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PRELIMINARY STATEMENT

Respondents-cross-appellants Man Choi Chiu ("Man Choi") and 42-52 Northern Blvd., LLC ("LLC"), Helen Chiu and Teresa Chiu (collectively, the "MCC Parties") respectfully submit this reply brief in further support of their cross-appeal from so much of the February 6, 2013 Judgment (R. 15-17)[1] that: (i) incorrectly determined that Winston Chiu ("Winston") had a 10% interest in the LLC as of the February 9, 2008 Valuation Date; (ii) miscalculated the LLC's "net asset value" ("NAV") and, thus, incorrectly determined that the "fair value" of Winston's 10% interest was $1,044,974, and not the mathematically correct amount of $908,296; (iii) failed to apply any discount to the "fair value" of Winston's interest, to account for the lack of marketability of his illiquid interest in the privately-held, real estate holding company; and (iv) improperly awarded *pre*-judgment interest on Winston's "buy out" amount at the statutory 9% rate, commencing as of the Valuation Date.

Winston's assertion that the court erred in determining that he only had a 10% interest, because he claims on his appeal that, by "agreement," he "was and always intended to be a 25% member of the LLC," is belied by his sworn trial testimony. Thus, at trial Winston was still incredulously testifying (as in the prior

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[1] References "R.__" are to the Joint Record on Appeal. All terms defined in the MCC Parties' Brief, dated November 26, 2013, shall have the same meaning here.

trial) that he was the sole, 100% owner of the LLC (R. 689-690, 698), notwithstanding that his own counsel, during the opening statement, had argued that Winston had an interest of "either 25 percent up to 32 percent" (R. 62-63). Indeed, Winston had filed personal tax returns for over a decade, fraudulently claiming to be the LLC's 100% owner, in order to improperly deduct, on his returns, 100% of the company's operating expenses that he himself admittedly never paid (and based upon information that he himself fabricated) (R. 27, 714). Thus, the trial court correctly rejected Winston's self-serving assertion that the parties ever had an "agreement" making him a purported 25% member of the LLC.

The positions asserted by Winston at trial and on appeal, as well as Winston's claimed 25% interest in the LLC, are, were and remain a "moving target." The fact is that Winston seized upon the death of his nephew, Henry Chiu, who acted as his father's (Man Choi's) "right hand," to literally "steal" the LLC's valuable commercial Property, by fraudulently conveying title to the Property, from the LLC to his own "Godbless WMSC Living Trust," and seeking to exclude Man Choi's wife and daughters from their family business.

At trial in the first action, Winston attempted to "justify" his fraudulent conduct by claiming that he was the LLC's sole owner, based upon loan documents that he signed at the closing, on behalf of the LLC, purportedly showing him as a "member" of the LLC. In 2005, the trial court invalidated

Winston's fraudulent conveyance, which determination was affirmed by this Court in 2007. In the ensuing litigation, Winston set out to take advantage of the confusion caused by Henry's sudden death, in the way the LLC's financial statements and tax returns were haphazardly prepared, to claim that he had an interest of *at least* 25%, based upon the erroneous information contained in such documents.

Simply stated, Winston is hoping that this Court, on appeal from the Judgment in the second trial, will award him a huge "windfall," in excess of $2.6 million (or over $4 million, with interest to date), based upon such unreliable documents, notwithstanding his meager "capital contribution" of only $193,854 (to avoid capital gains tax liability from his own sale of property).

In fact, had the court properly given credit to Man Choi for all of his "capital contributions," totaling nearly $2 million, toward the LLC's purchase of the Property, and not merely his cash contributions totaling $581,562, the court would have properly determined that Winston did not have a 10% interest, but rather an interest of 5.74%, the "fair value" of which was $440,471. Thus, the very same "Roth Steel" factors (i.e., the complete lack of formality, no executed note, no security, etc.) that the court applied in properly finding that the $1,233,014 contributed by Man Choi, for "major structural alterations" to the Property, was an "additional capital contribution," should have led the court to also find that the sum

of $1,149,920 advanced by Man Choi (from the proceeds of the Bondst mortgage refinancing that occurred only months before the LLC's closing), and specifically for the purchase of a "capital asset," was also a "capital contribution."

Thus, the parties' relative interests should have been determined based upon a calculation of *all* of the funds contributed by the parties to the LLC for the purchase and subsequent improvement of the Property, and not upon "estoppel," based on the LLC's documents that only reflected a small portion of Man Choi's total contributions. The court erred in invoking "estoppel" to create an initial 25% interest in the LLC that Winston never had and to which the parties never expressly "agreed."

