JAMS ARBITRATION
NO. 1425022927

In the matter of the arbitration
between

Capital Enterprises, Co.,

Claimant,

Alvin Dworman,

Respondent

CORRECTED PARTIAL FINAL AWARD

TABLE OF CONTENTS

The undersigned arbitrator, having been designated in accordance with Section 10.1, of the Amended and Restated Partnership Agreement of Capital Properties, dated, July 1, 1981 ("Agreement"), giving all parties the opportunity to produce and present their evidence, and having examined the evidence and submissions, finds, concludes and issues this Partial Final Award as follows:

I. OVERVIEW OF THE CASE

The subject matter of this dispute involves a partnership, Capital Properties Company ("Capital Properties" or "Partnership") which was formed in 1966, by Respondent Alvin Dworman ("Dworman") and two other investors, to own and operate buildings in Manhattan, located at 65 West 55th Street, 155 East 55th Street, and 210 East 58th Street, as well as 200 East 58th Street. On July 1, 1981, pursuant to an Amended and Restated Partnership Agreement of Capital Properties Company ("Agreement"), Mickey Palin ("Palin") replaced the two other owners and became a partner and 50% owner of Capital Properties, with Dworman owning the other 50% interest. The WHEREAS Clause, refers to Exhibit A to the Agreement as describing the Partnership's properties, which Exhibit identified 65 West 55th Street, 155 East 55th Street, and 210 East 58th Street. 200 East 58th Street is not described in Exhibit A.

Palin made no capital contribution; rather, through Carard Management Company ("Carard"), Palin's property management company (or an affiliate), he was to manage the properties. In 1993, the First Amendment to the Agreement ("First

Amendment"), was executed, substituting Capital Enterprises Co. ("Enterprises") as a general partner for Palin, who had resigned from Capital Properties, and who had sold a 50% in Enterprises to the Sachs family. The First Amendment is the last document governing the Partnership. This First Amendment contains no further description of the Properties.

Two of the buildings (65 West 55th Street and 155 East 55th Street) have parking garages, which in 1998 were leased to Bricin Parking Corp., ("Bricin") a company owned and operated by Gary Adelman, an officer and shareholder of Carard, and controller for Mickey Palin's companies.

Dworman and Palin were not only business partners, but over the course of their lengthy relationship, they and their respective families became personal friends. An issue which runs through this entire arbitration is the extent to which, if at all, Dworman participated in, was aware of, or consented to, Carard's (or Palin's) decisions concerning the Partnership management, as Claimant contends, "for more than thirty-five years". According to Claimant, it is "incredible to believe that Dworman would ignore a substantial investment like the Partnership for over three decades". On the other hand, Dworman contends that he was unaware of "Palin and Enterprises' malfeasance". Therefore, he did not "consent" to it, and could not have "objected" to it, since he was unaware of the misconduct.

In preparing this Award, I reject Palin's claim that the manner in which he and Dworman ran this Partnership, was that although "Dworman left the day-to-day tasks to

Mickey Palin…Dworman did not ignore the business. To the contrary, he knew exactly what Mickey Palin was doing, and the two partners made all important partnership decisions together." Indeed, in light of Palin's steadfast refusal to produce the partnership books and records for over two years; records to which Dworman was clearly entitled and which turned out to evidence serious malfeasance and wrongful conduct by Palin, and his other proven breaches of his fiduciary duty, this is not credible. Rather, it is my conclusion that to the contrary, most - if not all – important Partnership decisions were made by Palin, without either any disclosure or without full and complete disclosure. to Dworman. Corroborating this determination, is my review of Dworman's videotaped deposition, [redacted] his demeanor and statements, convincingly demonstrated that he was neither a knowing, nor a willing partner in Palin's self-interested management of the affairs and business of the Partnership.

Sometime in the 1990s, Palin's son, Dean Palin ("Dean Palin"), began working for his father, and in approximately 1996, assumed primary responsibility for the daily management of the three buildings. According to Dean Palin, he reported both to his father and to Dworman. Regarding Dean Palin, I find that his testimony was colored by his self-interest, demonstrated not only by his improper receipt of leasing commissions, but also by his tenancy in four combined apartments, at below-market rates. Thus, I do not credit his testimony that he kept Dworman fully apprised of management issues at the three properties.

Around 2013, Dworman, sought to inspect the books and records of the Partnership. Enterprises' refusal to produce the requested books and records, led to the filing of a July 27, 2015 petition to compel their production. This petition was granted on October 1, 2015.

Prior to the filing of the petition to compel the production of the books and records, Dworman and Palin, on March 10, 2015, met in the offices of Alan Hoffman, CPA, a member of Janover LLC, Properties' accountants, to discuss dissolution of the Partnership. After this meeting, Hoffman drafted a memorandum, which purported to summarize the substance of the meeting. Dworman disputed this summary, and the partners had no further contact with each other. It should be noted that Dworman is currently in his 90s, and Palin is currently in his 80s.

Following the court-ordered production of the partnership's books and records, Dworman retained the accounting firm of Marks Paneth LLP to examine them. Based on this examination, in 2016, Dworman filed three separate lawsuits, individually and derivatively, seeking: (1) to remove Carard as the property manager; (2) to remove Janover as the Partnership's accountant; and (3) to remove Bricin as the garage operator. Dworman alleged conversion of the revenue and cash flow generated by the partnership; diversion of revenue from the parking garages; failure to maintain the buildings, including unrepaired code violations; unauthorized loans; and charging an unauthorized

4% management fee[1]. On May 4, 2016, the court issued a preliminary injunction, granting the requested relief. Thereafter, the parties stipulated to retain Halstead Management Company LLC ("Halstead") to manage the properties and the court appointed as accountant, the firm of Lutz & Carr LLP, which has subsequently resigned.

On July 28, 2016, Enterprises filed a petition to compel arbitration, which was granted on January 12, 2017, and this arbitration ensued.[2]

Against this contentious backdrop, before the Arbitrator there are numerous claims and counterclaims (set forth below): essentially, Capital Enterprises (Palin) seeks to enforce what it contends is an enforceable "handshake" agreement, entered into on March 10, 2015, between him and Dworman to dissolve the partnership and distribute the assets, as the parties agreed, i.e., transferring 65 West 55th Street to Dworman, transferring 155 East 55th Street to Capital Enterprises or Palin, and holding 210 East 58th Street for a period of time and then transferring it to either Dworman or Enterprises or to a third party. Additionally, Claimant has claims alleging breaches of contract and breaches of fiduciary duty, and he seeks relief by way of various requests for declaratory judgment and specific performance, e.g., appointment of a new accountant, return to Carard's leasing strategy, and performance of façade repairs, as well as an accounting, which he alleges will demonstrate that Dworman received unilateral benefits. Dworman

[1] Dworman also brought separate actions against Janover and Bricin, which are currently pending.

[2] That portion of the January 12th Order which denied arbitration of two of claimant's demands, on statute of frauds grounds, was reversed by the Appellate Division on June 27, 2017, which concluded that "the broad arbitration provision of the partnership agreement controls the parties' dispute", and that "the applicability of the statute of frauds, should be determined by the arbitrator".

counterclaims for damages and an accounting, and also seeks dissolution both pursuant to the terms of the Agreement and under New York Partnership Law.

II. PRELIMINARY STATEMENT

Following completion of discovery, document and depositions, and various other pre-hearing matters, an evidentiary hearing was held over 6 days, from November 4 through November 8, 2017 and on January 3, 2018. At this evidentiary hearing, very able counsel for both parties, effectively and efficiently, offered voluminous documentary evidence, as well as the testimony of the following witnesses: (1) for Claimant -- Michael Palin; Dean Palin; Howard Zimmerman, architect; Sharon Locatell, President of Appraisers & Planners; Simeon Friedman, CPA; and (2) for Respondent -- Eric Kreuter, CPA, Marks Paneth LLP; Marc Nakleh, Cushman & Wakefield ("C&W"); Alberto Mora and David Nguyen, Vidaris Inc.; Mitchell Waxman, CFO for one of Dworman's companies and a CPA; B.J. Hoppe, Executive Managing Director, ADCO Group; and Alvin Dworman (by video-taped deposition).

At the conclusion of the hearing, an agreed upon post-hearing briefing schedule was established. Comprehensive briefs were submitted, and oral argument was held on April 20, 2018. Subsequent to argument, as requested, additional letters were submitted by the parties relating to the dissolution and winding up of the Partnership.

It seems most efficient, following the identification of the specific relief sought by the parties, to structure this Award by discussing, and resolving, the various issues

presented. However, before turning to this, it is necessary to first resolve the dispute over the burden of proof.

The essence of the dispute, relates to claims that each partner, has breached his fiduciary duty to the other. In this regard, the business judgment rule does not insulate a partner, accused of self-dealing or breach of fiduciary duty, who has the burden to demonstrate that its challenged acts were proper (see, e.g., Kantor v. Mesibov, 8 Misc. 3d 722, 724-25 [Sup. Ct. Nassau Cty., 2005]). This, of course, includes coming forward with evidence to show that the conduct was not self-interested or improper. Inasmuch as it is determined that Palin breached the fiduciary duty owed to Capital Properties (and Palin), as seen below, his failure to produce such proof is dispositive. Moreover, one to whom there is owed a fiduciary duty may reasonably rely on the representations made without being required to make an independent inquiry (Anderson v. Weinroth, 48 AD 3d 121, 136 [1st Dept., 2007]).

