christopher Mercer's, analysis of the NAV as correct. Accordingly, if the Trial Court's conclusions of which funds were contributions and which were debt are affirmed, the NAV of the LLC, and the fair value of Winston's percentage interest, actually increase.

The MCC Parties next argue that the Trial Court erred in determining that no marketability discount was appropriate in the context of this single asset real estate holding company. However, the analysis of Nelson on this point was conclusory, unsupported by any reliable data, and not credible, as Mercer's credible testimony demonstrated. Moreover, the case law cited by the MCC Parties that imposed a marketability discount is easily distinguishable and supports neither the imposition of the 25% marketability discount the MCC Parties originally sought at trial, nor the 15% to 25% discount they seek on appeal. By contrast, Mercer clearly articulated why a 0% marketability discount was proper in this action.

The MCC Parties also contend that the Trial Court erred in awarding Winston pre-judgment interest from the Valuation Date. Given the manifest bad faith of the MCC Parties, which led to Winston having to withdraw, an award of pre-judgment interest from the Valuation Date, of February 9, 2008, was plainly a proper exercise of the Trial Court's discretion.

Finally, the MCC Parties argue that the Trial Court properly dismissed Winston's breach of fiduciary duty claims because he failed to prove damages from being frozen out and because he lacked standing to bring a derivative claim. Winston, however, was damaged by being frozen out of the LLC's affairs, as set forth below. At the very least, an award of nominal damages would be appropriate given the brazen breach of fiduciary duty by the MCC Parties. Winston is also entitled to punitive damages, plus attorneys' fees.

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, plus pre-judgment interest since the Valuation Date at the statutory rate and grant him nominal damages, punitive damages and attorneys' fees on his breach of fiduciary duty claims.

FACTS

Winston respectfully refers this Court to his statement of facts in his Opening Brief, at 5-24. However, because the MCC Parties raise certain issues on their cross-appeal, some additional facts regarding the analyses of Mercer and Nelson as to the LLC's NAV and the fair value of a percentage interest in the LLC is required.

Mercer is a leading expert on valuation, particularly marketability discounts, having written and spoken frequently on the subject. (R. 1541-47).[1]

Mercer concluded that the LLC's net asset value, on the Valuation Date, was $10,427,000. (R. 1575-76). Nelson similarly concluded that the LLC's net asset value was $10,449,739. (R. 5247).

In arriving at his value, Mercer began with the LLC's balance sheet as of December 31, 2002, and determined what the figures would be as of the Valuation Date. (R. 1576-77). Mercer also calculated what he termed "foregone cash."[2] (R. 1577). Mercer used appraiser Henry Salmon's[3] $13.5 million appraisal of the Property. He estimated cash at $450,000 based on historical levels. He then carried forward the 2002 liabilities, including the amounts due to Man Choi and an entity owned by Man Choi, 1-9 Bondst Realty, Inc. ("1-9 Bondst"), with proper adjustments. (R. 1577-79). Thus, Mercer subtracted from the assets ($13,950,000) the liabilities ($5,150,000), added in the foregone cash ($1,626,000), and concluded that the net asset value of the LLC was $10,427,000, and that the fair

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[1] One of Mercer's books is "Quantifying Marketability Discounts: Developing and Supporting Marketability Discounts in the Appraisal of Closely Held Business Interests" (Peabody Publishing, L.P., 1997) and the Revised Reprint (2001) and a second is "Business Valuation: An Integrated Theory, Second Edition" (John Wiley and Sons, Inc., 2007).

[2] Mercer defines foregone cash as "the cash that would have flowed through the LLC had rent been paid at market rates from the time full [sic] occupancy, which I understand to be around 2002 to the present, or to the [V]aluation [D]ate." (R. 1580).

[3] Salmon was Winston's appraisal expert who testified at trial. Eric Haims was the MCC Parties' appraiser. Both came to nearly identical values of the Property as of the Valuation Date, with Haims' value being $13.7 million and Salmon's $13.5 million. (R. 372, R. 1371).

value of a 25% interest was worth 25% of that figure, $2,606,750.[4] (R. 1576, 1579).

Mercer determined the amount of the foregone cash by using the rents derived by Salmon for 2006-2008, and then decreased the rents approximately 5% for each of the preceding years. From the estimated market rent owed, he offset various expenses, including alteration expenses, real estate taxes, interest expenses for the mortgage, general repairs and maintenance. He also took into account principal payments on the mortgage. He did not include foregone cash for 1999-2001. (R. 1581-1585). In this way, and by carrying forward the LLC's debt from the 2002 balance sheet, Mercer's valuation gave Man Choi complete credit for all payments Man Choi or his entities made on behalf of the LLC, including payments to alter the Property.

Mercer further testified that any discount for lack of marketability should be zero percent. (R. 1556, 1566, 1614-1616).

In stark contrast to Mercer, Nelson's qualifications as a valuation expert and particularly with respect to marketability discounts were weak with no writings or speeches on the subject. Nelson lists only two articles on his résumé, neither of which relates to valuation, and has only one speaking engagement on an unspecified topic relating to business valuation on an unspecified date, before a

[4] The fair value of Winston's interest is calculated by multiplying the LLC's net asset value by his percentage interest.

Texas Bar Association. (R. 1282-83).

Nelson opined that, before arriving at the net asset value of the LLC as of February 9, 2008, he had to redo the books and records of the LLC, (R. 939-40, 1158),[5] because the LLC's original books and records were, in his view, not in accordance with Generally Accepted Accounting Principles ("GAAP") Statement of Position 78-9 ("SOP 78-9"), Accounting for Investments in Real Estate Ventures. (R. 1128; *see also* R. 998-99; R. 1058). Nelson reclassified as capital contributions both payments that were related to the purchase of the Property, which had originally been booked as loans on the LLC's financial statements and reported as loans on the LLC's tax returns, as well as payments for alterations to the Property, with the effect of unilaterally diluting Winston's membership interest. (R. 940-941, 982). Nelson opined that Winston's membership interest at the outset of the LLC was 9% rather than the 25% reflected in the LLC's records and its tax returns, (R. 982), and that as of February 9, 2008, it had been diluted, per his remade books and records, to 5.74%, worth $450,000. (R. 5247). Winston, frozen out of the LLC, was never offered the chance to make capital contributions in proportion to the amounts Man Choi spent to alter the Property so Man Choi

[5] Although the Court refused to permit Winston to enter into evidence the report of Mercer, the Court overruled Winston's objection to allowing the MCC Parties to admit as evidence five binders plus some smaller exhibits (R. 3918-5249) through Nelson. These exhibits contained documents that had not been produced during discovery and documents that Nelson and his firm had created, which were his expert report. (*See, e.g.*, R. 946-67, 969, 979-80). The Court also noted Winston's proper objection based on an inability to determine who created the documents admitted as these exhibits. (*See, e.g.*, R. 958).

could operate an unrelated retail restaurant supply business there. Nelson determined that the LLC's fair value on the Valuation Date was $7,837,304 ($10,449,739 less a 25% marketability discount).[6] (R. 5247).[7]

ARGUMENT

I. WINSTON WAS A 25% MEMBER OF THE LLC AND THE MCC PARTIES' ATTEMPT TO UNILATERALLY REDUCE THAT PERCENTAGE TO A FIGURE BELOW 10% MUST BE REJECTED

Man Choi argues that Winston's interest in the LLC, at the LLC's formation was 9%, rather than the 25% the Trial Court properly found, and was diluted to 5.74% as of the Valuation Date, because the Trial Court classified $1,149,920, plus other funds totaling $216,860, as loans when they should have been treated as capital contributions by Man Choi. This argument fails for several reasons.

A. Winston Was And Was Always Intended To Be a 25% Member of the LLC

Winston was, at the outset and as of the Valuation Date, a 25% member of the LLC for all of the reasons set forth in Winston's Opening Brief, at 8-17, 25-29. As set forth therein, the MCC Parties have repeatedly admitted that Winston was a 25% member of the LLC, through the Reconciliation of Initial Cash (R. 5339), the

[6] Included in this figure is an amount of $988,347, which Nelson determined that Man Choi and his entities owed as rent to the LLC as of February 9, 2008, akin to Mercer's "foregone cash." (R. 1089-90; R. 5247). It is less than Mercer's figure because Nelson, inexplicably, calculated rent for only 2006-2008 rather than the entire period at issue which also included 2002-2005. (*Id.*)

[7] The MCC Parties have abandoned their argument that Winston withdrew his contribution from the LLC in May 2001, when the fair value of his interest would have been $14,000, (MCC Br. 28; *see also* R. 5246), presumably because, given the complete lack of any facts supporting such a withdrawal, pressing this argument would further reduce their and Nelson's credibility.

LLC's tax returns and K-1's (R. 1778-1803), the LLC's balance sheets (R. 5350-5355), and the list created by Helen Chiu and sent to the LLC's accountants. (R. 5349). As also set forth in Winston's Opening Brief, and herein, the reason Winston was a 25% member of the LLC was based on his contributions to the LLC and the parties' agreement.

B. The Trial Court Properly Concluded that $1,149,920 were Loans By Man Choi and Not Capital Contributions

Despite the countless admissions, and the clear indication that the parties agreed Winston was to be a 25% member of the LLC, the MCC Parties argue that $1,149,920 that came from the refinancing of the properties at 1-9 Bond Street, together with various other costs totaling $216,860, used for the purchase of the Property should be viewed as capital contributions by Man Choi, rather than loans, with the result that his initial contribution is increased from $581,563 to $1,948,343, and Winston's initial percentage in the LLC reduced to 9%. (MCC Br. at 14-15). As the Trial Court insightfully noted in rejecting the contention, this argument is nothing more than "litigation hindsight" and the parties agreed to a 75%-25% split. (R. 31, 33).