Even if the court were correct that Winston had a 10% interest, the court's most egregious error was in improperly calculating the LLC's NAV and thereby overvaluing the "buy out" value of Winston's interest. The court's accounting error was in failing to move over from the "equity" to the "debt" column, on the LLC's balance sheet, "liabilities" totaling in excess of $1.37 million, representing funds contributed by Man Choi toward the LLC's initial purchase of the Property, including the $1,149,920 (erroneously stated as $1,142,000) from the Bondst Refi. Thus, when the court determined that the $1,142,000 was a "loan," it should have made an equivalent accounting adjustment to reflect such amount as "debt" on the LLC's balance sheet.

Significantly, as Winston's own valuation expert treated all such sums advanced by Man Choi as "debt" in valuing the LLC (R. 6369), Winston cannot complain that the $1.37 million must be moved to the "debt" column on the balance sheet and the LLC's NAV appropriately re-calculated (R. 6321).

Had the court properly computed the LLC's total "assets" and "liabilities" (based upon its own findings), it would have determined that the LLC's NAV was $9,082,559, instead of $10,449,739, and thus the "fair value" of Winston's 10% interest was $908,296, instead of $1,044,974.

The court also committed an error of law by not applying any discount for the lack of marketability of Winston's interest in a closely-held company, merely because the LLC is a real estate holding company. Indeed, the Court of Appeals and this Court have consistently held that the valuation of a closely-held company should include consideration of any risk associated with illiquidity of the shares. Moreover, neither the Court of Appeals nor this Court has ever recognized an exception for single-asset, real estate holding companies. Indeed, the purported authorities cited by the trial court (and relied upon by Winston) to support a "zero" discount are based upon a legal principle that no longer applies in either this Department or the First Department.

The most recent case directly on point was Giaimo v. Vitale, 101 A.D.3d 523, 956 N.Y.S.2d 41 (1st Dep't 2012), leave to appeal denied, 21 N.Y.3d 865, 973

N.Y.S.2d 582 (2013), wherein the First Department specifically rejected the premise of both the trial court's finding (and Winston's argument on appeal), that no discount should be applied to value an interest in a single-asset, real estate holding company. Moreover, there the Court "searched the record" and found that a 16% discount was appropriate. Likewise, here, the record contains more than sufficient and credible testimony by Joseph Nelson, the MCC Parties' valuation expert, for this Court to make its own determination of the proper amount of such discount, which should be between 15% and 25%.

Lastly, it was error for the court to have awarded *pre*-judgment interest in favor of Winston (and certainly not at the statutory 9% rate, from the Valuation Date). Winston should not be rewarded (in excess of $500,000 in interest) first, for having literally "stolen" the LLC's Property, and then for having deliberately overstated his minor interest in the LLC to coerce an exorbitant "buy out" from his brother.

ARGUMENT

POINT I

WINSTON DID NOT HAVE A 10% INTEREST IN THE COMPANY AS OF THE VALUATION DATE

While the court erred in finding that Winston had a 10% interest as of the Valuation Date (R. 38), it was correct in rejecting Winston's claim of a purported 25% interest on that date. Indeed, had the court properly credited Man Choi for all of his "capital contributions," totaling nearly $2 million, specifically for the LLC's initial purchase of the Property, the court would have properly determined that, as of the Valuation Date, Winston only had a 5.74% interest, the "fair value" of which was $440,471.

A. *There Was Never Any Express "Agreement" Between the Parties Granting Winston a 25% Interest*

There was never any "agreement" granting Winston a 25% interest in the LLC and certainly nothing "written in stone," as Winston would have this Court believe. Such purported "agreement," in fact, would be contrary to Winston's own sworn trial testimony, wherein he incredulously claimed that he remained the 100% owner of the LLC, notwithstanding prior court rulings that Winston "withdrew" in February 2008.

Nor did the court find that there was ever any express "agreement" between the parties. In the absence of an "operating agreement," the court (albeit

erroneously) "inferred" that the parties agreed to an initial 75%-25% ownership "split" in favor of Man Choi, based upon the LLC's documents (R. 30).

However, such documents, the Reconciliation of Initial Cash (R. 5339), the LLC's tax returns and K-1 Statements (R. 1778-1803), the LLC's balance sheets (R. 5350-5355), and a "list" supposedly prepared by Helen Chiu (R. 5535), reflected only the parties' relative cash contributions ($581,562 for Man Choi and $193,854 for Winston) toward the initial purchase of the Property. In fact, Man Choi actually contributed nearly $2 million toward the purchase (together with in excess of $1.2 million for improvements to the Property), but such $2 million in contributions were not properly reflected in such documents that were haphazardly prepared following Henry's sudden death in May 2000.

Contrary to Winston's assertion, the court properly considered and excluded, as barred by the Dead Man's Statute (CPLR § 4519), Winston's self-serving testimony concerning his alleged "agreement" with Henry (who was never a member of the LLC) that supposedly gave Winston the right to purchase up to 25% of the "Common Stock" of an unnamed "limited liability company" (notwithstanding that LLC's do not issue "stock").

Thus, Winston's assertion on appeal that any such "agreement" ever existed, or that he was, and has always intended to be, a purported 25% member of the LLC, is belied by the facts.