III. RELIEF SOUGHT BY THE PARTIES

A. Claimant's Claims. In the Demand, Claimant's assert eleven claims, which as re-stated in its Pre-Hearing Memorandum, are as follows:

1. Claims 1-2: Breach of Contract and Breach of Fiduciary Duty against Dworman, for failing to carry out his partnership responsibilities, including his responsibilities as managing partner, and for improperly delegating his authority;

2. Claims 3-4: Declaratory Judgment, for determination that there is no basis for Respondent's claims that Enterprises, through its control of the property manager, Carard Management Corp., misappropriated or stole assets from the Partnership, or mismanaged the Partnership assets;

3. Claim 5: Specific performance, to enforce Section 4.3's (of the Agreement) requirement that Carard or any other affiliated company be engaged to be property manager for the Partnership, and to return control of day-to-day management to Enterprises;

4. Claim 6: Specific performance, to revoke Dworman's authority to act on behalf of the Partnership in connection with his lawsuits against Carard and the Partnership's former accountant, officers, employees or vendors;

5. Claim 7: Specific performance, to enforce the parties' March 2015 agreement in which they provided consent to dissolve the Partnership;

6. Claim 9: Specific performance, to resolve stalemate on issues as follows: (a) ordering the filing of the 2015 tax return prepared by Lutz & Carr and the appointment of a new accountant, (b) re-implementing the former strategy used by Carard with regard to leasing, and (c) proceeding with façade work contracts;

7. Claim 10: Breach of fiduciary duty for carrying out self-interested transactions in connection with the Partnership matters set forth in Claim 9;

8. Claim 11: Accounting, with regard to the disposal of 969 Third Ave, lost rental income from free or rent-reduced leases to Dworman's relatives, and offsets from damages caused by Dworman's surrogates after Dworman abandoned his partnership duties.

B. Respondent's Counterclaims: In his Answer, Dworman asserts two counterclaims, as follows:

1. Dworman demands that Enterprises and/or Palin account to the Partnership, and hold as trustee for the Partnership, any directly or indirect derived benefits and profits from the conduct of the Partnership pursuant to Section 43 of New York Partnership Law;

2. Dworman demands a full accounting of the Partnership's affairs as well as the monies, profits and other benefits directly or indirectly received by Claimant from the Partnership and the damage caused by Claimant to the Partnership properties. Also, he seeks attorney's fees, costs and prejudgment interest.

The gravamen of Respondents' claims is that the Claimant, through Mickey Palin "had stolen money and assets from their Partnership and then concealed his theft", contending that this constitutes self-dealing and breach of fiduciary duty concerning the Partnership, and its monies and properties.

IV. DISSOLUTION

The parties disagree on just about everything, however, they do agree on the need for dissolution of the Partnership, although for different reasons and on different grounds. There is also disagreement on how to conduct the winding up and distribution of the

assets. According to Claimant, the dissolution should be pursuant to, what it contends is an enforceable oral agreement between the partners, entered into on March 10, 2015. Claimant further contends that even if it is determined that the alleged March 2015 agreement is not enforceable, dissolution "should be ordered based on this framework". Respondent, on the other hand, contends that no enforceable agreement was reached by Dworman and Palin on March 10, 2015, and that the dissolution should be based upon Partnership Law, section 63, and as provided for in the Partnership Agreement.

A. Enforceability of the alleged March 10, 2015 Agreement:

On March 10, 2015, Dworman and Palin met with Alan Hoffman ("Hoffman"), to discuss the winding up of the partnership. Prior to this meeting, Dworman, who was interested in "separating from" Palin, had been meeting and speaking about winding up the Partnership, and they had both been individually speaking with Hoffman about the "tax consequences" of doing so. This led to a meeting in Hoffman's office on March 10, 2015. Mitchell Waxman ("Waxman") accompanied Dworman to the meeting, but did not participate, rather he waited in a separate room. During the meeting, the partners discussed the distribution of the three properties owned by the partnership, and their concerns about the tax consequences of a sale of the buildings. According to Claimant, at this meeting, it was agreed to distribute the buildings as follows: Dworman would receive 65 West 55th Street; Enterprises would receive 155 East 55th Street, which had a higher value, and that when the difference in values was agreed upon, Dworman would

receive a credit equal to the difference. Further, that the Partnership would hold 210 East 58th Street for a period of time, after which it would either be purchased by a partner or sold to a third party. Claimant states "[t]he only thing which the partners did not finally set at the meeting was the assignment of value for the properties and the calculation of the equalizing payment."

Hoffman testified that, at the end of the meeting he did not know if Dworman and Palin "actually shook hands", and that, other than valuation, they had "essentially agreed upon a framework for dividing up the assets". At the end of the meeting, Waxman rejoined them, and Hoffman was requested to prepare a memorandum summarizing the discussion.

Review of the memorandum, which Hoffman prepared, entitled "Capital Properties Potential Transaction", demonstrates that the 2015 alleged oral agreement between Dworman and Palin is, at most, an agreement to agree, which is unenforceable. See, e.g., Amcam Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 AD2d 423 (1st Dept., 2010). Here, an examination of the memorandum, purporting to set forth the parties' agreement, shows that the parties' alleged oral agreement was "contingent on the negotiation of additional terms". IDT Corp. v. Tyco Group, 13 NY3d 209, 212 (2009). For example, Hoffman wrote that distributions would be made, "once an agreement is finalized", clearly a reference to more than just an agreement on the valuation of the properties. Indeed, he wrote, and highlighted, that "the difference in values has not been

agreed to". The memorandum also contained a heading "Summary of Open Terms", which lists four open terms, including valuation; the requirement that they "must also agree on the independent managing agent for 210"; that "[t]attorney's [sic] must write an agreement and come up with a way to determine who will eventually purchase 210 [East 58th Street]"; and that there "must" still be a discussion about NYS/NYC RPT" (real property tax). Also, even Palin acknowledged that he and Dworman had not agreed upon "which of the three alternative scenarios [relating to 210 East 58th Street] to proceed with or adopt." To me, these are certainly material terms, as to which no agreement had been reached; rather, they were left for future negotiations. Therefore, it is evident that, at this March 2015 meeting, the parties did not reach an enforceable oral agreement on dissolution of the Partnership.[3]

B. Should the Alleged March 10, 2015 Agreement be Utilized in the Dissolution Process

Claimant contends, in its post-hearing memoranda and in its May 16, 2018, post-hearing letter, that the Partnership should be dissolved in accordance with the so-called "March 2015 Plan". Not surprisingly, Respondent objects, and contends that the dissolution and winding-up should be in accordance with the terms of the Agreement, and the relevant sections of New York's Partnership Law. Both parties agree that there should be appointed a Special Liquidator.

[3] Having reached this conclusion, there is no need to discuss Respondent's further argument that this alleged oral agreement is barred by the statute of frauds or by section 10.5 of the Agreement ("This Agreement may be modified or amended only upon the written consent of both of the Partners".)

Recognizing that an arbitrator has broad authority to craft a dissolution remedy, Claimant states that the Partners' "last major decision… included a tax-efficient plan for liquidating the properties", and was agreed between them in March 2015. Specifically, it is argued that this framework's main advantage is that it is "the most tax advantageous for both partners." In its Post-Hearing Opposition Brief, Claimant states that it "wishes to retain, at a minimum, one of the partnership properties – 155 East 55th Street." Claimant further explains, in its letter, that the 2015 plan, or what it describes as a "Structured Sale", utilizing a professional appraisal process, involving a "swap" of 155 East 55th Street and 165 West 55th Street, would not only result in substantial tax savings for the partners, but would be a faster and more efficient process, than a brokered or cash sales process. With regard to 210 East 58th Street, this property could be sold to either partner at its appraised value or to a third party. Purporting to buttress this proposed approach to the winding up, Claimant has presented a hypothetical illustrating what it contends is the "enormous difference" between a cash sale and a Structured Sale, contending that this would give each "partner greater flexibility and be a time and cost efficient method of attaining the ultimate objective."

Respondent, opposes this proposal, and requests that the dissolution be based upon Section 63 of the Partnership Law. Of course, since there was no enforceable dissolution agreement between the partners, this is the operative statute. Respondent further contends that the provisions of the Agreement should govern the winding-up process, not as Claimant wishes, what is set forth in the March 2015 Memorandum.

Section 5.3 of the Agreement provides for the appointment of a Special Liquidator and the sale of the Partnership's assets; and section 5.4 provides for the priority of distribution. In order to implement the winding up, and sale. Respondent, in its May 16, 2018 letter, agrees with the necessity for the appointment of a Special Liquidator, who would be directed to "obtain[] the maximum cash recovery for the assets being sold", and would do so by "retain[ing] one of the premier New York based international investment sales companies". Respondent opposes any dissolution or winding up, under the "oral dissolution agreement that Mickey Palin claims he made with Alvin Dworman in March 2015 so as to protect Claimant's personal tax position". In this regard, Respondent has stated that he would be "happy to accept the tax consequences of a third party driven sale".

I agree with Respondent that the winding up process should not be under the so-called March 2015 plan. Simply put, there was no "plan", just the discussion of a "potential transaction", as acknowledged by Palin and Hoffman. This being so, there is no basis for it to override the clear provisions of the Agreement, even though I may have the authority to do so, by taking "into overall fairness and the maximization of value for both Claimant and Respondent", as Claimant argues. [4] It seems inappropriate to consider, post-hearing, the proffered hypothetical, which is based upon a number of

[4] Clearly not coincidental, is that Palin's son (Dean Palin) and daughter (Andrea Fayer) each have been longtime tenants in their individual combined apartments located at 155 East 55th Street, which tenancies are challenged by Respondent as having been improperly leased. Adopting this proposal would undoubtedly be of significant benefit to both of these tenants, in addition to the other claimed benefits.

speculative assumptions[5], and which is not based upon the testimony or the evidence adduced at the hearing. Rather, the properties should be sold in a manner to maximize the proceeds from the sale of all three properties, by a professional broker, either on a combined basis or as individualized sales, whichever ensures the highest and best outcome. Such best value, as Respondent persuasively put it: "is not an appraisal, but rather what a willing buyer will pay for a property that is properly marketed for sale to the largest group of qualified buyers". Such marketing by the sales firm will be under the supervision of a Special Liquidator (Agreement, §5.3) to be appointed by me in this Partial Final Award. Furthermore, under the circumstances, as concluded below, Palin engaged in dishonest and wrongful conduct. Therefore, it would be inappropriate to adopt a plan designed to allow him to avoid tax consequences.