The MCC Parties argue that *Roth Steel Tube Co. v. Comm'r of Internal Revenue*, 800 F.2d 625 (6th Cir. 1986), as well as consideration of the surrounding circumstances, citing to *38 Town Assoc. v. Barr*, 225 A.D.2d 613 (2d Dep't 1996), and *Hynes v. Barr*, 225 A.D.2d 588 (2d Dep't 1996), require a finding that the

$1,149,920 and $216,860 are contributions because there were no promissory notes, no repayment schedules, no stated interest rates, and no collateral given. (MCC Br. at 36-37). The MCC Parties further rely on *In re Cold Harbor Assoc. L.P.*, 204 B.R. 904 (Bankr. Ct. E.D. Va. 1997), and argue that if a transaction does not bear the earmarks of an arm's length transaction and generally lacks formality, it should be viewed as an equity contribution rather than a loan. (MCC Br. at 36-37).

As set forth in Winston's Opening Brief, even assuming the *Roth Steel* factors are applicable given that the holding in that case relates only to federal taxation and not adjudication of ownership interests between owners,[8] the determination of whether funds were contributions or loans does not alter the members' ownership percentages when that percentage is established by the clear agreement of the parties. LLCL §§ 504 and 509. In this case, the parties agreed that Winston was to be a 25% member of the LLC when the Property was purchased, as set forth in the agreements in tab 13 of the Closing Binder. (R. 5637-50).[9]

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[8] *Cold Spring*, which undertakes a similar analysis and actually cites *Roth Steel*, nowhere discussed how the percentage ownership of a company should be determined or the appropriateness of characterizing monies expended as either loans or as capital contributions to change ownership reported on, *inter alia*, sworn tax returns.

[9] The Trial Court should have considered the agreements included in tab 13 to the Closing Statement, (R. 5637-50), and permitted Winston to testify concerning them, since the prohibitions of the so-called "Dead Man's Statute", do not apply in this case. There was no dispute as to the signatures on the agreements, and thus pursuant to *Acevedo v. Audubon*

Moreover, an agreement need not be in writing, when, as here, there is other evidence corroborating Winston's 25% interest, such as the LLC's tax returns and financial records, which evidence it. *Czernicki v. Lawniczak*, 74 A.D.3d 1121, 1125, 904 N.Y.S.2d 127 (2d Dep't 2010) ("Given this ample evidence of the parties' intent...their failure to memorialize the agreement in writing is not dispositive"). Thus, even without considering the written agreements in the Closing Binder, there can be no other explanation as to why the Reconciliation of Initial Cash, financial statements, and sworn, federal tax returns for 1999 and 2000, as well as the membership list Helen Chiu sent to the LLC's accountants, all of which were prepared well after the closing on the Property, and the parties' course of conduct, all evidence this 75%-25% split, other than the fact the parties had agreed to it. (R. 1778-1803, 5339, 5349-50, 5637-50). Indeed, two of the LLC's financial statements, for 2001 and 2002, prepared in 2003, maintain the 75%-25% split despite the bulk of the $1,233,014 that the Trial Court concluded was a capital contribution having been spent in those two years. (R. 5350-53).

Thus, the MCC Parties' argument proceeds from the demonstrably false premise that there was no agreement between the parties.

Management, Inc., 280 A.D.2d 91, 95, 721 N.Y.S.2d 332, 335 (1st Dep't 2001), the Court could rely on the agreements. Moreover, MCC testified on several occasions concerning Henry's role in the LLC and the purchase of the Property, (R. 212-13, 222-24), thus opening the door to Winston's explanation of the agreements.

Furthermore, it is apparent, from both the drop in value of the Property and the LLC's balance sheets that the LLC was in a precarious financial position in 2001. (R. 384, 5352-53). The record also indicates that the tax returns, financial statements for 1999-2000, and the Reconciliation of Initial Cash were all created during 2001. (R. 1778-1803, 5340, 5354-55). Thus, it would have been advantageous for Man Choi to list certain monies as loans, as he did, so as to be a creditor ahead of Winston if the LLC failed.[10]

Accordingly, the Trial Court correctly concluded that the parties had agreed to, at least, an initial 75%-25% split and that the funds booked as loans for the purchase of the Property were indeed loans. The MCC Parties attempt to rely on *Roth Steel* and *Cold Harbor* to argue that the $1,149,920 and $216,820 booked as loans on the LLC's records are capital contributions by Man Choi that increase his initial interest and further reduce Winston's initial interest in the LLC at its formation should be rejected.

[10] The MCC Parties citation to *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 456 (3d Cir. 2006), is inapposite. First, the Third Circuit held that the district court had properly declined to recharacterize certain funding as equity rather than debt. Moreover, since the LLC was in such a precarious financial condition, it is more likely that MCC was concerned about being paid back as a creditor rather than expecting a return based on the LLC's uncertain future at the time.

C. The Trial Court Properly Estopped the MCC Parties From Challenging Winston's Membership for 1999 and 2000 Based on the Tax Returns

Not only is there a clear agreement between the parties concerning the initial membership interests in the LLC, but the Trial Court also properly estopped the MCC Parties from challenging Winston's percentage membership interest for 1999 and 2000, although, as discussed in Winston's Opening Brief and further herein, it erred in declining to apply the estoppel to subsequent years.

The MCC Parties rely on *Heisler v. Gingras*, 90 N.Y.2d 682 (1997), (MCC Br. at 39) a case decided before *Mahoney-Buntzman v. Mahoney*, 12 N.Y.3d 415 (2009), for the proposition that estoppel should not be used to resolve ownership disputes. *Heisler* is completely inapposite for several reasons: 1) it does not discuss whether estoppel based on tax returns is a proper basis to determine ownership in an LLC, and *Mahoney-Buntzman*, as well as myriad other cases cited by Winston in his Opening Brief, make clear that it is; and 2) the *Heisler* court makes clear that its concern is to protect minority shareholders. Permitting the MCC Parties to avoid their statements on sworn tax returns to diminish Winston's interest would have the opposite result.

The MCC Parties next take an unnecessary digression into the difference between "judicial estoppel" and "equitable estoppel," based on the Trial Court's citation, (R. 31), to *Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997).

(MCC Br. at 40-41). The law set forth in *Mahoney-Buntzman* is unequivocal – estoppel precludes taking a position in legal proceedings that is contrary to a declaration on sworn, federal tax returns. 12 N.Y.3d at 422, 881 N.Y.S.2d 369. That the Trial Court considered whether Man Choi could avoid estoppel based on a good faith mistake, unintentional error, or other valid reason, which are grounds on which one can avoid the invocation of judicial estoppel, actually gave Man Choi greater benefit of the doubt than that to which he was entitled. Since the Trial Court correctly found estoppel applied, its citation to *Safelite Glass* is ultimately immaterial.[11]

The MCC Parties contend that the Trial Court should not have applied estoppel in this case because the information in the LLC's sworn, federal tax returns demonstrating that Winston had a 25% interest was contradicted by other evidence. However, the only evidence the MCC Parties cite is their argument, already refuted above and in Winston's Opening Brief, that the Trial Court improperly characterized the $1,149,920, plus $216,860, as loans rather than as contributions. This argument does not rely upon any contemporaneous documents but rather the reworked books and records created by Nelson while the litigation was pending. These Nelson-created documents are not factual evidence, they are

[11] *Baje Realty Corp. v. Cutler*, 32 A.D.3d 307, 310 (1st Dep't 2006), erronesouly cited by the MCC Parties to contend the tax returns do not have preclusive effect, (MCC Br. at 41), is inapposite since it likewise concerns prior statements in a judicial or quasi-judicial proceeding and not sworn statements on tax returns.

an expert's after the fact charts. For this reason, the MCC Parties citation to *Chassier v. Brasserie*, 2007 WL 2815085 (Sup. Ct. N.Y. Co. 2007), is inapposite, since in that case there were numerous conflicting documents. Here the contemporaneous documents are all in accord and show Winston to have been a 25% member. (*See, e.g.*, R. 1778-1803, 5339, 5349-5355). *Chassier* is also inapposite, because the only tax returns involved were unsigned. By contrast, the tax returns in this action were sworn to by Man Choi and filed with the IRS. (R. 1778, 1792). Given the abundant and undisputed documentary evidence, Man Choi's self-serving claim that the tax returns are "erroneous" although they have never been amended is nothing more than an attempt to recant a correct and sworn statement to gain an improper advantage in this litigation.

The MCC Parties also misstate the law when they claim the Trial Court erred in applying estoppel because neither Man Choi nor the LLC derived a benefit from listing Winston as a 25% member of the LLC on the LLC's tax returns. (MCC Br. at 41). Notably, although the MCC Parties state that the husband in *Mahoney-Buntzman* had derived a tangible tax benefit from his filing, the MCC Parties misread the case. Instead, because the husband was to incur greater tax liability by treating the sale of his stock in two companies to his father as business income rather than as sale of stock, the amount paid by the father was increased 17% to account for the extra taxes. 12 N.Y.3d at 419. The husband then reported

the money on his joint return with his wife as self-employed business income. *Id.* When the husband then tried to claim the proceeds from the transaction with his father were not marital property, because they were the sale of stock he held prior to his marriage, the Court of Appeals affirmed the decisions from the courts below that he was estopped from doing so because he had reported the monies as business income on his joint federal tax returns. Thus, in actuality, the party against whom estoppel was asserted in *Mahoney-Buntzman* had negative tax consequences from his filing, in that he had to pay income tax at a greater rate than capital gains taxes, but estoppel was nevertheless invoked.