B. *The Court Erred in Determining That the $1.149 Million Contributed by Man Choi, Specifically for the LLC's Purchase of the Property, Was a "Loan"*

The court erred in determining that the $1,149,920 contributed by Man Choi from the proceeds of the Bondst Refi (which funds were obtained a few months prior to the September 1999 closing) (R. 1849-1881), specifically for the LLC's purchase of the Property, was a "loan."

Had the court properly considered all circumstances surrounding such capital infusion, as required by the authorities cited in its own post-trial Memorandum Decision (R. 32), it would have come to the exact opposite conclusion. Thus, there was a complete lack of formality, no promissory note evidencing such "loan," no collateral given to secure the repayment of over a million dollars and no stated interest on such "loan." Moreover, such funds were indisputably used specifically for purchasing a "capital asset," i.e., the Property.

Notably these were the very "Roth Steel"[2] factors that the court used in correctly determining that the $1.2 million contributed by Man Choi to improve the Property constituted "additional capital contributions."

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[2] See Roth Steel Tube Co. v. Commissioner of Internal Revenue, 800 F.2d 625 (6th Cir. 1986). Notwithstanding Winston's attempt to limit Roth Steel only to federal taxation matters, the case has been repeatedly cited by federal and state courts, specifically because of the factors that courts should consider in determining whether a capital infusion should be classified as "debt" or "equity."

In the face of such overwhelming evidence presented at trial, Winston facetiously argues (see Reply Brief, at p. 10) that such contributions by Man Choi do not alter the members' respective ownership interests, because such percentages were purportedly "established by the clear agreement of the parties," referring to Winston's alleged "agreement" with Henry (that was properly excluded on the basis of the Dead Man's Statute).

Moreover, Winston erroneously asserts on appeal (see Reply Brief, at p. 11) that such "agreement" need not be in writing, where there is "other evidence corroborating Winston's 25% interest," but here such "evidence" consists of the LLC's own unreliable financial statements and tax returns. In a desperate attempt to defend his belated 25% claim and convince this Court of such fictitious "agreement," Winston claims that "there can be no other explanation" as to why the documents showed a 75%-25% "split" (id.), while neglecting to mention the most obvious (and truthful) explanation that such initial "split" only reflected the parties' relative cash contributions toward the LLC's purchase of the Property.

Lastly, Winston speculates, without citing any evidence or testimony in the record,[3] that because the LLC was allegedly in a "precarious financial position in

[3] In "support" of such assertion, Winston cites to R. 384, where Eric Haims, the MCC Parties' real estate appraiser, testified that the Property was worth $4.2 million as of March 1, 2001. Haims' testimony concerning the appraised value of the Property as of 2001 had absolutely nothing to do with, and was not evidence of, the alleged "precarious financial position" of the LLC in 2001. Nor does Winston's reference to the LLC's balance sheets (R. 5352-52533), without any testimony on this issue, support his contention.

2001," it would have been "advantageous" for Man Choi to have listed such advance of funds as a "loan," so that he would have been "a creditor ahead of Winston if the LLC failed" (see Reply Brief, at p. 12). Such belated fabrication, which is truly the product of "litigation hindsight," should be rejected by this Court.

C. *The Court Improperly Invoked Estoppel to Create Winston's Initial 25% Interest to Which the Parties Never Expressly Agreed*

The court erred in invoking "estoppel" based upon the LLC's flawed financial statements and tax returns, to "create" an initial 25% ownership interest for Winston, to which the parties never expressly "agreed."

The Court of Appeals established in Heisler v. Gingras, 90 N.Y.2d 682, 665 N.Y.S.2d 59 (1997), reargument denied, 91 N.Y.2d 867, 668 N.Y.S.2d 563 (1997), that "estoppel" should not be employed to resolve ownership disputes between shareholders. Thus, contrary to Winston's attempt to distinguish Heisler by arguing that there the Court had expressed concern for the rights of "minority" shareholders (see Reply Brief, at p. 13), the Court expressly "rejected" utilizing "any estoppel theory or analysis" to establish a person's status and rights as a shareholder. 90 N.Y.2d at 686-687, 665 N.Y.S.2d at 60.

Another irrelevant argument by Winston, to downplay the significance of Heisler, is that it was decided before Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 881 N.Y.S.2d 369 (2009), as if the former were somehow "overruled" by the

latter. Moreover, in Mahoney-Buntzman, the Court of Appeals did not utilize estoppel to create a membership interest (as here), but rather precluded a party, based upon a filed tax return, from taking inconsistent positions with respect to the ownership of certain property.