V. CLAIMANT'S REQUEST TO DECLARE DWORMAN A "MISSING WITNESS" AT THE HEARING

Claimant seeks a "missing witness" adverse inference from the fact that Dworman, who was present for at least three days of the hearing, did not testify. Respondent opposes this application, contending that it was untimely made and that the delay prevented him from seeking a protective order [redacted]

[redacted]

[5] E.g., the length of the sale process, and the "high likelihood that successful bidders will subsequently attempt to re-trade their bids" based upon the fact that these are old buildings with "significant deferred maintenance and ongoing capital expenditure requirements".

Passing the issue of timeliness, which itself would warrant denial of the requested inference, People v. Gonzalez, 68 NY 2d 424 (1986), Claimant is not entitled to such an inference. Here, prior to the hearing, [redacted] (see Joint Order Regarding Depositions, Order No. 4, Order No. 3, and Order No. 2). Ultimately, he was directed to sit for two 90-minute sessions. While Dworman attended portions of the evidentiary hearings, that does not demonstrate that his failure to be called by Respondent as a witness should be the basis for an adverse inference. Indeed, Claimant was on notice that Dworman would not be called, since he was not listed on Respondent's prehearing witness list, dated December 1, 1017. More tellingly perhaps, is that he was listed as witness "10. Alvin Dworman (via deposition testimony)" on Claimant's prehearing witness list, dated December 1, 2017. That Claimant chose not to call him reflects not only a strategic decision, but most likely a recognition that if it had, [redacted] Obviously, receipt of Dworman's videotaped deposition into evidence, was considered sufficient. Therefore, this request is denied, and I have evaluated his video-taped deposition as if he had testified in-person at the hearing.

VI. RESPONDENT'S REQUEST THAT THE TESTIMONY OF MICKEY PALIN SHOULD NOT BE CREDITED

Respondent cites to passages of Mickey Palin's testimony, which he contends are false, and which he claims "evidence[s] Palin's complete disregard for the truth and lack of credibility as a witness, and warrant[s] application of the doctrine of *falsus in uno, falsus in omnibus*". Therefore, it is argued that his testimony "should not be credited". I decline this invitation[6] to reject the Palin's testimony; rather, I will evaluate his credibility and reliability as I would do of any other witness, and decide whether or not to accept or reject any portion of it. However, since the issue of Palin's credibility has been separately raised, it is not inappropriate for me to note that the following informs my consideration of his testimony: (1) Palin's steadfast refusal to produce the books and records of the Partnership, to which Dworman was absolutely entitled, for over two years until ordered to do so by the Supreme Court[7]; and (2) Palin's improper use of substantial Partnership monies in the amount of $3,211,544, over an extended period of years, to make personal loans for his own personal purposes.

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[6] In its Opposition to Respondent's Post-Hearing Brief, Claimant opposes this application and argues that "If Any Witnesses Testimony Should be excluded" under this Doctrine, it should be that Hoppe's. Similar to my denial of Respondent's request, this is also denied.

[7] A brief chronology is helpful: on February 13, 2013, B.J. Hoppe, Executive Managing Director, ADCO (Alvin Dworman Companies) Group, an umbrella organization comprising over a hundred of Dworman's companies, wrote to Dean Palin, Palin Enterprises, requesting certain documents relating to Capital Properties. By July 2015, when this information was not provided, judicial intervention was sought, and the supporting affidavit demonstrated the demands which were made upon respondents Capital Enterprises, Michael Palin and Carard Management Corp. At an October 1, 2015 hearing on this application, the court dismissed out-of-hand Palin's claim that there was a conflict of interest requiring disqualification of Dworman's counsel and ordered "full access to all books and records".

VII. ALLGEGED 4% MANAGEMENT FEE

The Partnership Agreement provided that Carard[8] (which was a Palin company), or any other affiliated company, would be engaged "to perform the duties necessary to coordinate the business and affairs of the Partnership and to perform for the Partnership all services customarily performed by a property management company in accordance with sound management principles and the performance of such other duties as are required for the proper management, maintenance and operation of residential buildings similar to the Properties" (Section 4.3). It was further provided that the Partnership would pay Carard "such fair and reasonable compensation and fees as shall be agreed upon by the Partnership and [Carard] in an amount equal to the aggregate costs and expenses directly or indirectly incurred by [Carard] in performing its duties and obligations hereunder...." The parties agree that this provision did not entitle Carard to otherwise make a profit, but that it was limited to recoup the costs and expenses incurred with managing the Properties. Also, it appears undisputed that Carard did not have its own offices, but operated out of Palin's office, and individuals, who worked in his office,

[8] Section 10.2 recognized that Carard was a Palin company, as it provided: "...by Carard Management Company or any other entity affiliated with Palin". See also, Respondents' Exhibit No. 6. Claimant states that Carard "was technically owned by Dworman and Palin equally (Claimant's Revised Post-Hearing Memorandum, p. 14). However, at various times, Hoffman prepared tax returns, which identified as owners, Dean Palin and Gary Adelman (Palin's in-house controller and primary in-house accounting officer) (2007-2009) and which he changed to Mitchell Waxman (Dworman's in-house CFO) (2009-2011). Following a conversation with Dworman, who said that Waxman was not an owner, Hoffman removed his name and relisted Adelman. It is evident that Carard was always a Palin company, which Palin testified he had "formed" and that he was responsible for its "day-to-day operations". His son Dean Palin and Adelman were its officers and directors.

performed the management duties for the properties owned by Partnership, as well as for other properties not related to Carard. This required that the expenses relating to the Partnership had to be allocated to Carard.

According to Hoffman, after a few years he was told by Mr. Leif, a now-deceased member of the Partner's original accountants (Shanholt, Marinoff & Fleiss), to "deal with a four percent management fee and that's been for the most part, the management fee that's been talked about and – worked with since then". It is this so-called "4% management fee", which Respondent challenges and which Claimant asserts was agreed upon and implemented by the partners.

Initially, it must be noted that the Agreement provided that it "may be modified or amended only upon the written consent of both of the partners" (section 10.5). Nonetheless, according to Claimant, the 4% management fee, which was never reduced to writing, "was really an accounting mechanism", of which both parties were well aware, and that it had been employed for over three decades. Claimant explains the 4% management fee, as a "practical" accounting mechanism, whereby Hoffman recorded the "overhead management expenses" or the "expenses attributable to the Partnership Properties, the employees' time and any other office expenses (including rent, utilities, etc.)", as a "management fee on all of the year-end financial statements for the Partnership". As Claimant's expert demonstrated in Schedule I to his report, reviewing the financial statements during the years 2000 through 2014, the property management

fee actually charged was not regularized at 4%, rather it varied from 2.86% (2000) to 4.04% (2003)[9]. He calculated the total actual "Property-Management Fees – Actual Charged" for the three properties, from 2000 through 2014 as $5,417,909.

Claimant contends that Dworman was aware of, and consented to, this management fee, since he "periodically asked Waxman about it", who testified that he would compute the percentage from the financial statements "and give that information on a slip of paper to Mr. Dworman and that was about it". This periodic inquiry supposedly demonstrates that Dworman was aware that there was such a management fee and consented to it. Moreover, according to Claimant, when, infrequently, the actual expenses exceeded this 4% cap, Hoffman would "true up" the books to reflect the transfer of funds from one of Palin's other entities, recorded on the financial statements as "due to/from" Carard[10]. Or in other words, the Partnership was reimbursed whenever "the expenses exceeded 4% of the properties' rent revenues".

Respondent contends that there was no oral modification of section 4.3 of the Agreement, which provides that Carard would only receive its costs and expenses, and that he is not estopped from objecting to Enterprises' conduct. He contends that the only evidence proffered in support of the 4% modification, is the testimony of Palin and

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[9] Only on two other occasions, 2001 and 2011 was the fee 4% or higher: 4.04% and 4.03%, otherwise it ranged from 2.86% (2000) to 3.95%(2010 and 2014).

[10]Actually, in the exhibit utilized at this point during Waxman's testimony, Joint exhibit No. 34, it is referred to as "Due from managing agent").

Hoffman, which he claims is insufficient as a matter of law, and that the line item in the financial statements, which indicate a management fee, expressed in dollars, would not allow a "reader to understand whether the total represented actual expenses or a flat 4% stipend."