Indeed, the MCC Parties fail to cite any cases that impose the requirement of a tax benefit before a party is estopped from taking a position in a litigation inconsistent with sworn tax returns. *Romano v. Romano*, 139 A.D.2d 979 (2d Dep't 1987), *Capizola v. Vantage Int'l Ltd.*, 2 A.D.3d 843 (2d Dep't 2003), *Czernicki*, 74 A.D.3d 1121, and *Naghavi v. N.Y. Life Ins. Co.*, 260 A.D.2d 252 (1st Dep't 1999), cited by Winston in his Opening Brief, and which the MCC Parties fail to distinguish, do not impose this requirement, or even discuss that it might be a factor to consider. In a footnote, (MCC Br. at 42, n. 21), the MCC Parties misstate the facts of *Stevenson-Misischia v. L'Isola D'Oro SRL*, 85 A.D.3d 551 (1st Dep't 2011), when they claim the party against whom estoppel was applied derived a tax benefit as a result of the filing. In *Stevenson-Misischia*, the court declined to

apply estoppel because: 1) the filing entity was not a party to the case; and 2) the tax returns were filed by an entity *other than the entity against whom the plaintiff wished to assert estoppel.*[12] There is no discussion of any required tax benefit. In the same footnote, they similarly misstate the facts of *Peterson v. Neveille*, 58 A.D.3d 489 (1st Dep't 2009), since it does not mention whether or not there was any tax benefit based on the filing or that such benefit should be considered in deciding whether or not to estop a party from taking a position inconsistent with its sworn returns. The rule of *Mahoney-Buntzman*, the cases that preceded it, and its progeny is hard and fast. The MCC Parties are trying to make up law out of whole cloth.

The MCC Parties also argue that estoppel should not apply because Winston has used the LLC's tax returns to argue that he is entitled to at least a 25% interest in the LLC and has claimed to be the 100% owner. (MCC Br. at 42). The argument is meritless, since it is undisputed that Winston had no hand in preparing the LLC's tax returns and did not, as Man Choi did on behalf of the LLC, swear to their truth. Thus, estoppel does not preclude him from arguing that the percentage reflected on the tax returns is too low. Moreover, Winston now seeks a declaration

[12] *Stevenson-Misischia* was properly cited by the Trial Court, (R. 30), for the general proposition that a "party to litigation may not take a position contrary to a representation made in an income tax return." 85 A.D.3d at 552.

entirely consistent with the LLC's tax returns: one that declares him to be a member with a 25% interest in the LLC as of the Valuation Date.[13]

In their fact section, the MCC Parties also appear to attempt to explain away the inclusion of Winston as a 25% member of the LLC in its records and tax returns with the story that they were merely doing Winston a favor to help facilitate a 1031 exchange that would have spared Winston capital gains taxes on a house he sold. (MCC Br. at 13-14). They also generally claim that the initial 75%-25% split was erroneous, (*see, e.g., id.* at 39), although it was not. These claims are belied by the evidence, as discussed, and are, more importantly, irrelevant.

First, there is no evidence that Winston had to be made a 25% member to effectuate the 1031 exchange or that Winston had any communications with the LLC's accountants when the tax returns and other financial statements were being prepared. *Zemel v. Horowitz*, 11 Misc.3d 1058(A), at *6 (Sup. Ct. N.Y. County 2006) (Fried, J.) (no issues of fact precluding summary judgment because "plaintiffs have failed to submit any documentary evidence that Horowitz represented and/or counseled plaintiffs with respect to the preparation of the 2000

[13] The MCC Parties make much of the fact that Winston is getting a handsome return on his investment, and try to create the impression to this Court that such a return is unfair because it is more than investors have seen from Google or similar companies. (MCC Br. at 32). They ignore, of course, that Man Choi would receive similarly high returns of over ten times on his initial investment of $581,563.

tax returns, or that Horowitz communicated with plaintiffs' personal accountant to instruct him how to report the transaction").

Second, even if everything the MCC Parties say about the reason for making Winston a member is true, or that the initial 75%-25% split was a unilateral error on Man Choi's part which he now regrets, the MCC Parties' motives in making Winston a 25% member are not relevant to this case, particularly because the amount of Winston's membership is established in the tax returns, as well as other documents, and is confirmed by MCC Parties', and the LLC's accountants' and lawyer's, testimony. *Blank v. Blank*, 256 A.D.2d 688 (3d Dep't 1998) (where the plaintiff's interest was established by corporate tax returns, financial statements, and bank applications, as here, the defendant's contention that the paper trail showing ownership by plaintiff was simply a misunderstanding was unavailing); *In re Heino*, 73 A.D.3d 1062, 1064 (2d Dep't 2010) (court did not deem the petitioner's "explanation" for the inclusion of property on the tax returns as negating the information contained therein).

D. The Trial Court Erroneously Failed to Apply Estoppel For the Entire Period from 1999 to the Valuation Date

The Trial Court erroneously failed to apply estoppel for the entire period from 1999 to the Valuation Date. (R. 31). It simply is not the law that a party, recognizing that any further tax filings will disadvantage its litigation position, can stop filing tax returns to avoid estoppel arising from the returns it has already

sworn are true and filed with the IRS, as the MCC Parties try. Their unsupported contention that they cannot file tax returns until this dispute is resolved would certainly be news to the IRS. The MCC Parties have cited to no authority that would permit them to withhold such filings for 13 years. Nor have the MCC parties ever explained why they did not amend the tax returns they filed if they were somehow "erroneous."

The MCC Parties argue that estoppel should not apply for the period after 2000 because Winston has "unclean hands" based on his filing tax returns claiming to be a 100% owner of the LLC. (MCC Br. at 44-45). But Winston's position that he is at least a 25% owner in this litigation has never been inconsistent with the LLC's sworn tax returns. Only the MCC Parties' attempt to have Winston deemed less than a 25% owner is inconsistent with the LLC's and Man Choi's prior sworn statements on the LLC's tax returns. Accordingly, the MCC Parties' "unclean hands" argument does not preclude estoppel for the period of 2000 to the Valuation Date.

Furthermore, the doctrine of unclean hands applies only to equitable claims. Winston's claim for declaratory judgment of his percentage interest in the LLC, which sought a buy-out, and his claim for the fair value of his interest as of his withdrawal, inasmuch as they resulted in money damages in the amount of the fair value of his percentage interest, are legal in nature and thus "unclean hands" does

not apply. *See* CPLR § 3001; to LLCL §§ 606 and 509; *Arrow Commc'n Labs., Inc. v. Pico Products*, Inc., 219 A.D.2d 859, 860, 632 N.Y.S.2d 903, 904 (4th Dep't 1995) (declaratory judgment claim that seeks a money judgment is legal in nature).

Additionally, this point has already been adjudicated against the MCC Parties. In the first trial, Justice Blackburne determined that Winston could be expelled based on his conduct. In reversing Justice Blackburne, this Court held in the 2007 Appellate Order that Winston's conduct was irrelevant to his membership interest and that his interest should be "based primarily on the LLC's own records." *Man Choi Chiu v. Chiu*, 38 A.D.3d 619, 621 (2d Dep't 2007). This decision is *res judicata*.

E. Even if Estoppel is Not Considered, Winston Was a 25% Member As of the Valuation Date

Even if estoppel for the period from 2000 to the Valuation Date (or at all) is excluded from the analysis, Winston was still a 25% member as of the Valuation Date. This is so because: 1) the trial court improperly classified $1,233,014 spent to customize the Property as a capital contribution by Man Choi; 2) there was an agreement that Winston would be a 25% member; and 3) because one member of an LLC may not unilaterally dilute another.

i) The $1,233,014 is Debt

The Trial Court's rationale in concluding the $1,233,014 spent to alter the Property to suit the needs of Man Choi's businesses 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 an underpayment of rent that Mercer calculated was $1,626,928. (R. 1581-86; *see also* R. 6432-33).

Furthermore, the alterations were done to customize the Property to the needs of the Man Choi-owned entities' retail and light manufacturing operations and in such cases, the occupying entity is responsible for alteration costs, as set forth in Winston's Opening Brief. (*See, e.g.*, R. 255-57, 1809, 1812, 1815-20, R. 5712). Furthermore, some of the $1,233,014 was paid to Ronald Fishman and the LLC's accountants and therefore were not spent on physical alterations to the Property. (R. 640-43; R. 3171-73; R. 3477-78). Indeed, the documentary proof of what the $1,233,014 was spent on was not produced in full during discovery, was not in proper form and was admitted in error over Winston's objection. (R. 272-76, 648).

Moreover, the MCC Parties set forth no evidence that, in an arm's length transaction between a big-box retailer and the owner of a large warehouse space, that the retailer, such as Home Depot, Lowe's, Sam's Club, or other similar entities, would not bear the cost of renovating the building to suit their needs.

Certainly, the occupying entity, if it undertook such renovations, would not then be granted any ownership interest in the arm's length landlord if it happened to be an LLC.