Here, however, the plainly unreliable information set forth in the LLC's tax returns should not have been utilized either to create a 25% membership interest for Winston, or given any preclusive effect, because there was more than ample evidence, including Nelson's expert testimony, that the LLC's haphazardly-prepared books and records were inaccurate and "incomplete" (R. 945-946). Thus, the initial 75%-25% "split" in interest, as reflected in the LLC's records, indisputably failed to take into account all of Man Choi's capital contributions. As in Chassier v. Brassier, 2007 WL 2815085 (Sup. Ct., N.Y. Co. 2007), the information in the tax returns here was neither conclusive nor dispositive as to the members' respective ownership interests.

The court also erred in invoking estoppel, because neither Man Choi nor the LLC derived any tangible benefit whatsoever from "holding out" Winston as a 25% member. Thus, in Mahoney-Buntzman, relied upon by Winston, the husband had derived a tangible financial benefit from a payment made to him from the sale of his interest in two companies, the income from which he reported on the parties' joint tax return during the marriage. When the husband, in a subsequent divorce

action claimed that the proceeds from the sale of such stock were "separate property," the court estopped him from taking such position, because he had previously reported such funds as income on the joint tax return. By contrast, here neither Man Choi nor the LLC derived any financial benefit from filing tax returns showing that Winston had a purported 25% interest. Cf. Mahoney-Buntzman.

Lastly, Winston himself should be "estopped" from relying upon the LLC's tax returns, showing that he had a purported 25% interest, because he admittedly filed personal tax returns, for nearly a decade, declaring that he had a 100% interest (in order to improperly deduct, on his personal taxes, 100% of the LLC's operating expenses). Evidently, Winston believes that estoppel is a "one way street" that only applies to the MCC Parties and not to his intentional fraudulent conduct.[4]

Moreover, contrary to Winston's self-serving assertion (see Reply Brief, at p. 21), nowhere in its 2007 decision (on Winston's appeal in the first action) did this Court ever "hold" that "Winston's conduct was irrelevant to his membership interest[.]" Winston's assertion that this Court's 2007 decision is "*res judicata*" as to his bad "conduct" is no more true than Winston's fabricated, but discredited

[4] Winston erroneously argues that estoppel cannot be invoked against him, because his claim for a declaratory judgment, which sought a "buy out" of his interest, is "legal in nature" (see Reply Brief, at p. 20). However, the nature of the underlying controversy is essentially an "accounting" action between partners, which is equitable in nature.

assertion that this Court previously "held" that he had a 25% membership interest based upon the LLC's own records.

D. *The Court Correctly Held That Estoppel Did Not Preclude Evidence of Man Choi's "Additional Capital Contributions"*

The court correctly held that estoppel did not preclude evidence showing that the relative interests of the parties changed after 2000, based upon the "additional capital contributions" made by Man Choi, i.e., the $1,233,014 contributed for "capital improvement" of the Property. Contrary to Winston's assertion, the parties' relative interests are not static, but are subject to adjustment based upon additional capital contributions made by Man Choi.

There is no evidence to support Winston's contention, and no law cited by Winston, that the LLC stopped filing tax returns after 2000 to "disadvantage" Winston in the litigation. On the contrary, the LLC could not have filed any returns after 2000 due to the ongoing litigation with Winston concerning the extent of his purported membership interest. Winston, on the other hand, evidently had no problem filing personal tax returns, for nearly a decade, unilaterally declaring himself to be the 100% owner.

Responding to the court's proper determination that Man Choi's $1.2 million for "capital improvements" to the Property was a "capital contribution" (R. 33-34) Winston merely repeats the same tired arguments previously rejected by the court. Thus, by adopting Nelson's calculation of the LLC's NAV, the court properly

rejected the testimony of Z. Christopher Mercer, Winston's valuation expert, concerning an alleged "underpayment of rent," in excess of $1.6 million.

The court also properly rejected Winston's claim that the $1.2 million was expended merely to "customize" the Property, a former vacant warehouse, for Man Choi's own restaurant equipment and supply business (see Reply Brief, at p. 22). Thus, the court properly found that the improvements, including "building a second floor, installing escalators, installing a freight elevator, changing the electrical system, and doing HVAC work" (R. 27), actually "increased the value of the property" and that Winston "share[d] in that benefit" (R. 34).

At trial, Winston failed to demonstrate that a few challenged payments to certain professionals were not related to the improvement project and, in any event, the amounts of such payments were insignificant.

Moreover, while Winston may have objected to the admission of the boxes of documents containing the invoices and receipts evidencing such improvements, Winston elected not to pursue such issue on appeal by failing to brief it in its initial Brief and, hence, waived any "objection." See, e.g., Miller v. Brust, 278 A.D.2d 462, 717 N.Y.S.2d 663 (2d Dep't 2000) (this Court noting that contentions raised for the first time in a reply brief are not properly before the Court).

The court also correctly rejected Winston's wholly unsubstantiated assertion that a "triple net tenant" would have been responsible for the cost of making such

major improvements (R. 34). Moreover, Winston failed to cite any authority for his assertion that a "triple net tenant" would pay for structural changes to accommodate its needs.