As a threshold matter, a review of the evidence does not demonstrate that there was any such an oral agreement between the parties. Although Dworman was not questioned about this so-called 4% management fee, Palin was, and his testimony was inconsistent. On direct-examination, he testified that "Right towards the beginning, we [Dorman and Palin] agreed on a fee of approximately 4 percent", to estimate what the expenses would be. Then on cross-examination, he admitted that it would be a "mistake" if Carard received the 4% fee for a year in which the expenses were significantly less than 4 percent, which changed on redirect-examination to that the fee could not have been "more than 4 percent". However, when asked at his deposition if there was such a 4 "percent fee based on the gross revenue of the properties", he replied "I can't recall that", further replying that it would be the accountant, Hoffman, who would recall it. Hoffman testified that it was the now-deceased accountant, Mr. Lief,[11] who suggested a 4% management fee, although he testified that he did not understand it to be something that the partners had decided, rather he just "took the direction from Mr. Lief." According to Hoffman, he spoke at least once with Dworman about the fee, who "did not express any

[11] Respondent accurately points out "there is no documentary evidence to support this [contention] whatsoever. "

disagreement with the management fee being 4 percent". This hardly shows an agreement between the partners, or as argued by Claimant, that "[b]y implementing this procedure, doing so, the partners did not modify the Partnership Agreement. They simply came up with a practical way of making sure that Carard was reimbursed for its costs of management". To the contrary, there is no basis to warrant overcoming the Agreement's requirement that it may be amended or modified in writing. Accordingly, the claim that the parties orally agreed upon a 4% management fee, notwithstanding the express language of the Agreement, is rejected[12] .

Turning to the damages, if any caused by this fictitious 4% management fee. As Dworman acknowledges, there certainly were "legitimate expenses" incurred by Carard in course of performing its management responsibilities. However, Enterprises, which has the burden to demonstrate what fees were legitimate, and their amounts, has failed to come forward with any such evidence as to the actual amount of these legitimate expenses. Rather, Claimant's expert, Saul N. Friedman, explained that "[o]ur analysis confirms" the 4% fee; and he challenged the methodology[13] of the Kreuter Report. According to Friedman, "Carard's fees were consistent" with this agreement. Hoffman

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[12]Buttressing this conclusion is that the management fee was not regularly calculated at, what Claimant contends is agreed-upon 4% of the gross revenues of the three properties, but rather as its own expert notes, "Carard actually received *less* than 4% of the gross revenues from 2000-2014 [except for 2003 & 2011]". There is no evidence that year-end reconciliations were made, except where the fee exceeded the 4%. This leads one to question, if there was an agreement that Carard receive a fixed management fee, why was it not paid?

[13] To the extent that Friedman, in his testimony and jointly authored report, disagrees with the Kreuter opinions, having reviewed both, the Kreuter is the more persuasive. Moreover, I reject the Friedman's Report conclusion that "The Kreuter Report lacks impartiality".

testified at his deposition, that "it didn't matter" to him what the expenses were, and he explained that "from my perspective, as long as the expenses didn't exceed four percent, it didn't matter to me what they paid. As long as they were under legitimate expenses and they --- every one of them were. Well, not everyone, but every one that we looked at were legitimate operating expenses for M. Palin, and he allocated some of these to Carard." And it is revelatory that when asked, again during his deposition, "[d]id it matter to you whether the expense was legitimate or not", Hoffman responded, "[n]o". At the evidentiary hearing, he testified that he "generally looked at the expenses to see if they were [legitimate]" and that he was not "necessarily aware of anything that may not have been [a legitimate expense]". His deposition testimony is more credible. It is evident that he did not know or care if a particular expense was legitimate or not, so long as it was within the 4%. Other than arguments made in Claimant's briefing, there has been a complete failure to demonstrate that any of the expenses were, in fact, proper.

Absent such proof by Claimant, Respondent proposes that "some subset of the unauthorized 4% management fee – perhaps 2% - that was charged to the Partnership consisted of legitimate expenses." Since it has been determined that there was no basis for Carard paying itself 4%, this fee is disallowed. However, it is also certain, as Respondent acknowledges, that Carard must have incurred "reasonable expenses", as the Agreement recognized, and requires "shall" be reimbursed by the Partnership. Because, on this record there is no way to calculate the actual expenses incurred, and in light of Carard's wrongful conduct in charging the 4%, the practical solution to this conundrum is

to apply Respondent's generous suggestion and calculate the reimbursable expenses at 2%. The alternative, due to the absence of proof by Claimant that these charges were proper, would be to unfairly penalize Claimant to disallow them all. Therefore, $2,708,954.50 is considered to be legitimate, reimbursable expenses, and $2,708,954.50 is considered wrongful damages.[14]

VIII. PARTNERSHIP LOANS

As identified in the report prepared by Kreuter, Respondent's expert, during the period from 2000 to 2015, Palin wrote 28 checks, totaling $3,211,544, on the single Carard bank account[15] to himself, his various businesses, and to Dean Palin and his

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[14] The concerns expressed by Kreuter concerning "Office Expenses", "Payroll Disbursed to Related Parties", "Automobile Expenses", "Travel and Entertainment Expenses", and "Excess Expenses Charged to the Partnership", do not affect this solution. Although, together with the improper loans, these concerns certainly impact considering how Carard, and Palin as the Managing Partner of Enterprises, and who acknowledged his control over Carard, mismanaged the Partnership's funds.

[15] It is not disputed that there was always only one single bank operating account, i.e., the Carard account, which contained funds of the three Partnership properties, and those of Carard itself. Notably, the Carard funds not only related to funds generated by these properties, but included funds generated by other non-Partnership properties managed by Carard. Whether it is correct, as contended by Respondent's expert, that "[s]uch comingling presents an environment that facilitates fraud", or whether as Claimant's expert testified, that it was common for "small closely-held companies" to use one account, is not the point. The use of a single bank account, to include not only funds related to the Partnership, but other Carard funds as well, was clearly improper under the Agreement, which provides "There shall be no comingling of the funds of the Partnership with funds of any other entity" (Section 6.4). This provision precluded even including the funds from the Partnership properties in a single account. Hoffman's deposition testimony, does not establish that the use of a single account, was "done with the two partners' awareness and consent", as contended by Claimant. After asserting that he did not "understand what your definition of comingling is", Hoffman later testified that he was relying "upon the fact that it was set up that way, the partners knew from the beginning and they never changed it...." Nor does Claimant's argument that Dworman's failure to question why he was never asked to sign any of the checks, warrant concluding that he consented to the single account.

companies. These payments were not disputed, rather they were explained in various ways, and at different times, by Palin.

At the hearing, Palin testified that each of these checks was either a "mistake" or an "error" and that all of them had been "repaid". However, this is contrary to his October 16, 2017 deposition, that these were "all short term loans", and that "every one of them was paid back." During this deposition, he also stated that he had told Dworman about the $160,000 check that he had written to Dean Palin's restaurant, and that Dworman had consented to it. The hearing testimony is also contrary to Palin's April 26, 2016 affidavit, submitted to the Supreme Court in opposition to Dworman's motion for Appointment of a Temporary Receiver, where he stated that he had "permitted short-term advances to be made to Palin-related entities – a practice he explained "I ended in 2014"; "a practice done with the full knowledge and consent of Mr. Dworman". In its post-hearing Opposition to Respondent's Post-Hearing Brief, Palin seeks to explain this plain discrepancy between the hearing testimony and the earlier affidavit, by stating "that affidavit, which was submitted in a different proceeding for different reasons…is irrelevant". Such prior statements, both the deposition testimony and the affidavit, are certainly not irrelevant. Rather, it is axiomatic that prior inconsistent statements may be

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Claimant contends that "there is no evidence that the bank account was used to operate multiple entities or that the revenues from other non-Partnership properties were commingled in the account", although this latter is contrary to Respondent's expert, who concluded: "I find it indisputable that Michael Palin and Carard (with the assistance of Janover partners) repeatedly and continually commingled the revenue and cash flow generated by the Properties with those of outside entities, allowing Carard and Michael Palin to misappropriate money for their benefit". At the very least, his violation of the Agreement, enabled Palin to do what he pleased with the single bank account.

used to impeach a witness's at-trial testimony. It is also significant that the entries in the books and records describe these 28 checks, as either a "loan" or an "advance". This was confirmed by Hoffman, who testified at the hearing that his understanding was that these transactions, were "[s]imply, loans that [Palin] was taking and paying back."

Based on the evidence, I reject Palin's claim, as he testified at the hearing, that these 28 checks were signed by him in error or as a mistake. I also reject the claim that this was done with the knowledge and consent of Dworman. Having reached this conclusion, it is irrelevant whether these monies were ultimately repaid. The point is that the checks were improperly drawn on the Carard bank account by Palin. Manifestly, they demonstrate his self-dealing with partnership monies. This was underscored by Hoffman, who himself testified that he did not believe that the "loan[s] should have been made". That he was able to reconcile the books, or that the loans were "repaid", ignores this fundamental reality. Simply stated, the Carard bank account was not Palin's personal account, to do with as he wished, although that appears to be how he considered it.

Respondent seeks to recover damages for these improper loans by applying New York's statutory interest rate of 9% (CPR § 5004), in the amount of $53,092. Claimant correctly argues that there is no "legal basis to apply a statutory rate to an interest loan calculation". Additionally, it can be judicially noticed that the average Bank Prime Rate during the relevant timeframe was well-below 9%. Therefore, recognizing that there was certainly damage sustained by these self-dealing loans, it is not inappropriate to apply a more reasonable 3% rate, thereby reducing the total damages to $17,697.33

IX. ALLEGED IMPROPER LEASING OF RENT STABILIZED AND NON- RENT STABILIZED UNITS

Respondent asserts that there has been improper leasing of various units in the properties, causing damage to the Partnership. Dworman contends that Palin improperly leased at least six non-rent stabilized apartments, at below-market rates to his family and to his friends. Additionally, he contends that Palin also improperly similarly leased twenty-one rent stabilized units. Palin, on the other hand, contends that Dworman, knew of, and consented to the leases to his son (Dean Palin) and daughter (Andrea Fayer), and that there was nothing improper about the other rentals. Additionally, Palin claims that at Dworman's request, the Partnership allowed a number of Dworman's family members as well as his friends and business associates, to occupy units "without paying rent during some or all of their tenure". Since however, according to Palin, Dworman now "has disclaimed any agreements with Claimant concerning these rentals to friends or associates", Palin seeks as his damages, the recovery of one-half of the "value attributed to the Dworman-affiliated tenancy benefits".