Significantly, as discussed in Winston's Opening Brief, the LLC treated these payments as loans on its books and records. (*See, e.g.*, R. 5351)

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 that altered the parties' 75%-25% ownership.

ii) The Parties Agreed Winston Would Be a 25% Member

As set forth in Winston's Opening Brief, at 32, and above, it would be improper to base membership percentages on capital contributions if there were an agreement. The MCC Parties do not dispute this conclusion. There is ample evidence of this agreement, as set forth above. There was no evidence of any agreement or other arrangement whereby the percentage membership interests could be altered by the unilateral contribution of one member.

iii) The MCC Parties Cannot Unilaterally Dilute Winston

Moreover, given an agreement, and even in its absence, Man Choi cannot unilaterally dilute Winston's interest as a matter of law. (Opening Br. at 37-38). The MCC Parties attempt to distinguish only two of the cases cited by Winston for this proposition. The first is *Telstra Corp. v. Dynergy*, 2003 WL 1016984 (Del.

Ch. Mar. 4, 2003), which the MCC Parties contend is inapposite because the decision turned on a partnership agreement. As discussed above, in this action, there is a clear agreement that Winston was intended to be, always, a 25% member of the LLC. The second is *Dingle v. Xtenit, Inc.*, 20 Misc.3d 1123(A) (Sup. Ct. N.Y. Co. 2008). The MCC Parties argue that *Dingle* is inapposite because the dilution was from 15% to less than 1%. *Dingle,* however, does not state that dilution is improper only when it is of a certain magnitude. The MCC Parties also argue that the dilution in this case is only just over 1% from 9% to 7.84%. (MCC Br. at 46). To accept this proposition, however, is to agree with the MCC Parties' contention that Winston's membership interest in the LLC was 9% in 1999, which contention the Trial Court properly rejected based on the LLC's sworn tax returns and evidence of the parties' agreement that Winston would be a 25% member of the LLC. It is also factually incorrect, as the MCC Parties argue that Winston was a 5.74% membership of the LLC as of the Valuation Date. The MCC Parties do not even attempt to distinguish, or discuss, the other cases cited in Winston's Opening Brief, at 37-38, which establish that unilateral dilution of the sort Man Choi is trying to accomplish in this action is impermissible.

Moreover, that the alterations may have increased the value of the Property, as the Trial Court suggested, (R. 34), is irrelevant to the question whether such contributions for alterations could dilute Winston's membership. Even if dilution

were acceptable, which it is not, any increase in the value of Winston's membership interest in such a scenario was merely coincidental. 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). Salmon testified that renovations might not increase the value of a property and some might actually decrease the value of the property, such as the sign for Win Depot, (R. 1815, 1816, 1818), since it would have to be removed by a new tenant, although the cost for the sign was nevertheless included in the $1,233,014 calculation. (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.

The Trial Court's acceptance of Winston's dilution on the basis of his failing to object to the renovations or to offer to share in the expenses was also in error. (R. 34). The clear evidence was that Winston was completely frozen out of the LLC following Henry's death. (Opening Br. at 20; R. 264; R. 736; R. 886-90; R. 5712; R. 6148-51; R. R. 6164-6169; R. 6283-85). Moreover, the evidence was uncontroverted that the alterations were for the benefit of Man Choi's restaurant supply businesses. (*See, e.g.* R. 255-57). There was no evidence that Winston was asked if he consented to such alterations, whether he would share in those

expenses, or any explanation of why he should do so when the LLC was hijacked for Man Choi's own personal gain.

iv) The Trial Court Erred In Not Taking Into Account Winston's Guaranty

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 (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"). The MCC Parties' attempt to distinguish *Sachs* fails since the court noted that the plaintiff's ownership interest increased based on plaintiff's giving of a guaranty. 26 A.D.3d at 54. Simply put, if Winston's guaranty were of no value, then the bank would have issued the mortgage without it, and, as Fishman testified, the bank did indeed require it. (R. 1009). Thus, it is evident that the mortgage, and the Property, could not have been obtained without this guaranty. The only other personal guarantor on the mortgage was Henry. The MCC Parties (none of whom ever personally guaranteed the mortgage) make much of the fact that the guaranty was never

enforced, but that fact is irrelevant, since Winston was certainly liable on it until well after the Valuation Date.

Accordingly, Winston was at all times a 25% member of the LLC until his withdrawal as of the Valuation Date.

III. THIS COURT SHOULD REJECT THE MCC PARTIES' ATTEMPT TO LOWER THE NAV OF THE LLC

The MCC Parties argue that the Trial Court overstated the LLC's NAV as of the Valuation Date by $1,366,780, and that the NAV should be reduced from $10,449,739 to $9,082,959, with the requisite reduction in the value of Winston's percentage interest. (MCC Br. at 53). The MCC Parties contend that once the Trial Court accepted Nelson's slightly higher valuation of the LLC without endorsing Nelson's rationale for that valuation, where Nelson's valuation was premised on the assumption that all of Man Choi's payments on behalf of the LLC were capital contributions, it was obliged to make accounting adjustments when it concluded that certain of these payments were loans rather than contributions. (*Id.* at 55). As an initial matter, this contention should be rejected because the MCC Parties did not raise it until after the post-trial decision was issued by Justice Weiss. (R. 6525-26). Moreover, the conclusion that the LLC's NAV should be reduced based on the Trial Court's conclusions as to which funds were loans and which were capital contributions is incorrect, for the reasons set forth below.

A. If This Court Does Amend the Net Asset Value of the LLC, It Must Accept the Net Asset Value of Mercer

Without any discussion of Nelson's reasoning or charts, the Court accepted Nelson's NAV of $10,449,739, over 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 values was negligible. (R. 36).

However, based on the Court's determination that certain funds were loans by Man Choi or his entities to the LLC and other funds contributions, Mercer and Nelson would thus arrive at starkly different NAV's, greatly affecting the value of Winston's interest. Mercer's NAV, based on the guidance in the Trial Court's decision, becomes $11,659,867, (R. 6339-40, at ¶ 6; R. 6433), while Nelson's becomes $9,082,959. (R. 6433; R. 6318, at ¶ 18).

It is respectfully submitted that given this difference, and since the Man Choi Parties have raised the issue, the Court must look behind the NAV calculation and determine whose method of calculating the NAV is more credible. It is respectfully submitted that it is the analysis of Mercer that is more credible.[14]

[14] The MCC Parties twist facts and distort the truth, as they do throughout the brief, in attempt to convince this Court that Mercer's analysis is somehow not credible. In this instance, they contend that Mercer was directed by counsel to assume Winston had a 25% interest in the LLC, (MCC Br. at 30), as if that would somehow affect his calculation of the fair value of the LLC. Indeed, just as Nelson, Mercer calculated the net asset value of the LLC and then the fair value of a 100% interest in the LLC. Only at the last step, did he then apply simple multiplication and determine the fair value of a 1% interest in the LLC and a 25% interest.

1. Mercer's Approach To Calculating The NAV Is More Credible

As a general matter, the Court questioned Nelson's credibility on several occasions. First, in determining that $1,142,000 from 1-9 Bondst was a loan to the LLC, as it was booked on the LLC's books and records, the Trial Court rejected Nelson's testimony that these funds should be viewed as a contribution by Man Choi as "lack[ing] credibility." (R. 33). The Trial Court also held that "Nelson's testimony that MCC is entitled to a whopping 25% lack of marketability discount for what is essentially real property placed in a limited liability company package has no credibility..." (R. 36).

Although at trial both Mercer and Nelson came to nearly identical NAV's,[15] when the Court's determination that certain funds were loans and others were contributions are factored in, Nelson and Mercer arrive at very different NAV's. The differences between Nelson's and Mercer's approaches to calculating the LLC's NAV demonstrates that Nelson's calculation cannot be credited. As will be discussed below, both at trial and, now, based on the Trial Court's decision, the

[15] Again, the MCC Parties distort the record in contending that Mercer sought to mimic Nelson's "net asset value" approach to arrive at a similar number. (MCC Br. at 30). The argument is ludicrous. First, they cite to testimony from Mercer in which he flatly denies that he adjusted his analysis based on anything Nelson testified to. (R. 1697-98). Indeed, Mercer testified without contradiction that he drafted his report, with the same NAV to which he testified at trial, in October 2011, well before Nelson (who produced no report during discovery and whose conclusions were not shared with Winston during discovery) testified. (R. 1698; *see also* 6346). Both used the NAV approach because that is the standard method to value a company, as Mercer should know given his eminence in the field, which vastly outshines Nelson's limited expertise in the area, as discussed herein.

main differences in the approaches of Nelson and Mercer are the calculations underlying "Man Choi 'Receivable'" line (this is the same as Mercer's foregone cash calculation) and the "Due MCC and Affiliates" line, as can easily be seen in the side-by-side comparison at R. 6432-33.

2. Nelson Vastly Understates The Amount Man Choi Owes To The LLC Which Underscores His Lack Of Credibility

As to the "Man Choi 'Receivable'" line, Nelson opines that Man Choi and his entities owe the LLC $988,347, while Mercer concludes that they owe the LLC $1,626,928. (R. 6432-33, 6445-47).[16] Although they arrive at different amounts, both Mercer and Nelson agree that, because the LLC was not renting the property out at market rates, it did not receive additional cash that otherwise would have been available to the LLC to either distribute to owners or to pay down existing debt, and that these forgone funds must be included in valuing the LLC. (*Id.*)

The difference in the amounts owed by "Man Choi 'Receivable'" line as calculated by Nelson and Mercer is due to the fact that Nelson arbitrarily considered market rental income to equal expenses for the years 2002-2005, vastly

[16] The MCC Parties argue, as they did below, that Mercer failed to account for $1.8 million in operating expenses paid by Man Choi or his entities from 1999 to 2002, and that, if he had, it would eliminate Mercer's $1,626,000 in "foregone cash." (MCC Br. at 30, n. 18). However, Mercer did account for this $1.8 million. As Mercer testified, he did not include in his foregone cash calculation the period from 1999 to 2002, because he assumed, favorably to the MCC parties who were actually enjoying below market rent during that period, that the LLC broke even during those years, meaning that whatever rental income was paid to the LLC ($1.8 million) covered the LLC's operating expenses. (R. 1584-85).

understating the amount owed to the LLC by Man Choi and his entities, while Mercer calculated the market rent for 2002-2005 by decreasing the market rental rate found by Salmon at five percent per year, going back, and then determined the difference between the LLC expenses (the 'rent' actually paid) and that market rent. (R. 1590-92; *see also* R. 6342, at ¶ 14).