Winston's bald assertion that it would be improper to alter the percentage membership interests, based upon Man Choi's "additional capital contributions," because the parties allegedly had an "agreement," was likewise correctly rejected by the court. The court properly found that there was no "agreement" between the parties concerning how these additional funds spent by Man Choi, on "major renovations," would be characterized (R. 33).

Lastly, the court was correct in rejecting Winston's belatedly fabricated "dilution" theory, as the court recognized that a smaller interest may be worth more if, as here, the value of the property increased (R. 1148-1150). In 1999, the LLC paid $5.4 million for the vacant warehouse Property, which by early 2008, in its vastly improved condition (as a result of Man Choi's additional contributions) and because of a rapidly rising market, was worth in excess of $13.5 million. Moreover, the extent of any alleged "dilution" was relatively small, about 1%, from an interest of 9% (based upon all of Man Choi's capital contributions) to 7.84%, and not from Winston's purported 25% interest down to 7.84%.

Further, the court correctly found that Winston had failed to prove that he ever objected to the improvements or offered to contribute any funds to share in

their expense (R. 34). Winston's mere allegation that he was "frozen out" of the LLC is belied by the fact that he, a "retiree" residing in California, never had any involvement in the LLC's business affairs in the first instance.

E. *The Court Correctly Rejected Winston's Assertion That His Paper "Guaranty" Was a "Capital Contribution"*

The Court correctly rejected Winston's claim that his paper "guaranty" of the LLC's mortgage constituted a "capital contribution" (see Reply Brief, at p. 26), because the guaranties given by Man Choi's two companies and his late son were "off-setting" and the guaranties did not factor into the parties' initial ownership "split" (R. 29).

Winston's argument ignores the fact that the bank made the $3.5 million mortgage loan to the LLC based upon the established credit of Man Choi and his companies (and their substantial collateral),[5] and not based upon Winston's uncorroborated "Personal Financial Statement" (R. 780-781, 3905).

Moreover, at closing Winston executed a "guaranty" only because he was signing other loan documents on behalf of the LLC, which Man Choi permitted him to do in order to effectuate his 1031 exchange on this $193,854 "contribution."

[5] R. 5330-5336, 5530-5535, 5869-5884, 5932-5976.

POINT II

THE COURT IMPROPERLY CALCULATED THE "NET ASSET VALUE" OF THE COMPANY, THEREBY OVERVALUING THE "FAIR VALUE" OF WINSTON'S INTEREST

The court's improper computation of the LLC's NAV resulted in an overvaluation of the "fair value" of Winston's interest, even assuming that Winston had the 10% interest found by the court.

The court made a fundamental accounting error. Thus, after determining that certain funds contributed by Man Choi for the initial purchase of the Property, totaling nearly $1.37 million (including the $1,149,920 from the Bondst Refi), were "debt" and not "equity," the court failed to categorize such amount as a "liability" and move the amount to the "liability" column on the LLC's balance sheet. The court simply took Nelson's calculation of the LLC's NAV of $10,449,739 (which was based upon treating *all* amounts contributed by Man Choi toward the purchase of the Property as "equity") without making the appropriate adjustment for the additional $1.37 million as "debt" (R. 6524).

The chart prepared by Nelson amply illustrates that when the $1.37 million in "debt" is moved from the "equity" to the "debt" column on the balance sheet, the LLC's NAV is decreased from $10,449,739 to $9,082,959 (R. 6321). Thus, the "fair value" of Winston's purported 10% interest becomes $908,296, rather than $1,044.974, as erroneously computed by the court.

Significantly, Winston cannot complain that the $1.37 million must be shifted to "debt" on the balance sheet and the LLC's NAV appropriately re-calculated, because his own expert, in performing the very same calculation, classified *all* such sums contributed by Man Choi toward the purchase of the Property as "debt" (R. 6369). As such, Winston is estopped from contending otherwise.

Rather than concede the court's obvious accounting error, Winston repeats the very same "excuse" proffered by the court that the MCC Parties should have raised such argument *before* the court had issued its Memorandum Decision (R. 6525-6526). However, conspicuously unexplained is how the MCC Parties could have possibly anticipated or known, in advance of the court's decision, that the court would have (erroneously) determined that the $1.37 million was "debt" and not "equity," and that the court would have simultaneously failed to shift the $1.37 million to "debt" on the LLC's balance sheet in calculating the LLC's NAV.

That the LLC's NAV should be recalculated to correct the court's accounting error, however, does not "open the door" to Winston rearguing that his own expert's valuation was "more credible." In the first instance, the court on two separate occasions expressly rejected Mercer's valuation testimony, first when the court adopted Nelson's NAV calculation (as the "more credible testimony about MCC's capital contributions for improvements") (R. 35-36), and second, when the

court denied Winston's post-trial cross-motion for an upward modification of the LLC's NAV," in which Winston claimed that his alleged 25% interest was worth in excess of $2.2 million (R. 6526).