Six non-rent stabilized units were identified in the C&W Report (Amended), which were rented at 155 East 55th Street to: (1) Andrea Fayer (Apt. 11-A); (2) Dean Palin (Apt 10-K); (3) MDM Associates (a company partly owned by Palin) (Apts. 5-E/F/G); (4) Gerry Shallo (Dean Palin's business partner at S & P Realty) (Apt. 8-H); and

Jay Gindoff (identified by C & W as an insider[16]) (Apt 7-C); and at 210 East 58th Street, Sachs Equity (a company affiliated with the Sachs family) (Apt 12- G).

According to C&W, these six units had below-market rates, calculated at $129,165, or a ten year total of $1,291,650. In addition, to these units, Dworman contends that the Partnership was damaged by the below-market rate lease of an office to S & P Realty (Shallo's company) at 155 East 55th Street, amounting to $26,649.96 in annual damages, although this amount is not claimed as damages. Arguing that the burden is on Claimant, Dworman points out that no evidence was offered "to demonstrate that these units were not improperly leased, or any evidence to suggest that Dworman consented to these specific insider-affiliated leases".

Additionally, the C&W report identified 21 rent-stabilized units, which it alleged had been improperly leased and re-leased to Palin's family members, friends or business associates,[17] causing annualized damages of $467,158, or a ten-year total of $4,671,580.

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[16] This characterization is challenged by Claimant, who points out there is no evidence to support it, except the one-page tenant profile, Respondent's Exhibit No. 78, which it states does not contain any information to support such claim.

[17] According to the C&W Report, nineteen of such units were rented to non-primary tenants, nine were leased to family members of Enterprise's partners, six were leased to Dean Palin (who combined three of them with a destabilized unit into a 4 bedroom, 3 bathroom apartment) and Andrea Fayer (who also combined three of them with a destabilized unit into a similar 4 bedroom, 3 bathroom apartment), two were leased to Curtis Sachs (who combined them into one apartment), one was leased to Michael Sachs, and the other ten were leased to Palin's friends or business associates, including one to a corporate tenant, The Dalton School, which is described as Dean Palin's alma mater.

These rent-stabilized tenancies, included two corporate tenants, i.e., Garden School House and The Dalton School, neither of which are entitled to "rent stabilized tenancies".

According to Respondent, this conduct constituted a breach of Enterprises' fiduciary duty, since it enabled these lessees, to "enjoy below-market rates at the direct expense of the Partnership and Dworman" Respondent observes that Locatell, Claimant's rebuttal expert did not dispute that these lessees were not entitled, under the rent stabilization laws, to their rent stabilized apartments. Following her hearing testimony, Locatell submitted an "Amended" report, which still did not dispute this lack of entitlement; rather, she made some typographical corrections, recalculated certain of her "loss in value" calculations, and calculations in her Bricin garage leases section. Also, as with the non-rent stabilized units, Dworman contends that Enterprise had the burden to produce records, to justify that the tenants were entitled to the rent-stabilized tenancies, and that it failed to do so. Therefore, it is argued that this failure warrants "the logical conclusion...that Enterprises provided rent-stabilized leases to its family, friends and business associates at its whim, and then consistently renewed those rent-stabilized leases even when it knew that those tenants were not otherwise entitled to those tenancies".

Claimant responds that there were neither any improper rentals nor any damages incurred, because, all the tenants paid, as Dean Palin testified, "what any other tenant would have had to pay for that apartment". A review of the C&W report shows this not

to be so, and neither the Locatell rebuttal report nor her testimony concluded otherwise.[18] Buttressing this conclusion, is the evidence that S&P Realty had been paying less than market rate for its office space. [19]

Furthermore, with regard to Andrea Fayer and Dean Palin, Claimant argues that the uncontradicted evidence is that Dworman knew and consented to each's occupancy of their respective combined apartments, at the below-market rents[20] that they were paying, and that he "provided his consent for the combination of [their] units". This is based on the testimony of Dean Palin, who testified that he told Dworman that he was getting married, and that because the "top floor tenant had turned over" that he "was going to move in with my wife. To which Dworman responded "great mazel tov, take the apartment. No problem". And when his "family got larger" he told Dworman that he was combining apartments, who "didn't object". Concerning Andrea Fayer, according to Dean Palin, not only had Dworman also had been "told" that his sister lived in the building and had combined units, but that he had visited her apartment in 2007, when he attended the Shiva for Mickey Palin's wife. In addition, Hoffman testified that Dworman knew that they both lived in the building and "he would ask me how much their rents were", although there is no evidence what his response was, or that they he knew that

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[18] With regard to Locatell's testimony, and her "Amended Expert Rebuttal: of Cushman & Wakefield, Inc. Expert Report", Nakleh's explanation of the reasons for the some of the difference between his conclusions and Locatell's is persuasive.

[19] Dean Palin acknowledged that one tenant, his business partner and the owner of S&P Realty, Gerry Shallo, was paying "below-market" rates for his two-bedroom apartment at 155 East 55th Street.

[20] Claimant's expert, Locatell, concluded that the combined Dean Palin and the combined Andrea Fayer apartments, were currently rented at substantially below market rates.

each were paying below market rates. This is not credible evidence that Dworman consented to the below market rate rentals.

In contending that there were no "improper" leases, Claimant argues that Respondent failed to prove that there were so-called "insiders", rather that this characterization was based upon the allegation that "the tenants have some personal or professional affiliation with the Palins". To the contrary, there is a basis in the record, including the tenant profiles, which permits such description or characterization. [21] Claimant also claims that "Dworman never objected to any of these rentals". However, there is no evidence to support any claim that Dworman was aware of the nature of these rentals: either involving the stabilized-leases or non-stabilized leases; the below-market rents[22]; or to Palin's family, friends and/or insiders. Therefore, the issue is not whether he objected -- and the evidence on this is silent; but rather, whether he consented, after having been fully informed by Enterprises about these rentals. Enterprises, has failed to demonstrate there had been any disclosure to Dworman concerning these improper rentals. Based upon this evidence, it is concluded that such conduct constituted a breach of fiduciary duty which was owed `to Dworman.

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[21] Claimant acknowledges that there are "only a few individuals and entities that can be considered affiliates, and this includes Mickey Palin's children, Andrew Fayer and Dean Palin", including, Gerry Shallo, MDM Associates and Sachs Equities. Also, it acknowledges that "a couple of the Sachs family grandchildren lived in the buildings". Dean Palin testified that Michael Warren is "the son of one of my dad and Sachs's partners". (1647) This leaves as entities only The Dalton School, alleged without contradiction, to be Dean Palin's alma mater, and The Garden Hill School, which is not further described.

[22] During the hearing, Dean Palin acknowledged that one tenant, Gerry Shallo was paying "below-market" rates for his two-bedroom apartment at 155 East 55th Street.

Having concluded that these rentals – rent-stabilized and non-stabilized units – were improper, it is necessary to turn to Claimant's argument, that "to the extent Respondent will be permitted to 'disclaim' his consent and approval [23] of the arrangements with regard to the so-called 'Palin insiders', so too should Dworman's 'friends and family' be held accountable for the significant offsets associated with their rent reductions". This refers to the rentals to Lester Dorman (Claimant's brother), Maria Valium (friend of Dworman), Grace Gallo (alleged to be Lester's companion[24]), and Alpert & Kimmel (Dworman's personal attorneys). It appears that Lester Dworman occupied his apartment, in the 1990s and that he did so without paying any rent.[25] However, no documentary evidence has been submitted to support the claimed loss of rent. The only evidence is the extremely vague testimony of Dean Palin, which was insufficient to support any claim of reasonably computable damages. Regarding Valim, who occupied her apartment from the mid-1990s to 2016, again, there is no documentary evidence to support the similarly vague assertions of Dean Palin.[26] Finally, as to Alpert & Kimmel, it is also Dean Palin's vague testimony[27], unsupported by any documentary

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[23] There is no finding of such "consent and approval" by Dworman.

[24] As to Gallo, there has been submitted no claimed damages; rather it appears that she is mentioned solely to demonstrate that apartments were leased to friends of Dworman, citing to the Dean Palin's testimony that "at [Dworman's] request, we gave her an apartment".

[25] On May 30, 1991, Palin wrote to Dworman complaining that Lester was not "paying" rent.

[26] Dean Palin testified that Valim rented "an old stabilized apartment" and while they could have "gotten more for the apartment", he could not "quantify" an amount, at best he thought that the rent at the time "she took possession could have been at 2300 a month, 2200 a month…and I think she was paying 14'.

[27] Dean Palin testified that the "lawyers didn't pay rent" during the period of their occupancy, that it was a "barter deal with [Dworman] for past work". He estimated, for the beginning of the rental (1991) and for

evidence, that Claimant relies upon. This is insufficient to permit computation of any reasonable damages amount.

Accordingly, with regard to these twenty-seven improperly leased units, the loss of rent, over a 10-year period, or damages, totals $5,963, 230[28]

X. BRICIN LEASES

There are commercial parking garages located in two of the buildings: 65 West 55th Street and 155 East 55th Street. Beginning on September 28, 1998, and continuing until the Supreme Court's, 2016 Order, these lots were leased to Bricin Parking Corp., a separate company, that was owned and operated by Adelman, one of the officers (Controller) and shareholders of Carard. Palin testified that the two prior garage owners had been stealing and that Dworman suggested that they be taken over and "run" by Adelman, who had had some prior experience with garages. The partners agreed to this arrangement and Bricin was then formed by Adelman. The initial 1998 leases were amended in 2004, four years before their 2018 expiration dates, and extended to 2019, with no increases throughout the term of the lease.