If Nelson's method were endorsed, the underlying assumption the Court would have to accept is that the Property's market rent in 2005, well after the renovations were completed, was $517,189, but in 2006, it was $935,594, or a difference of $418,405. (R. 1590-92; *see also* R. 6342, at ¶ 14; R. 6446; R. 5230). Instead, if Nelson adopted Mercer's approach, and decreased the rent at five percent per year, going back, rather than arbitrarily assuming the market rent equaled expenses, the market rents for 2005-2002 would be as follows: 2005, $888,814; 2004, $844,373; 2003, $802,154.91; and 2002, $762,047. As a result, and not accounting for the interest that would have accrued on these funds, Nelson's "Man Choi 'Receivable'" would be approximately $1.8 million, or even more than Mercer calculated. (R. 6342, at ¶ 14; R. 6447).

Under Mercer's analysis, however, the market rent for 2005 would have been $772,882 and $813,560 for 2006. (R. 6446; *see also* R. 1590-92; R. 6342, at ¶ 14).

Suffice to say, both the record in this case and common sense show that it is much more plausible that the rent increased approximately 5% between 2005 and 2006, as Mercer posits, than it increased over 80%. Because he vastly understates the receivables from Man Choi, Nelson's entire calculation is suspect.

3. Nelson Overstates The LLC's Liabilities

The difference in the "Due MCC and Affiliates", liabilities of the LLC, line is based, *inter alia*, on Mercer's correctly including as liabilities the $1,142,000 that the Trial Court concluded was a loan. (R. 33; R. 6433).

Interestingly, prior to the Trial Court's decision, Mercer's "Due MCC and Affiliates" was greater than that of Nelson. (R. 6432). Since this had the effect of lowering the NAV of the LLC, and thus the value of Winston's interest, this underscores Mercer's credibility.

Following the Trial Court's decision, however, the disparities in the "Due MCC and Affiliates" become substantial. Now that it is in Man Choi's interest to lower the NAV of the LLC as much as he can, Nelson's version of the balance sheet, based on the Trial Court's determination of which funds were loans and which were equity, contains substantially more debt than Mercer's. (R. 6433, 6448). Putting aside the mortgage and accrued interest payable, the sum of which is virtually identical in both Mercer's and Nelson's analysis, Nelson's calculation has liabilities of $1,806,783 and $1,366,780, which total $3,173,563. (R. 6321).

By contrast, when the $1,233,014 is removed from the liabilities on Mercer's balance sheet (as it must since the Trial Court determined it was a contribution), the liabilities are only $1,326,282. (R. 6433, 6448). Mercer's $1,326,282 includes the $1,142,040 that the Trial Court determined was a liability.

Mercer's figures come from the books and records of the LLC as they were recorded, rather than numbers generated by Nelson's firm while this litigation was already pending. Mercer did make adjustments to several assets and liabilities to accurately reflect changes between 2002 and 2008, as he testified. (R. 1579). Mercer's changes included calculating the outstanding mortgage at the valuation date, eliminating a $300,000 liability that no longer existed, and developing pro-forma income statements to determine the asset referred to as "foregone cash." What he did not do, and properly so, was undertake a wholesale revision of the LLC's books and records to benefit Man Choi in light of the MCC Parties' litigation position, as Nelson did.

Furthermore, the $1,806,783 that Nelson adds to the liabilities of the LLC appears nowhere on any balance sheet of the LLC and is thus based on charts created by Nelson to prepare for his testimony, not the LLC's records prepared and kept in the ordinary course of its business. Indeed, as shown at R. 6450, this $1,806,783 was computed, incredibly, partly on the basis of $1,086,322 that Nelson contends (without explanation or basis in the record) is rent the LLC owes

Win Restaurant Supplies. There is absolutely no basis to conclude the LLC would owe rental income to Win Restaurant since the LLC owned the Property. Removing this figure would, of course, increase the LLC's NAV by the same amount. That Nelson's substantially higher liability figures are unjustified is yet another reason Nelson's analysis of the NAV should be rejected and Mercer's accepted.[17]

For the foregoing reasons, although the MCC Parties are correct that the NAV of the LLC must be adjusted based on the Trial Court's decision, they are incorrect as to how it should be adjusted. The Trial Court's decision, if its determination of which funds are loans and which are contributions is affirmed, requires that the NAV increase to $11,659,867 and Winston's 25% interest calculated from this increased amount.[18]

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[17] It is anticipated that the MCC Parties will argue, as they did below, that Mercer's calculation of the NAV should not be credited because he assumed $450,000 in cash for the LLC as of February 9, 2008, based on historical cash reserve and later financial statements showing such cash, (R. 1578), when Nelson's analysis showed the amount of cash for the LLC to be, purportedly, $3,195. (R. 6468, at ¶ 68, fn. 11). Nelson does not deny that the historical records of the LLC reflect $450,000 of cash and does not offer an explanation as to why or how this cash was used. Nelson, again, conveniently ignores that, even if the MCC Parties' $3,195 figure is correct, it is so only because the LLC either spent the cash covering operating expenses or paying for building improvements or otherwise dissipated it without distributing any part to Winston. In either case, the LLC was deprived of any funds for several years since it was not collecting a market rental income, meaning that the cash was used to pay for items that should have been covered by rental income or directly by the tenant. Thus, it is proper to include the $450,000 as an asset of the LLC.

[18] Assuming this Court accepts that the NAV of the LLC should be adjusted, it is simple math to determine the value of Winston's 25% interest by multiplying the percentage interest by the NAV. If the Court accepts that the NAV should be adjusted upwards consistent with Mercer's valuation to $11,659,867, Winston's 25% interest as of the Valuation Date would be worth

IV. THE TRIAL COURT PROPERLY REJECTED THE MCC PARTIES' ATTEMPT TO APPLY A WHOPPING 25% MARKETABILITY DISCOUNT AND CORRECTLY DETERMINED THAT A 0% DISCOUNT WAS APPROPRIATE

The Trial Court properly applied a 0% marketability discount to determine the fair value of Winston's percentage interest in the LLC. (R. 36). Specifically, the Trial Court held, "MCC is not entitled to a lack of marketability discount...the LLC's business consisted in nothing more than the ownership of realty which is easily marketable...In any event, Nelson's testimony that MCC is entitled to a whopping 25% lack of marketability discount for what is essentially real property place in a limited liability company package has no credibility, and the record does not permit the court to determine what lesser percentage might be appropriate." (*Id.*) (emphasis added).

The MCC Parties contend that this was error and seek the application of a 25% (or at the very least 15%) marketability discount that is unsupported by any credible record evidence, logical argument, or case-law concerning single-asset real estate holding companies. (MCC Br. at 56). The MCC Parties' argument for the imposition of a 25% marketability discount rests on Nelson's opinion, which is not credible, that a discount of this magnitude would be appropriate, (MCC Br. at 29, 61), and easily distinguishable case law. (MCC Br. 56-61). Instead, the case

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$2,914,966.75, plus pre-judgment interest from the Valuation Date. If this Court concludes the NAV of the LLC should have been $9,082,959 rather than the $10,449,739 to which Nelson testified, as the MCC Parties argue, (MCC Br. at 55), Winston's 25% interest would be worth $2,270,739.75, plus pre-judgment interest from the Valuation Date.

law and the credible opinion of Mercer demonstrate that the Trial Court was correct in determining that a marketability discount of 0% was appropriate.

A. Case Law Does Not Support the Imposition of a 25% or even a 15% Marketability Discount

The leading case on marketability discounts in New York is *Friedman v. Beway*, 87 N.Y.2d 161 (1995). The court there prohibited imposition of a discount for the minority status of the dissenting shares and explicitly required that the dissenting shareholder "be paid for his or her *proportionate* interest in a going concern, that is, the intrinsic value of the shareholder's economic interest in the corporate enterprise." 87 N.Y.2d at 167 (emphasis in the original). The Court's apparent permission to impose a marketability discount under appropriate circumstances[19] has been a source of confusion in the Appellate Division and trial courts ever since. 87 N.Y.2d at 168-169 (citing *Matter of Seagroatt Floral Co.*, 78 N.Y.2d 439, 442 (1991)). Furthermore, although the *Beway* Court remanded the matter to the trial court for a new determination of the discount for a lack of marketability, and the lower court ultimately applied a 26% discount, the case concerned nine corporations each owning a separate property which the majority shareholders wanted to move into a single partnership. Accordingly, it is starkly

[19] The *Beway* court wrote: "we have approved a methodology for fixing the fair value of minority shares in a close corporation under which the investment value of the entire enterprise was ascertained through a capitalization of earnings (taking into account the unmarketability of the corporate stock) and then fair value was calculated on the basis of the petitioners' proportionate share of all outstanding corporate stock."

distinguishable on its facts and does not support the imposition of a marketability discount concerning a single asset real estate holding LLC.