The court properly rejected Mercer's testimony, as well as his inflated valuation of Winston's purported 25% interest, at between $2.2 and $2.6 million (depending on whether fictional "foregone income" is included), because it was not credible and not supported by Mercer's own data. Unlike Nelson, Mercer never performed a real "net asset value" valuation of the LLC, but simply took his "marching orders" from counsel to value Winston's purported 25% interest based upon the flawed information contained in the LLC's documents that only reflected the parties' relative cash contributions to the LLC.

Indeed, Winston devotes an inordinate number of pages in his Reply Brief in an attempt to explain, and bolster, Mercer's valuation (as his trial testimony was largely incomprehensible), while attempting to impeach Nelson's credibility, simply to distract the Court's attention from the obvious necessity to re-calculate the NAV correctly. Thus, as with his "copycat" post-trial cross-motion to "recalculate" the LLC's NAV, Winston's strategy is to confuse the issues in the hope that this Court will simply affirm the trial court's (mis)calculation.

Reviewing the record, this Court should modify the Judgment to reflect the LLC's correct NAV of $9,082,959 as of the Valuation Date, and the corresponding

"fair value" of Winston's interest as $908,296, if this Court were to determine that Winston had a 10% interest.

POINT III

THE COURT ERRED IN FAILING TO APPLY ANY LACK OF MARKETABILITY DISCOUNT TO WINSTON'S INTEREST

The court erred in failing to apply any discount to the "fair value" of Winston's interest, to account for the lack of marketability of Winston's illiquid interest in the privately-held company. Thus, the court erroneously concluded that no discount should be applied merely because the LLC's "business consists of nothing more than the ownership of realty which is easily marketable" (R. 36).

However, in in both Friedman v. Beway Realty Corp., 87 N.Y.2d 161, 638 N.Y.S.2d 399 (1995), and In re Seagroatt Floral Co., Inc., 78 N.Y.2d 439, 445-46, 576 N.Y.S.2d 831, 834 (1991), the Court of Appeals mandated that, in determining the "fair value" of a closely-held company, the illiquidity of the members' interests should be taken into account.

Moreover, nothing in Beway, Seagroatt, or any other authorities cited by the court in its Memorandum Decision (or relied upon by Winston on appeal), justifies a departure from the well-established law that the valuation of an interest in a closely-held company requires courts to consider the risks associated with the illiquidity of such interest.

Thus, in Beway the Court of Appeals made it abundantly clear that in calculating the value of shares of a closely-held company, due regard for their unmarketability must be made by applying a percentage discount and that the failure to do so constitutes "reversible error."

Indeed, Winston concedes that, upon remand, in Beway the lower court "ultimately applied a 26% discount," but claims that no discount should be applied to "a single asset real estate holding LLC." However, nothing in Beway expressly precludes the application of such discount, and indeed, it would be "reversible error" not to apply any discount at all, as the court did here.

Moreover, Winston misstates the holding of Seagroatt by falsely claiming that, there, the Court of Appeals found that a 0% lack of marketability discount was appropriate. On the contrary, the Court of Appeals actually affirmed a 25% discount by finding that petitioner's expert's valuation had properly included a 25% discount.[6] Thus, Seagroatt confirms that a lack of marketability discount should not only be considered, but also applied.

Contrary to Winston's effort to sow "confusion" on this issue as well, New York courts have consistently applied a lack of marketability discount, even in valuing real estate holding companies (as here), and such discount has ranged from 15% to 25%.

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[6] 78 N.Y.2d at 443, 576 N.Y.S.2d at 833.

Thus, in Matter of Murphy v. United States Dredging Corp., 74 A.D.3d 815, 818, 903 N.Y.S.2d 434, 437 (2d Dep't 2010), this Court applied a 15% discount to an interest in a company whose assets consisted of cash from the sale of one property and the ownership of a property net leased to a tenant, a situation closely analogous to this Record.[7] Winston attempts to distinguish the significance of this Court's holding in Murphy by claiming that, there, the corporation's intention was to hold its real estate for a lengthy period of time, thereby reducing the liquidity of the shares. However, this Court's holding could not have been clearer, that "the Supreme Court properly applied a lack of marketability discount of 15%, on the ground that the Corporation was a close corporation" (emphasis added). 74 A.D.3d at 818, 903 N.Y.S.2d at 437.[8]

Murphy is also significant because, as Winston concedes, this Court held that "the law does not limit the application of a lack of marketability discount to the good-will of a corporation in all instances." Id. As a result of this Court's clarification of the rule in Murphy, neither Cohen v. Cohen, 279 A.D.2d 599, 719 N.Y.S.2d 700 (2d Dep't 2001), nor Matter of Cinque v. Largo Enterprises of Suffolk County, 212 A.D.2d 608, 622 N.Y.S.2d 735 (2d Dep't 1995), holding that

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[7] As explained in the MCC Parties' Brief (Point III, at pp. 58), this Court has routinely applied a discount of between 15% and 25%.