2015, various possible high and low rents; however, Enterprises did not produce any evidence - written or otherwise - to support these claimed damages.

[28] It is noted that this is consistent with Exhibit 4 to the Amended C&W Report; however, in the text there is an arithmetical error and C&W calculates the loss of rent, over a 10-year period as $5,963,228.

According to Palin, in connection with these garage leases, he made an oral agreement, whereby Adelman would keep 50 percent of the profits and pay the other 50 percent to Carard. Adelman was also paid an additional salary of $48,000 per year, in addition to the salary he received from Carard. It was stipulated that this alleged oral agreement was not contained in the written leases or amendments. Although Palin testified that these oral terms were "approved by my associate and partner [Dworman]", this assertion is not credible. Especially in light of the method in which the funds were recorded in Carard's books and records, examination of which showed that during the period 2000 through December 2016, $714,385, the 50 percent share of Bricin's profits, were recorded as "Management Fee Income". According to Kreuter, these monies "were not remitted to the Partnership and were concealed in Carard's books as "management fees".

Hoffman, testified that this 50 percent was paid to Carard, that these monies were reflected on Carard's tax returns as income, and that they were credited to the Partnership "as a reduction of the [4%] management fees", or in other words, that such management fee "was reduced by the 50 percent profit interest in Bricin". To Hoffman, the Bricin leases generated 50 percent profits were an "offset to the 4 percent management fee", which he testified would have to be "income to the partnership by way of a reduced management fee". However, he testified that while the Bricin monies "could have been shown...as additional rental income to the properties", it was booked "as a lower management fee". Hoffman, himself, unabashedly testified that "the mechanism – it

might be difficult for me to explain. The intention, and I think we accomplished that, was to make sure that Mr. Dworman and Mr. Palin shared equally in any outside income from Bricin....[29]

As pointed out by Respondent, there is "[n]o evidence that the Partnership received any benefit from the payments made by Bricin to Carard representing 50% of the Bricin profits". While Claimant's contends that this allegation is "false", Claimant fails to indicate where, if at all, the management fees were reduced by the Bricin payments. Claimant has not produced any evidence to the contrary, except to state that "Carard account funds belonged to the Partnership" and that all of Carard's "excess funds" were transferred to the Partnership in 2016, when Halstead assumed its role. This does not demonstrate that the Partnership ever received the benefit of its 50 percent interest, i.e., $714,385, in the garage profits.[30] Accordingly, it is concluded that such an arrangement was entered into by Palin, without Dworman's consent or knowledge, and that Enterprises is liable for this breach of its fiduciary duty.

Respondent contends that the Partnership is also entitled to recoup the 50 percent portion of the profits retained by Bricin. This argument is grounded on the further claim

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[29] Hoffman's convoluted hearing testimony on this subject was not credible.

[30] At the Post-Hearing argument, counsel for Palin, contended that "Dworman shared with [Palin] the fifty percent of the profits of Bryson[sic]". This contention is rejected as unsupported by the evidence. Rather, as testified by Kreuter, these monies "do not show up in the partnership's books as income", or as argued by Respondent's counsel, "[]t never went to the partnership. Alvin Dworman never got the benefit of it." Or in other words, when asked, if "the reduction of the expenses at the Carard level doesn't have a commensurate benefit to the partnership", he responded "Correct", having just testified that there was "no economic benefit derived at the partnership level."

that it was a breach of Palins' fiduciary duty to have permitted "Bricin, a Palin-affiliated insider, owned by Adelman" to secretly derive profits from Bricin during the same period. The difficulty with this claim is that it was not included in the Kreuter report, and not raised until the hearing, when Kreuter stated that this item of damages, "must be multiplied by a factor of two", because of "the benefit to Gary Adelman". Therefore, this claim is denied.

In addition, the lease renewals were described by C&W as "substantially below market". C&W opined on the annual market rate as of November 1, 2008, and applying a 2% annual growth rate, which rate was accepted in Claimant's Amended Expert Report ("referred to as Claimant's Expert Report") "as appropriate", disputing however "C&W's market rate for the subject garage spaces". Having reviewed both expert reports (C&W and Locatell) and having considered their testimony, C&W is more persuasive[31]. Therefore, the damages from the below market Bricin leases at 65 West 55th Street are $500,000 and at 155 East 55th Street are $85,000, totaling $585,000.

XI. LEASING/BROKERAGE COMMISSIONS

Dean Palin testified, on cross-examination, that from 1990 through May 2016, he worked "as a commission sales person" at S & P Realty, owned by Gerry

[31] Although in her opinion, she disputed the market rate for 65 West 55th Street; however, she did not challenge the market rate for 155 East 55th Street.

Shallo, which handled the commercial rentals in the three buildings. Dean Palin acknowledged that in doing so he was "acting as a representative of both the landlord and the tenant", and that the tenants "knew that he was on both sides of the transaction". He also testified that Dworman knew of this practice, i.e., "receiving commissions for tenants [he] brought into the building[s]", or as he put it, that he was "getting…[a] little share of the commissions. That's how I was compensated a little extra from Mr. Dworman and my dad." According to Dean Palin, Carard would pay Shallo, who then paid him "whatever [Shallo] thought was fair"; they did not have any prearrangement. He was unable to estimate the amounts paid to him, although he testified that "[i]t could be closer to a hundred" thousand dollars a year. He explained that "it goes up and down. It's not that consistent".

On January 3, 2018, the last day of the hearing, almost a month later, while being cross-examined, B.J. Hoppe was shown Respondent's Exhibit No. 152 (entitled "Mark Paneth Work Product, Review of General Ledgers for Payments made to S&P Realty for the Period 2000 through 2016"), which had been prepared on January 2, 2018, consisting of 49 pages, which was represented by counsel as "simply a computation of the documents behind it which are the financial materials produced by Mr. Palin". Or in other words, it was argued to be a "demonstrative" exhibit. Over objection, it was received conditionally into evidence; Claimant was allowed an opportunity if it wanted to challenge it, to do so later. It was challenged in the post-

hearing briefing, on the ground that it was the work product of Respondent's expert, who had already testified and whom Claimant was unable to cross-examine.

This objection is well-taken. The document may have been compiled from source documents provided by Claimant; however according to its title, it was Respondent's expert's work product and not a demonstrative exhibit based upon facts admitted during the evidentiary hearing. Therefore, the Claimant was denied an opportunity to cross-examine Kreuter, if indeed he was the person who prepared it at Mark Paneth. Accordingly, Respondent's Exhibit No. 152 is stricken from the record.

Turning now to the analysis of this so-called commission arrangement. Initially, the claim that Dworman knew of, and consented to this arrangement, is rejected. It strains credibility that Dworman would have agreed and consented to Carard paying these commission to S & P Realty, if he had known that a portion of such commission would be then returned to Dean Palin, an owner of Carard. It is not insignificant that Dworman, at his deposition, testified that he had never been told about S & P. The only credible explanation is that S & P Realty was kicking back commissions for permitting it to lease the Properties' units. These payments, which although were not included or referred to in Kreuter's testimony, nevertheless were acknowledged during the testimony of Dean Palin, and cannot be ignored.

While this conduct was certainly improper, Respondent's Exhibit No. 152 was stricken from the record, and Dean Palin's testimony, alone, is insufficient to even estimate a reasonable quantum of damages. Therefore, this request for damages is denied. Although this is relevant concerning Dean Palin's credibility.

XII. PARKING GARAGE REPAIRS

Respondent claims that the two parking garages had been "severely neglected and fell into dangerous disrepair", which damages pose immediate safety hazards". It relies on its expert Alberto Mora, and the Vidaris Report, which states that Merritt Engineering ("Merritt"), which has been retained by Halstead, the court-appointed property manager estimates the "repair work needed at 155 E 55th Street is $1,100,000, not including repairs to structural steel which will likely be needed. At 65 W 55th Street, the estimated cost is $150,000". Combining these figures, Respondent seeks damages of $1,250,000.

In response to this request, Claimant raises a number of objections, including that the partners had agreed to monitor the garages and repair what was necessary, without closing the garages. Except to observe that it is highly unlikely that Dworman was so involved with the garages to permit concluding that he was aware of, and consented to their neglect, I turn to the other issues. Concerning "immediate safety hazards", because

Halstead advised Alex Kalajian[32], that Ipark (which replaced Bricin) would "run the garage with repairs done at a later date", it is argued that the condition of the garages did not pose an "immediate safety hazard". While the Vidaris Report did opine that "the hazardous conditions pose immediate safety hazards", which may or may not have been rendered incorrect by Halstead's decision to repair the garages "at a later date", this does not negate the conclusion that the "garages appear to have been severely neglected". Indeed, Vidaris described the extent and nature of the neglect, in great detail.