The nature of the confusion that *Beway* has given rise to was highlighted by Judge Warshawsky in *Murphy v. U.S. Dredging Corporation*, 2008 WL 2401230 (Sup. Ct. Nassau Co., May 19, 2008), *aff'd in part & rev'd in* part, 74 A.D.3d 815 (2d Dep't 2010), *lv. denied,* 18 N.Y.3d 953 (2012), a case involving dissolution of an enterprise that owned a portfolio of residential and commercial properties in various parts of the country many of which were subject to long term leases and various financing arrangements: "in most cases such as ours, the lack of marketability discount serves to cloak what is really a minority discount," and minority discounts are impermissible under *Beway.* Justice Warshawsky imposed the 15% marketability discount used by one expert who testified at the trial which the other expert "would also use but for the fact that he has concluded that no discount of this nature is appropriate under [these] facts." *Id.* On appeal this Court affirmed the 15% discount and noted that in order to reduce tax liability the "[c]orporation's intention was to hold its real property for a lengthy period of time." 74 A.D.3d at 817. Of course, the need to hold the underlying property to avoid gains taxes reduced the liquidity of the shares. Although a number of previous cases of this Court appeared to limit application of a marketability discount to the goodwill of a corporation, the court clarified that "the law does not

limit the application of lack of marketability discount to the goodwill of a corporation *in all instances*." 74 A.D.3d at 818, 903 N.Y.S.2d at 437 (emphasis supplied).[20]

While the rulings on marketability discounts both before and after *Beway* have been uneven in the discounts that have been approved and the reasons given, the decisions are in harmony on the point pertinent to this case, that a single asset holding company presents the weakest possible case for imposition of a marketability discount. This is particularly true where, as is the case here, the asset held is a single building for which there is a tight market with high demand, no restrictions on its sale and which has been appraised as of a particular valuation date assuming exposure to market prior to the valuation date.

In *Matter of Seagroatt Floral Co. (Riccardi)*, 78 N.Y.2d 439 (1991), relied upon by the MCC Parties, and cited by both the *Beway* court and the *Murphy Dredging* court (at the Second Department), the Court of Appeals found that a 0% marketability discount was appropriate and rejected the idea that such a discount must be taken against the value of the enterprise rather than at some earlier stage. The court explained that while:

[20] When Nelson was asked at trial about why this case was an instance which justified not only departure from the long line of Second Department cases limiting the application of the discount to goodwill but a discount nearly 70% higher than that approved in *Murphy Dredging* his answers were vague and lacking in substance (e.g. "I mean. I didn't write the opinion. It says 'in all instances.' I think the words speak for themselves") and expressed the inaccurate view (which *Seagroatt* rejected "as a matter of law") that "New York statute says that marketability discounts are to be taken." (R. 1227-28; R. 1225-28).

> the corporations argue that an identifiable discount must in all cases be applied against the value found – that the factor of illiquidity cannot be 'buried' in the capitalization rate . . . there is no single method for calculating that factor . . . Certainly, this Court has never mandated one. Thus, to the extent that respondent corporation suggest that illiquidity can only be taken into account by the application of a percentage discount against value—such as the Referee applied—the argument fails as a matter of law.

78 N.Y.2d at 446-47. Here both real estate appraisers used the Income Capitalization Approach and developed a capitalization rate for that purpose. (R. 368, 496, 1355, 1366).

In *Vick v. Albert*, 47 A.D.3d 482 (1st Dep't 2008), the First Department applied *Beway* to value a partnership holding a single property and gave a 0% marketability discount holding that "application of the discounts sought by defendants would deprive plaintiffs of the decedent's proportionate interest in a going concern, since they would not receive what they would have received had the entire entity been sold on the open market unaffected by a diminution in value as a result of a forced sale." 47 A.D.3d at 484. Significantly, the First Department then cited two Second Department cases both of which remain good law, *Cohen v. Cohen*, 279 A.D.2d 599, 719 N.Y.S.2d 700 (2d Dep't 2001) and *Matter of Cinque v. Largo Enterprises of Suffolk County*, 212 A.D.2d 608; 622 N.Y.S.2d 735 (2d Dep't 1995), for the proposition which is directly on point here: "*The unavailability of the discounts is particularly apt here, where the business consists of nothing more than ownership of real estate.*" 47 A.D.3d at 484, 849 N.Y.S.2d at

252 (emphasis supplied). This Court should follow *Vick*, since it is persuasive and well-reasoned.

The MCC Parties contend that the Trial Court's reliance on *Cohen* was misplaced. However, *Cohen*, as *Vick*, and unlike the myriad of cases cited by the MCC Parties, squarely addresses the question of whether a marketability discount should be applied to a single asset real estate holding company, and both answer that question in the negative.

In *Cole v. Macklowe*, 2010 WL 7561613 (Sup. Ct. N.Y. Co. Sept. 27, 2010), the court went one step further and precluded any testimony with respect to marketability discounts in valuing "an equity interest in various properties, each of which is owned by a Macklowe-controlled limited liability company or limited partnership." As in the instant case, there were no restrictions on the sale of the underlying property or the holding entity that owned it, and the Court continued, "in cases involving the involuntary sale of the interests of a minority owner who has essentially been forced out of a company, the minority owner is entitled to receive the 'fair value' of these interests . . . the Court in [*Beway*] implicitly recognized that a marketability discount may not [be] applied where, as here, it is essentially based on the minority's lack of control."

Giaimo v. Vitale, 31 Misc.3d 1217(A) (Sup. Ct. N.Y. Co. 2011), involved the valuation of two holding companies which owned 19 residential buildings.

There the trial court once again gave a 0% marketability discount but based on a different rationale than in the cases above that also applies to the instant case. *Giaimo* stated the proposition that determination of fair value is "a question of fact which will depend upon the circumstances of each case; there is no single formula or mechanical application." *Id.* at *4 (citing *Seagroatt* (which it quoted) and *Matter of DeAngles v. AVC Services Inc.,* 57 A.D.3d 989 (2d Dep't 2008)). Because "the availability of similar properties on the open market is limited and . . . a buyer would accordingly buy the properties. . .through the corporations" the court affirmed the Referee's decision that the discount for lack of marketability did not apply. This rationale for finding a 0% marketability discount would apply here with equal force since the expert appraisal testimony demonstrated that both experts believed that the availability of similar properties was "limited", (R. 1390-92; *see also* R. 500-01), and Mercer testified without contradiction that there would be no impediment to a purchaser who was interested in the building from buying the LLC itself. (R. 1593-95).[21]

[21] Mercer was the expert in *Giaimo* and he testified there as he did here that application of a marketability discount was a disguised minority discount and thus inconsistent with *Beway's* prohibition of minority discounts and its requirement that the dissenting shareholder be given a proportionate share of the value of the enterprise as a going concern. The Referee accepted Mercer's rationale and the Court found the Referee's decision consistent with both *Vick* as well as a "long line of Second Department cases" limiting application of marketability discounts to the "portion of the value of the corporation that is attributable to goodwill." *Giaimo*, 31 Misc.3d 1217(A), at *3. Although it reached the same 0% discount, the Court avoided ruling directly on whether it was proper to follow *Vick*, ruling only that *Vick* may not be followed "to the extent that it is inconsistent with *Beway*." *Id.*

The MCC Parties argue that the subsequent First Department decision in *Giaimo*, 101 A.D.3d 523, 956 N.Y.S.2d 41 (1st Dep't 2012), leave to appeal denied, 21 N.Y.3d 865 (2013), held that *Vick* should not be read to preclude the application of the lack of marketability discounts to interests in real estate holding companies. (MCC Br. at 59). Although the First Department reversed the portion of the *Giaimo* trial court's decision concerning the marketability discount, and applied a 16% marketability discount, at issue, as noted above, was the fair value of the shares in two closely held corporations owning 19 buildings, as opposed to a single LLC and the case did not address the issue addressed in *Vick* – that the application of a marketability discount is particularly inappropriate for a single asset real estate holding company. Moreover, Nelson's conclusory testimony, that takes up all of three pages, (R. 1097-99), in contrast to the detailed testimony on which the First Department relied in *Giaimo*, does not provide support for this Court determining a marketability discount other than 0%. Lastly, the First Department in *Giaimo* was clear that its holding there was limited to the peculiar facts of that case which did not include a single asset holding company but two companies holding several buildings: "[t]here are increased costs and risks associated with the corporate ownership of the real estate in this case that would not be present if the real estate was owned outright." (emphasis added). As Mercer credibly testified in this case, and as Justice Weiss held, the "LLC's

business consisted in nothing more than the ownership of realty which is easily marketable." (R. 36).

Man Choi places heavy reliance on several other cases that discuss marketability discounts, none of which provide any support for imposing a marketability discount of 25% or 15% in this case.

The facts in *Matter of Jamaica Acquisition, Inc.*, 2009 N.Y. Slip. Op. 52046(U), 2009 WL 3270091 (Sup. Ct. Nassau Co, 2009), are readily distinguishable because in that case, unlike here, there were restrictions on the sale of the assets owned by the enterprise—a varied portfolio of leased properties—because of the REIT structure in which the properties were to be held "for at least 10 years." Furthermore, because the enterprise there owned a portfolio of numerous properties just as in *Giaimo* and *Murphy Dredging,* the appraisal of any one property might not account for the illiquidity of the portfolio as a whole and an additional discount against the sum of the appraisals of the individual properties might be required.