[8] Likewise, in Matter of Jamaica Acquisitions, Inc., 2009 WL 3270091 (Sup. Ct., Nassau Co. 2009), the court applied a 25% lack of marketability discount in valuing the companies' assets consisting of income-producing properties. Notably, the court never held that there should be no discount merely because the companies' assets consisted of income-producing properties.

a lack of marketability discount should be applied only to the portion of the corporation that is attributable to "good will," remains the law in this Department.

Thus, this Court must reject Winston's argument that this Court should adopt the holding of Vick v. Albert, 47 A.D.3d 482, 849 N.Y.S.2d 250 (1st Dep't 2008), wherein the First Department applied a "zero" discount merely because the business consisted of nothing more than the ownership of real estate, as the two authorities specifically relied upon in Vick—Cohen and Cinque—are based upon a legal principle that no longer applies in this Department or the First Department.[9]

Indeed, Vick is no longer followed in the First Department. Thus, in Giaimo v. Vitale, 31 Misc.3d 1217(A), 930 N.Y.S.2d 174 (Sup. Ct., N.Y. Co. 2011), aff'd, 101 A.D.3d 523, 956 N.Y.S.2d 41 (1st Dep't 2012), relied upon by Winston, the lower court expressly refused to apply Vick, stating that it "may not be followed to the extent it is inconsistent with Beway."[10]

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[9] This Court must also reject Winston's argument that Cole v. Macklowe, 2010 WL 7561613 (Sup. Ct., N.Y. Co.) (Sep't 27, 2010) (Diamond, J.) has any applicability to the facts here. Cole is a lower court decision from New York County in which the court mistakenly read Beway as "implicitly recognize[ing] that a marketability discount may not be applied where, as here, it is essentially based on the minority's lack of control." There, the court misconstrued the fundamental differences between a discount for lack of marketability, which is widely recognized and applied by courts in New York, with a "minority discount" that is not permitted.

[10] Notably, Mercer was the expert witness in Giaimo. There, the court expressly rejected Mercer's testimony before a referee, stating that, "[n]otwithstanding Mercer's significant credentials, his testimony in this regard [that a "zero" lack of marketability discount should be applied] cannot be credited as it is, in fact, inconsistent with *Beway*." Id. at *12. For the very same reason, this Court should also reject Mercer's inherently erroneous trial testimony that applying any discount for lack of marketability would be inconsistent with *Beway*. Notwithstanding his supposed impressive credentials, at trial Mercer demonstrated a complete lack of understanding of New York law on "fair value" valuation proceedings.

Moreover, the Giaimo court questioned the rationale for limiting the application of the discount to a company's goodwill (as was held in Cohen and Cinque), noting that this Court, in Murphy, held that the discount should be applied to all of the assets of a closely-held real estate holding company, and not just "goodwill."

Indeed, the First Department itself no longer considers its prior decision in Vick to be good law. Thus, in affirming the lower court in Giaimo the First Department expressly held that there was no reason to preclude the application of the discount for "real estate holding companies," because "[t]here are increased costs and risks associated with corporation ownership of the real estate in this case that would not be present if the real estate was owned outright," and that "[t]hese costs and risks have a negative impact on how quickly and with what degree of certainty the corporation can be liquidated, which should be accounted for by way of a discount." 101 A.D.3d at 524, 956 N.Y.S.2d at 43.

Thus, if this Court were inclined to follow any precedent from the First Department, it should be Giaimo and not Vick. The significance of Giaimo is that courts cannot treat the value of a membership interest in a closely-held, real estate holding company as the equivalent of cash, which is precisely the error made by the trial court herein (R. 36).

Giaimo is also significant because the First Department, rather than remanding the case, "searched the record" and found that a 16% discount was appropriate. Here, there is more than sufficient evidence in the record for this Court, on appeal, to fix the appropriate amount of the discount. Contrary to the court's finding (R. 36), Nelson's conclusion as to a 25% discount was credible and supported by more than sufficient empirical data. Nelson's testimony was based upon his extensive experience as a CPA and valuation expert (R. 934-936), as well as his reliance upon numerous so-called "restricted stock studies," including the Pepperdine Study, and prevailing New York law, including this Court's decision in Murphy (R. 1096-1100, 1201-1203).[11] Moreover, Nelson's conclusion that such discount ranges between 15% and 25% (R. 1211-1218, 1301-1302) was supported by several days of credible expert testimony, on both direct and cross-examination.

Based upon the foregoing, the MCC Parties submit that a lack of marketability discount of between 15% and 25% should be applied to reduce the "fair value" of Winston's interest in the LLC, irrespective of whether such interest is found to be 5.74%, 10% or otherwise.