Regarding the repairs themselves, the Vidaris Report, referring to Merritt, states that the one-half of the parking deck will be replaced at 155 East 55th Street, and that at both buildings, "the ramps will be replaced, and extensive repairs to the rest of the deck will be needed". However, as Claimant points out "[i]t is not clear exactly what work will be undertaken at the garages, when it will be performed, or what costs might be borne by the Partnership." Supporting this is Claimant's reference to the IPark leases, which have identical provisions requiring that the "Tenant shall perform improvements and betterments to the Demised Premises to make the same ready for the conduct of Tenant's business operations...which Improvements shall be performed in accordance with...this lease". The leases also provide for the Landlord to "perform, on a one-time basis, at Landlord's sole cost and expense, all necessary repairs to the sidewalk immediately in front of the ramp leading to the Demised Premises and to the ramp

[32] Under the management contract with Halstead, each party would have an authorized representative. Alex Kalajian was Dorman's representative.

between the Demised Premises and the…Street". There is no reference to repairing the parking decks. Therefore, it is not possible to determine from Merritt's estimate, as reported by Vidaris, whose responsibility the deck repairs are, and how the repair costs will be allocated between the Landlord, i.e., the Partnership, and the Tenant, i.e., IPark. In the absence of such information, any such effort would necessitate impermissible speculation. Accordingly, there are no damages are attributed concerning maintenance of the parking garages.

XIII. ALLEGED DIMINUTION IN PROPERTY VALUE

This category of damages, is set forth in the C & W Report, [33] which constitutes the total of the difference between the "Actual Scenario" Forecast and the "But For Scenario" Forecast, as explained in the various tables, relating to each property, i.e., Net Operating Income, Capitalization Rate, Preliminary Indicated Value, Capital Expenditure Deductions (Façade Repair, Elevator Replacement, Apartment Renovations), Indicated Value, and Rounded. The total Diminution in Property Value, as calculated by Respondent, is $25, 300,000; as set forth below, I recalculate this to total $21,444,693.

[33] I have also carefully reviewed the Vidaris Report, and the testimony of its authors, Alberto Mora and David Nguyen, and Claimaint's Objection to the Expert Report of Alberto Mora & David Nguyen of Vidaris. The reasoning and conclusions of the Vidaris Report are accepted.

The Locatell rebuttal, both in her Report and testimony, alleges that there are "five (5) main errors" in the C&W Report.[34] Concerning these allegations, she asserts that the capitalization rate used by C &W, for the "But For Scenario" of 3.5% is too low.[35] I agree, that the capitalization rate fails to adequately consider all the risks involved and as result, the Locatell suggested rate of 3.75% is adopted. With regard to her other asserted errors, i.e., "But For" Income Projections; Ancillary Vacating and Lease-up Costs of Units; and Repair & Maintenance and Reserve Costs; I am satisfied that the projections in the C&W Report are not incorrect.

It is necessary only to discuss the Façade Repairs: New York City has instituted what is commonly known as FISP (Façade Inspection and Safety Program), administered by the New York City Department of Buildings ("DOB"). (Local Laws 10 & 11). The FSIP evolved from a requirement that that only street-facing facades be periodically inspected, i.e., every five years, by a licensed architect or engineer, to a requirement that all sides of the building be inspected. A building does not "pass" an inspection; rather there are three categories of conditions: (1) safe - no further action is required; (2) unsafe - which automatically requires that the owner erect a sidewalk shed; and (3) SWARMP –

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[34] Item 3, in the Locatell Report, "Mathematical Vacancy & Collection Loss Error", has been corrected in the Amended Expert Report of C&W (see Note preceding the Report's Table of Contents)

[35]Exhibit 3 to the C&W Report ("Sales Comparables"), uses 7 properties with an average capitalization rate of 3.67%, itself over the 3.50% selected. Locatell 's opinion that the selected "capitalization rates should …be higher", is persuasive. She accepted the actual scenario rate of 3.5% and testified that "on the but-for-scenario, [she] adjust[ed] the cap rate to 3.75. It's a minimal adjustment." I have adopted this 3.75% in my calculations.

which means "safe with a repair and maintenance program" (the property is currently safe but in the next cycle or inspection it will automatically be considered unsafe).

Howard Zimmerman, who specialized in FSIP compliance, was engaged by Enterprises to conduct façade inspections of the various buildings. He testified that he dealt with Palin, Dean Palin and Scott Ross, and that it was the latter with whom he had most of his interactions. He testified that he did not know "who Alvin Dworman is". As Zimmerman testified, and as summarized in the Vidaris Report, he conducted various inspections of the three properties:

- 210 East 58th Street: a previous FISP report had classified the building as SWARMP. Zimmerman's 2007 inspection reported the façade "unsafe", which triggered a requirement that the building owner immediately erect a sidewalk shed to protect pedestrians. Zimmerman also filed a FISP report in 2015, that the building remained unsafe, and "that no repairs or maintenance work had been completed since the previously filed FISP report". However, as he testified, he immediately "instructed" the owner to erect the required shed, no sidewalk shed was erected until 2016. The record shows that the DOB filed a violation on January 15, 2008, resulting in an $800 penalty.

Additional DOB violations were filed in 2011 and 2014. In 2013 and 2014[36], HH Building Consulting and Architecture filed applications to renew the permit for the nonexistent sidewalk shed – the first renewal stating that the work was 5% complete; the second that the work was 25% complete. However, as noted by C&W, because "Vidaris was unable to estimate[37] cost of the [façade] repair work", the cost of the façade repair is not included in the damages computation, although, as C&W correctly observes "this is yet another indication of mismanagement".

- 155 East 55th Street: Zimmerman filed a report in 2007, declaring the façade was SWARMP, and that the "Repairs [are] to be completed by 2010". The DOB issued a violation in 2014, for the failure to file the next cycle report. The next report was filed in 2015, stating that the façade was "unsafe". Although, this should have caused the immediate erection of a shed, it was not erected until later that year. Here C&W, referred to the Vidaris Report, which estimated the cost of façade repairs at this location to be "$1,700.000, and instead deducted $1,710.00 amount from the "But For Scenario." (This has been corrected in my recalculations).

[36] On November 19, 2012, an application to erect a sidewalk shed was filed by George H. Hernemar, on behalf of Cerine Scaffolding Services.

[37] At the evidentiary hearing, Zimmerman, testified that there had been no work done at 210 East 58th Street, to remedy the situation and no shed had been erected. He estimated the costs of repairing the façade, in 2006, as "maybe a half a million dollars or more." This estimate is not included in the damage calculations.

- 65 West 55th Street: In 2007, Zimmerman filed a FISP report stating that the façade was SWARMP. As with 155 East 55th Street, the DOB issued a violation in 2014, because of the failure to file the required next cycle report. Thereafter, on May 18, 2015 a FISP report was filed that the façade was unsafe; and on June 29, 2015, the Cycle 8 report was filed, declaring the façade unsafe. No shed, as required, was immediately erected. Here too, relying on the Vidaris Report, C&W accepted Vidaris' repair estimate of $1,500.000.

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Palin claims, as he has throughout these proceedings that "Dworman was aware of the state of the facades" and that the "the partners – consistent with their old-school management philosophy - were initially reluctant to spend the money required for this capital investment".[38] (It should be recalled that Zimmerman testified that he did not know Dworman.) Furthermore, once they had decided "to make the necessary investment, it took time, and withholding of Partnership distributions to build up the necessary reserves to fund the work". This is not persuasive. On the basis of this record it cannot be concluded that Dworman was aware of these unsafe conditions, and consented to years delay, placing members of the public at risk of serious injury or death. The work was mandated by the Local Laws, and the record demonstrates that, on behalf

[38] Although Claimant states that Zimmerman so testified (Claimant's Opp. to Resp. Post-Hearing Brief, p. 69), in fact, as noted above, Zimmerman did not know Dworman

of Carard, false reports about the sidewalk shed were submitted to the DOB. While counsel for Complaint correctly states "there is certainly no evidence that Dean Palin or Mickey Palin requested for false documentation to be filed, and there is no evidence of any damage resulting from these filings", it can hardly be that false filings would have submitted without Enterprises' knowledge and consent.

In an effort to downplay the serious of the façade issues, Dean Palin testified that although he had no specialized training, he had inspected the three building, and concluded that they were safe, even though he stated that "it was a big capital project to be discussed with Alvin Dworman and my dad". Echoing this is Claimant's statement that "that no member of the public was ever harmed due to the building facades" (emphasis added), because "Carard regularly monitored the facades during the period when the partners were contemplating how to approach the issue. Thankfully. However, as earlier stated this does not show that Dworman agreed that they should not comply with the FISP and his agreement to the submission of the false reports to the DOB.

It is evident that the failure, as required by law, to immediately erect the necessary sidewalk sheds and then to permit the submission of false reporting to the City, constituted an egregious breach of the fiduciary duty owed by Palin. With regard to the remedial costs, there has been no evidence submitted to rebut the costs estimated by Vidaris as to 155 East 55th Street and 65 West 55th Street.

In addition to the costs of Enterprises failure to perform this mandated facade repair, Report, the C&W Report based its damage calculations on the items referred to under "Scope of Work", in its Report. C&W calculated two scenarios: "Actual" (what actually took place) and "But For" (reflecting "what likely would have occurred 'but for' [Claimant's] alleged mismanagement". As already indicated, this opinion, is persuasive and its conclusions are accepted, except as recalculated. Underlying these damages (in addition to the façade repair costs) are Enterprises improper leasing of the rent stabilized and non-rent stabilized apartments, which has been already determined to constitute a breach of its fiduciary duty; its failure to perform regular maintenance, as documented in the Vidaris Report, which I conclude, based on the record, was done without Dworman's knowledge and consent (including the elevator replacement costs, documented in the Vda letters attached to the Vidaris Report), the need for apartment renovations, again occasioned by Enterprises' undisclosed mismanagement. In sum, as C&W concluded, all of "this adversely impacted the value of the properties".