The equitable distribution case *Cooper v. Cooper*, 84 A.D.3d 854 (2d Dep't 2011) is unhelpful for at least two reasons: (1) it was a matrimonial equitable distribution case in which the court was free to depart from the rules which apply

to statutory fair value cases between unmarried business people;[22] and (2) it included no facts regarding the underlying business or how the valuation was done except to describe it as a company which "distributes electronic components" rather than a holding company.

As discussed above, *Seagroatt*, relied upon by the MCC Parties, actually imposed a discount of 0%. *Murphy Dredging*, also discussed above, involved dissolution of an enterprise that owned a portfolio of residential and commercial properties in various parts of the country many of which were subject to long term leases and various financing arrangements. *Blake v. Blake Agency, Inc.*, 107 A.D.2d 139 (2d Dep't 1985), concerned the fair value of shares in an insurance brokerage firm. *Raskin v. Walter Karl, Inc.*, 129 A.D.2d 642, 644 (2d Dep't 1987), imposed a discount of only 10% and concerned four connected corporations which operated a mailing list brokerage business. Finally, *Matter of Beattie v. Pandata Systems Corp.,* 2009 N.Y. Misc. LEXIS 3971 (Sup. Ct., Suffolk Co., Jan. 15, 2009), concerned the fair value of a software company, and the parties disagreed on the impact of the business description on the question of fair value.

Not only does the case law support the Trial Court's decision, but Mercer explained that (as in *Seagroatt*) the capitalization rates used by the appraisers in

[22] *See, e.g., Michaelessi v. Michaelessi,* 59 A.D.3d 688, 689 (2d Dep't 2009) (trial court is vested with broad discretion in making an equitable distribution of marital property, and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed).

determining the value of the Property through the Income Capitalization Approach accounted for any lack of marketability. (R. 1558-59 ("In reality in the valuation of real estate or in the valuation of business enterprises when the earnings of a company or the net operating income of real estate are capitalized, they are capitalized assuming that exposure to market appropriate for the asset being sold already occurred. So that those discount rates, capitalization rates, to [sic] take into account the unmarketability of the corporate stock in valuing the net asset value for an asset holding company").)

The marketability discount applied to this single asset holding company whose only asset is a highly sought after commercial building should be 0%. That the Property is owned through an LLC rather than directly by Winston and Man Choi does not justify any marketability discount greater than 0%, much less a 25% discount, the only effect of which would be a windfall for Man Choi, who could then sell the building or the LLC free of any discount.

B. Nelson's Testimony that a 25% Marketability Discount Should Be Applied to Lower the Amount Awarded to Winston Lacked Credibility

Not only does the case law not support Nelson's testimony that a 25% marketability discount is appropriate, but the sources upon which he relied are similarly of no relevance to the question.

As an initial matter, as set forth above, Nelson's qualifications as a valuation expert and particularly with respect to marketability discounts were weak with no writings or speeches on the subject. Nelson lists only two articles on his résumé, neither of which relates to valuation, and has only one speaking engagement on an unspecified topic relating to business valuation on an unspecified date, before a Texas Bar Association. (R. 1282-83).

The sources that Nelson relied upon—restricted stock studies which he was unable to identify and a single chart in the so-called Pepperdine study which summarized survey results—provided no persuasive evidence or reasoning to support a discount of this magnitude or any magnitude. (R. 1202, 1210-11, 1283, 1098). Indeed, Mercer explained that such studies have no value whatsoever to the determination of a marketability discount (if one were proper) for a closely held LLC which owns nothing but a single parcel of highly demanded commercial property. (R. 1598-99 ("My opinion is the averages of restricted stock studies bear no resemblance either in time, the studies date back to the 1960's and the nature of the business itself, all of these studies were, company, virtually all of these companies are young public companies that are thinly capitalized that have public markets"); *see also* R. 1599-1601, 1603-05). The single chart of the Pepperdine Study was also unhelpful because it was a summary of a survey of marketability discounts given by an unidentified number of appraisers. Under cross, Nelson

grudgingly conceded that the purpose of a marketability discount is to account for the illiquidity of the shares of the LLC, that the LLC's assets did not include any goodwill and that the appraisal of the real property owned by the LLC involved calculation of a capitalization rate and assumed exposure time prior to the valuation date. (R. 1213, 1225-26, 1228, 1237, 1239, 1243-44, 1246). Nelson nonetheless clung to his arbitrary conclusion that the LLC's net asset value should be reduced by 25% before valuing Winston's 25% interest, with the result that Man Choi would retain the Property which could then be sold for the full appraised value with no marketability discount.

C. Mercer Credibly Explained, and the Trial Court Properly Determined, That a 0% Marketability Discount is Proper.

By contrast, Mercer, as set forth above, is a leading expert on valuation, particularly marketability discounts, having written and spoken frequently on the subject. (R. 1541-47). Mercer explained why a marketability discount here above 0% would have the effect of denying Winston his proportionate share of the value of the LLC as a going concern, as required by *Beway*, and provide the majority owner—Man Choi—with a windfall in the same amount as the discount. (R. 1556-1560, 1566, 1614-16). As an example, using Mercer's valuation of the LLC, Winston's 25% interest is valued at $2,606,750 and Man Choi's remaining 75% would be worth $7,820,250. If Nelson's 25% marketability discount is applied, then Winston's 25% interest would be worth $1,955,063, but because the overall

value of the LLC has not decreased, the implied value of Man Choi's 75% interest would increase to $8,471,937.

Further, as mentioned above, Mercer credibly explained how, because *Beway* "approved a methodology for fixing the fair value of minority shares in a close corporation under which the investment value of the entire enterprise was ascertained through a capitalization of earnings (taking into account the unmarketability of the corporate stock)," that because normal valuation methods (and both appraisers) take into capitalization, applying a marketability discount under these circumstances of other than 0% would be improper from an economic standpoint. (R.1563-65). He also credibly explained that applying a marketability discount to the value of the LLC, when both appraisers took into account time for exposure to market in valuing the Property, would be double-dipping and thus the exposure to market time in both appraiser's appraisals was an additional justification for applying a marketability discount of 0%. (R. 1567 – 1572).

The MCC Parties incorrectly argue that because both appraisers confirmed that there is an exposure or marketing time (6 to12 months in the case of Salmon and 12 to18 months in the case of Haims) prior to any hypothetical sale of the realty, the rationale for the application of a 0% marketability discount is undercut. Rather, this exposure or marketing period takes into account the illiquidity of the membership interests, as required, as of the hypothetical sale date. (*Id.*). The Trial

Court therefore correctly treated Winston's interest as easily marketable as of the Valuation Date and justifying a discount of 0%.

Accordingly, the credible testimony of Mercer established that the marketability discount applied to establish the fair value of this single asset real estate holding company should be 0%.

D. This Court Should Decline to Search the Record And to Apply a Discount Between 15% and 25%

The MCC Parties finally argue that this Court should search the record and apply a lack of marketability at some arbitrary value between 15% and 25% if it does not apply a discount of 25%. (MCC Br. at 61). The MCC Parties cite to the First Department decision *Giaimo* in support of this request. However, unlike the detailed testimony on the proper marketability discount in *Giaimo*, and as the Trial Court properly held, Nelson's conclusory testimony "does not permit the court to determine what lesser percentage might be appropriate." (R. 36); *see also Giaimo* 101 A.D.3d at 524-25; *Marinaccio v. Soc'y of New York Hosp.*, 224 A.D.2d 596 (2d Dep't 1996) (affirming grant of summary judgment against plaintiff because plaintiff's experts conclusory assertions failed to meet the plaintiffs' burden); *David Home Builders, Inc. v. Misiak*, 91 A.D.3d 1362 (4th Dep't 2012) (jury properly rejected expert's determination of fair market value of property, even

though it was uncontradicted, because expert's vague testimony was unsupported by specific evidence of the value of comparable properties).[23]

Accordingly, this Court should reject the MCC Parties' argument that the proper marketability discount in this action is 25%, and affirm the Trial Court's determination that the proper discount is 0% for this single asset real estate holding LLC.

V. THE TRIAL COURT PROPERLY AWARDED PRE-JUDGMENT INTEREST FROM THE VALUATION DATE

The Trial Court properly awarded Winston pre-judgment interest, at the statutory rate of 9%, from the Valuation Date to the date of entry of the Judgment. (R. 36).

The MCC Parties paint the question as one of discretion, but courts routinely grant prejudgment interest or are reversed for not awarding such interest in cases involving the dissolution of business entities and the buy-out individual interests therein. *In re Superior Vending, LLC*, 71 A.D.3d 1153, 1154 (2d Dep't 2010) (purchasing member to pay 9% interest since November 2002, when business relationship terminated); *Blake,* 107 A.D.2d at 150-51, *supra*, (reversing trial court and awarding interest from date of petition at 9%, stating, "justice requires

[23] Contrary to any argument the MCC Parties may make, Mercer did not rely upon *Giaimo* to justify his own conclusion that a zero percent discount for lack of marketability should be applied in this case, and he testified at great length concerning how he determined, independently of *Giaimo*, that a zero percent marketability discount was economically sound, justified, and consistent with *Beway*.

that...interest be paid"); *Murphy,* 74 A.D.3d at 820 (2d Dep't 2010) (accepting that trial court applied 9% interest rate from date of valuation until entry of judgment except for a period while decision was pending, where it used 5%, and remanding 5% rate for further consideration); *Jamaica Acquisition*, 2009 N.Y. Slip. Op. 52046(U), 2009 WL 3270091, at *28 (awarding interest at the rate of 6.5% on the amount owed from the valuation date to the decision of the court; the Court appears to have chosen this 6.5% rate based on the rate payable on a line of credit at the time of the merger); *see also Beway*, 87 N.Y.2d at 170 (affirming the award of pre-judgment interest); BCL § 623(h)(6) (award to dissenting shareholders shall include interest); CPLR §§ 5001 (permitting award of interest); 5004 (statutory rate is 9%).