[11] Nelson credibly testified that using "restricted stock studies" to determine a lack of marketability discount is "generally accepted," because restrictions on the sale of stock create a lack of market (R. 1208-1909). Nelson also testified that the Pepperdine Study was particularly useful, because it is a "survey" of "valuation experts" to "establish a range of what the typical valuation appraiser would arrive at with respect to a marketability discount" (R. 1210-1211).

POINT IV

THE COURT IMPROPERLY AWARDED PRE-JUDGMENT INTEREST ON THE "BUY OUT" VALUE OF WINSTON'S INTEREST IN THE COMPANY

The court improperly awarded *pre*-judgment interest on the "buy out" value of Winston's interest, and did so at the statutory 9% rate from the February 8, 2008 Valuation Date.

Winston concedes that the awarding of interest is a matter well within the court's discretion. See Susi Contracting Co. v. Orlando, 33 A.D.2d 548, 304 N.Y.S.2d 452 (1st Dep't 1969), leave to appeal denied, 26 N.Y.2d 610, 309 N.Y.S.2d 1027 (1970). Winston also concedes that in Jamaica Acquisitions, *supra*, the court awarded interest, not at the statutory 9% rate, but at a lesser rate, given the particular facts of that case.

The facts here do not justify an award of interest in favor of Winston in excess of $500,000. If any pre-judgment interest is to be awarded at all, it should be less than the statutory rate based upon the fact that it is the MCC Parties (and not Winston) who have been "forced to litigate for nearly a decade" with Winston, first to undo Winston's fraudulent conveyance of the Property and then to rebut and defend themselves against Winston's deliberately exaggerated claim that he was the 100% owner of the LLC.

In fact, the MCC Parties were fully justified in not acceding to Winston's unreasonable demands, to have his purported "interest" bought out at an exorbitant price, because the court ultimately determined that Winston had only a 10% interest, which was completely consistent with Man Choi's claim that Winston, *at best*, had a minor interest in the LLC, and a complete rejection of Winston's false assertion that he was, and still is, the 100% owner of the LLC. Under these circumstances, it would be unjust and inequitable to charge the MCC Parties for the "cost" of allegedly having "withheld" any funds from Winston.

Moreover, Winston should not be heard to complain that he was allegedly "frozen out" of the LLC, based upon his own adjudicated, fraudulent and illegal conduct. There was no justification for his "theft" of the LLC's multi-million dollar Property in the first instance and the court, in the first action, properly awarded legal fees in favor of Man Choi and the LLC (and affirmed by this Court) to compensate them, in part, for the substantial legal fees incurred to set aside the fraudulent deed.

Nor should Winston be heard to complain that the MCC Parties "reaped the benefits of the Property." Man Choi contributed nearly $2 million toward the LLC's purchase of the Property and in excess of $1.2 million to make "major structural alterations" to the Property thereafter, and paid in excess of $4.8 million in operating expenses for nearly a decade.

By contrast, Winston "contributed" less than $200,000 toward the purchase and did so *solely* for the purpose of effectuating his own tax-free, 1031 exchange (to save himself $20,000 in deferred capital gains taxes), and paid virtually none of the Property's operating expenses for a decade (while, at the same time, fraudulently deducting, on his personal tax returns, 100% of the LLC's operating expenses). The difference between them, completely lost on Winston, is that while Man Choi is entitled to reap the benefits of his substantial investment and risk-taking, Winston is not entitled to receive an unjust "windfall," in excess of several million dollars, based upon his claim that he allegedly "lost" an "opportunity" to invest his less than $200,000 elsewhere. Simply stated, Winston is not entitled to annual returns of 33% to 37% for his purported "investment" in the LLC.

For the foregoing reasons, Winston should not be awarded any pre-judgment interest. If any interest is warranted, it should not be at the statutory 9% rate and should not be from February 2008, but only from the February 6, 2013 entry of Judgment.

CONCLUSION

For all of the foregoing reasons, the Judgment should be modified to the extent cross-appealed from by the MCC Parties and, as modified, affirmed, and Winston Chiu's appeal denied in its entirety, and for such other and further relief as the Court deems just and proper under the circumstances.

Dated: New York, New York
March 13, 2014

Respectfully submitted,

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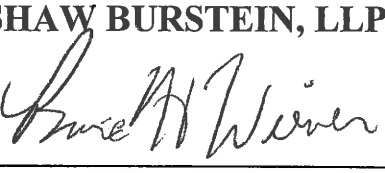
By: 

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CERTIFICATE OF COMPLIANCE

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Dated: New York, New York
March 13, 2014

Respectfully submitted,

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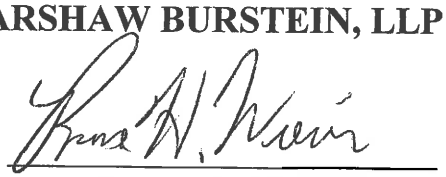
By: 

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