The MCC Parties concede, based on *Blake* and *Superior Vending*, as well as *Susi Contracting Co. v. Orlando*, 33 A.D.2d 548 (1st Dep't 1969), that the Trial Court had the authority to award pre-judgment interest. (MCC Br. at 62-63; *see also id.* at 63, n. 30).[24] They nevertheless argue that there is nothing in the LLCL that expressly provides for interest on a distribution upon the withdrawal of a member. (*Id.* at 62). There is nothing in the BCL that requires such interest either

[24] The MCC Parties erroneously cite *John Hancock Life Ins. Co. of N.Y. v. Hirsch*, 77 A.D.3d 710 (2d Dep't 2010), for the proposition that award of pre-judgment interest in an accounting action between partners is a matter of discretion. *Hancock* concerned the question of whether pre-judgment interest should be awarded on premium payments on a life insurance policy the defendant sought to void. Nevertheless, it is apparent from the cases cited above, and as conceded by the MCC Parties, that the Trial Court was well within its authority to award pre-judgment interest.

under the statutes providing for dissolution, BCL § 1104-a and § 1118, but, as the *Blake* court concluded, "justice requires that in cases arising" under these provisions pre-judgment interest be awarded. 107 A.D.3d at 150. Furthermore, "[i]nterest is not awarded as a penalty or to punish a party, it is a cost imposed for having the use of another party's money over a period of time." *Giaimo*, 10 A.D.3d at 526. Finally, CPLR § 5001 requires (or at least permits) interest in an action of this nature.

This is a case that screams out for an award of prejudgment interest. Winston has been forced to litigate for nearly a decade because he was completely frozen out of the LLC and, despite the clear holding of the 2007 Appellate Order that Winston was a member, the MCC Parties continued to exclude Winston, forcing him to withdraw and institute his own action and defend the action brought by the MCC Parties, while the MCC Parties reaped the benefits of the Property, acquired partially with Winston's funds, and its increased value. Further, despite the 2007 Appellate Order, the MCC Parties still sought to declare Winston forfeited his interest in the LLC and to expel him from the LLC, a claim that was rejected both by Justice Dollard and this Court. *See Man Choi Chiu v. Chiu*, 71 A.D.3d 646, 647 (2d Dep't 2010).

The MCC Parties contend that no pre-judgment interest should be awarded based on Winston's "inequitable and fraudulent conduct" in transferring the deed

to the Property to himself in 2001. (MCC Br. at 63). However, any reaction Winston had in 2001 to being completely frozen out of an LLC that he helped form was an understandable reaction to the MCC Parties' malfeasance and he paid for that by being required to pay Man Choi's attorney fees' in the first action. *See Man Choi Chiu v. Winston Chiu*, 67 A.D.3d 975, 976 (2d Dep't 2009). Additionally, the interest runs only from the date of Winston's withdrawal, in February 2008, and thus any conduct that occurred years before is of no importance to the question of interest. That the parties could not agree on their respective interests, with Winston claiming a greater interest in the LLC than the Trial Court ultimately awarded and Man Choi claiming Winston had no interest, despite the testimony of Nelson, is not a grounds to deny pre-judgment interest to Winston since this Court has held since 2007 that Winston is a member of the LLC and now his interest, subject to this appeal, has been decided.

The MCC Parties also argue that there is no evidence that any funds were wrongfully withheld from Winston and that the award of the value of his interest as of the Valuation Date stems from proper proceedings to determine that interest. (MCC Br. at 63-64). But, as the *Giaimo* court noted, interest is not a punishment, but simply accounts for the fact that one party has had the use of another's funds. Here, Winston withdrew as of the Valuation Date, but he has still not been paid the value of his interest. Accordingly, the MCC Parties have had the value of

Winston's interest at their disposal since 2008 and Winston has lost the opportunity to invest that money. Moreover, in the many cases awarding pre-judgment interest on the value awarded to a withdrawing minority shareholder or member of a company, the award was not predicated on their being a "wrongful withholding" of any funds. *Beway*, 87 N.Y.2d at 170; *Blake,* 107 A.D.2d at 150-51; *In re Superior Vending, LLC*, 71 A.D.3d at 1154.

Finally, the MCC Parties contend that any interest awarded should be less than 9%, but do not specify any lesser amount or set forth any rationale supporting a lesser amount. The MCC Parties also contend that interest should run only from the date of the entry of the Judgment. (MCC Br. at 63-64). However, as set forth above, Courts routinely award pre-judgment interest, not just post-judgment interest in similar circumstances, and it generally runs at least from the date of withdrawal or the petition seeking dissolution. Furthermore, the MCC Parties provided no evidence, and no argument in their brief (which would be improper in any event since the issue was not presented below), of any rate of interest below 9% that would be appropriate.

Accordingly, the Trial Court properly awarded pre-judgment interest at a rate of 9% from the Valuation Date.

VI. THE TRIAL COURT INCORRECTLY DISMISSED WINSTON'S FIDUCIARY DUTY CLAIMS

A. Winston Should Have Been Granted Nominal or Greater Damages and Punitive Damages on His Direct Breach of Fiduciary Duty Claim

The MCC Parties argue that the Trial Court properly dismissed Winston's freeze-out claim because Winston failed to prove any damages and because there was no express finding that any freeze-out had occurred. (MCC Br. at 64-65).

Taking the second argument first, the evidence of Winston's freeze out was uncontradicted, and even pridefully admitted by the MCC Parties. (Opening Br. at 20; 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, Winston had to go to Eastbank to get the necessary information concerning the LLC. (R. 882). The MCC Parties pretend that Winston had no involvement in the LLC, (MCC Br. at 65), but that position is circular. He only had no such involvement when the MCC Parties precluded him from being involved in any way following Henry's passing, as the MCC Parties admitted.

It is also incorrect that Winston had not proven damages from this freeze-out. Winston has been deprived on any profits from the LLC, which was operated at a loss due to Man Choi's sweetheart deal with his own companies, as a result of his freeze-out, for over a decade and the loss of such funds and the ability to use

them constitutes the requisite damages. To the extent such funds are included in the "Foregone Cash" or "Man Choi Receivable" line, then the award of nominal damages is appropriate. In attempting to distinguish *Brian E. Weiss, P.C. v. Miller*, 166 A.D.2d 283, 284 (1st Dep't 1990), *aff'd* 78 N.Y.2d 979, 574 N.Y.S.2d 932 (1991), the MCC Parties merely state in conclusory fashion that Winston failed to make a showing of entitlement to nominal damages in this action. (MCC Br. at 67). Moreover, if this Court permits Winston's unilateral dilution by MCC having customized the property to the needs of his separate retail and light manufacturing business, Winston was certainly harmed since he had no say in the alterations to the Property and certainly was not given a chance to contribute to them.

Given the clear evidence of Winston's freeze-out, it is respectfully submitted that a showing of damages, or at least nominal damages, has indeed been made. The MCC Parties also fail to distinguish *Action House, Inc. v. Koolik*, 54 F.3d 1009, 1013 (2d Cir. 1995), arguing only that no punitive damages can be awarded because there was no award of nominal damages. Winston, however, cited *Action House*, for the proposition that if this Court awards nominal damages, as it should, it could award punitive damages. The MCC Parties do not rebut this point. In 2007 this Court held that Winston was a member of the LLC. *Chiu*, 38 A.D.3d at 620. Nonetheless, the MCC Parties continued their malicious and willful freezing

out of Winston from the LLC in direct contravention of this Court's 2007 order. The MCC Parties' conduct is deliberate unlawful conduct and supports such an award of punitive damages. In short, the MCC parties who have been awarded substantial wealth in this case, chose to arrogantly defy this Court, and should be made to answer for it by a substantial punitive damages award.

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 without even awarding nominal damages. This Court should reverse the dismissal of the cause of action for breach of fiduciary duty and remand for a hearing to determine the fees due to Winston.

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

Winston has standing to pursue his derivative claim, although he is deemed withdrawn as of the Valuation Date, because he has not (even now) been paid the value of his interest. *Arfa v. Zamir*, 63 A.D.3d 484, 485 (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."

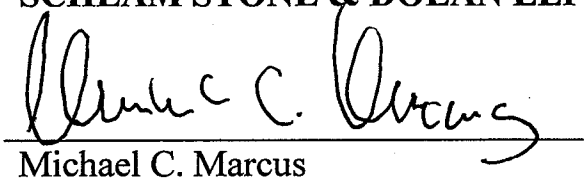
This Court should also remand and order a hearing concerning the amount of damages and attorneys' fees to be awarded for the derivative claim.

CONCLUSION

This Court should declare Winston to be a 25% member of the LLC as of the Valuation Date, with a fair value of $2,612,434.75, plus pre-judgment interest from the Valuation Date. This Court should also grant Winston judgment on his breach of fiduciary duty and derivative claims, together with any nominal or actual compensatory 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
January 27, 2014

Respectfully submitted,
SCHLAM STONE & DOLAN LLP

By: 

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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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