Inasmuch as the C&W capitalization rate for the "But For" Scenario of 3.5% has been rejected in favor of a 3.75% rate, these damages are recalculated to total $21,444,693.[39]

[39] These recalculations are as follows:

65 West 55th St.	Actual	But For	Difference
NOI	$1,974,213	$2,12,222	
Prelim Indicated Value	52,645,680	56,592,586.70	
Capital Expenditure Deductions (total)	2,150,000	2,550,000	

XIV. ENTERPRISES CLAIMS

Underlying Enterprises claims' (as well as its opposition to Dworman's claims already discussed) is the argument, already rejected, that this was a partnership, "common for men of their generation", conducted "like a family business". The Partnership's business was run on "[a] handshake". That while "Dworman left the day-to-day tasks" to Palin, "Dworman did not ignore the business. To the contrary, he knew exactly what Mickey Palin was doing, and the two partners made all the important partnership decisions together". And that "Palin kept no secrets from Dworman...." If this were so, and Dworman had been fully informed of what had been occurring, then why would he have opposed production of the books and records? The obvious answer is that this version is simply not credible; rather, Palin, self-interestedly ran the Partnership for his own benefit (and for the benefit of his son, Dean Palin, who actively participated in managing the Properties); not only making improper loans, but as described above

Indicated Value	50,495.680	54,042,566.70	3,546,907

155 East 55th St.	Actual	But For	Difference
NOI	$2,424,393	$2,841,687	
Prelim Indicated Value	64,650,480	75,788,320	
Capital Expenditure Deductions (total)	2,250,000	2,250,000	
Indicated Value	62,400,480	73,528,320	11,127,840

210 East 58th St.	Actual	But For	Difference
NOI	$1,374,462	$1,660,2100	
Prelim Indicated Value	36,652,320	44,272,266.70	
Capital Expenditure Deductions (total)	550,000	1,400,000	
Indicated Value	36,102,320	42,872,266.70	6,709,946

providing below-market rates and improper tenancies. It was precisely because of these allegations of misconduct by Enterprises, that the Supreme Court acted in 2016 and removed Carard, Janover and Bricin. Significantly, these allegations, have now been confirmed during this arbitration. [40]

Turning to the Claimant's specific claims:

A. Breach of Contract and Breach of Fiduciary Duty Against Dworman:

These two claims relate to the argument that in violation of §4.1 of the Agreement, Dworman "walked away" from the Partnership, and that as a direct result "Claimant has been significantly damaged". This damage includes several separate claims: the implementation of what is described as "B.J. Hoppe's Leasing Strategy"; the stalled

[40] This litigation, according to Claimant was the result of what it characterized as "the Palin Agenda", the title of an email attachment from Mitchell Waxman, dated May 08, 2015, a couple of months after the Partners' unsuccessful March 2015 meeting, following which there was no further contact between Dorman and Palin, and several months before the books and records lawsuit. It is argued that this document, constituted a "plan", by which B.J. Hoppe "Implements Plan to 'Isolate Palin' and take Control of the Partnership". This document, *inter alia*, advises that Dworman not talk to Palin. Since by this time Dworman had retained litigation counsel (reference to "Chris [Christopher] Sullivan"), this is not surprising. However, neither the document, nor the evidence adduced at the hearing supports the claim of such a plan. Nor is there any evidence to support the claim that the lawsuits were in furtherance this plan, and were "designed to drive a wedge even further between Dworman and Palin, weaponized the partners' longstanding informal manner of doing business against Palin". Furthermore, this claim is belied by the prompt decision of the Supreme Court in granting all of the requested relief. Additionally, B.J. Hoppe's testimony that Dworman in 2013, asked her to start focusing on Capital Properties, following which she contacted Palin about obtaining information about the properties is credible. This led to the requests for such information, which culminated in the filing of the books and records petition, and thereafter the other lawsuits. That Dworman executed, the two Powers of Attorney, which were never utilized, does not warrant a different conclusion. Nor do they support the contention, which has no basis in the record, that "Dworman 'Walk[ed] Away from the Partnership and Hoppe Solidifies Her Control Over the Business".

façade repairs; the Partnership's failure to make tax filings since 2015, and that the Partnership has stopping making distributions.

The reference to the so-called B.J. Hoppe Leasing Strategy is the claim that she had "taken complete control over decisionmaking communicated on Dworman's behalf" with Halstead. Because of this, Claimant that it is "entitled to an offset for the damages that Respondent has caused to the Partnership via his representatives' control over Halstead". Underlying this is the argument that "[t]he Partnership is suffering from unprecedented vacancies due to the management strategy being implemented by Respondent of aggressively evicting tenants and seeking top of the market rental rates", including "Halstead's refusal or failure to rent vacant commercial office spaces to willing tenants at 155 East 55th and 65 West 55th."

The short answer to the claim concerning Halstead's leasing strategy, is that the evidence does not establish the existence of control by Dworman via Hoppe of any control over Halstead. The three management agreements (one for each of the three properties), dated June 1, 2016, provide that Halstead "shall consult in connection with making decisions, obtaining consents and directions relating to the management of the Building", with specified representatives of Properties (Alex Kalajian) and Enterprises Michael Frender).[41] Claimant contends that "Hoppe personally communicated, directly

[41] The Halstead Agreements require joint consent with regard to all decisions concerning the Properties, e.g., employment and working conditions, expenditure of over $10,000 for repairs and alterations, contracts

and extensively, on an *ex parte* basis, with the President of Halstead, Paul Gottsegen and other Halstead employees, and directed them on how Halstead should conduct itself and communicate with Enterprises". The testimony shows that she communicated with Gottsegen before the appointment, and afterwards she had contact with him and other employees of Halstead concerning the Bricin leases. Also, the evidence shows that Dean Palin himself had communicated directly with Kalbfeld.[42] There is no basis for this claim of control over Halstead.[43] Further discussion is unwarranted.

Regarding the tax filings, Dworman has written to the Supreme Court explaining why he had refused to sign the disputed 2015 tax return. It seems evident that this is a matter for the court and not for the arbitrator. Concerning the stalled façade repairs, the dispute is over whether Dworman should be required to agree to Cerina's finishing the work on 210 East 58th Street. He opposed continuing with Cerina, on the ground that it was "objectively reasonable decision", because of the fraudulent documents which had

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concerning services such as electricity, gas, steam & etc., insurance, engagement of auditors for utility & etc., residential renting and subletting.

[42] It warrants noting that Fremder, Claimant's representative to Halstead, sought preferential treatment from Halstead for Michael Warren, who he explained "has a thirty five year relationship with Mickey Palin, and he and his brother are partners in other properties with the Palins in NYC." A similar request was made by Fremder concerning Andrea Foyer.

[43] Claimant also asserts that Hoppe "engineered the removal" of S&P Realty, by providing false information to Halstead, and that this "stalled" commercial leasing. Assuming that the incorrect information in Hoppe's October 6, 2016, email to Halstead caused the removal of S&P, a reading of the text of this email does not change the conclusion of lack of control. In fact, the record shows instances where Halstead sought joint consent. The record does not support the claim that commercial leasing has been stalled, at least one such lease occurred, i.e., 4J/K, 65 West 55th Street, on September 1, 2016. While in June 2017, there was a draft agreement concerning a proposed "Commercial Brokerage Agreement", there was no evidence concerning this draft's status. Or, that as Claimant has asserted that "[a]s of the date of the arbitration hearing, Dorman's representatives had still not approved the draft commission agreement".

been filed with the DOB. Since the hearing evidence, as earlier determined, clearly supports this contention, Dworman's concerns with regard to the continued engagement of Cerina are appropriate. With regard to the alleged improper failure to make distributions, since there will be a dissolution and winding up, the requisite distributions, if any are to be made, will be disbursed after the final accounting.[44]

B. Declaratory Judgment:

This seeks a declaratory judgment that Enterprises did not, thorough its control of Carard misappropriate, steal, or mismanage assets from the Partnership. Having concluded otherwise, this request is denied.

C. Specific Performance:

1. Restoration of Carard and Return of management control. Here Claimant is requesting that Carard or an affiliated company be restored as manager, and that day-to-day management control be returned to Enterprises. Halsltead was appointed pursuant to an order of the Supreme Court. Therefore, any application to vacate or modify these orders, be made to the court. And the court should be properly advised

[44] In light of the forthcoming winding up of the Partnership affairs, at which time the requisite distributions, if any will be accounted, there is no need to enter the dispute whether they have been requested or not, and whether relief should have been sought from either the court or the arbitrator.

of the conclusions in this arbitration, following the extensive evidentiary proceedings. This is recognized by Claimant, who referring to the stipulated order, stated that the "entire basis for this agreement was in order for the resolution of the claims of misappropriation." They have been resolved.

a. Revocation of Dworman's authority regarding lawsuits. Except for a reference to this Claim in a footnote (Cl. Revised Post-Hearing Memorandum, p. 60, fn. 24) this claim seems to have been abandoned. Therefore, it is denied.

b. Resolution of tax-filing dispute, re-implementing Carard's former leasing strategy, and proceeding with façade work. The tax-filing dispute and the façade issue has been resolved above. With regard to Carard's former leasing strategy, here there is in place a court-appointed property manager. Any complaints with its conduct should be addressed to the court.

D. Breach of fiduciary duty. This claim involves the same issues raised in Section A, above.

E. 969 Third Avenue. Both parties seek an accounting, and there is no disagreement that the arbitration was the accounting. However, there is substantial disagreement as the how this is to be done. And Claimant, makes several claims as part of its requested specific relief. Two of these claims have already been resolved: (a) the alleged "lost rental income from free or rent-reduced leases to Dworman's relatives; and (b) the offsets from damages caused by Dworman's surrogates after Dworman abandoned his partnership duties. This leaves to be discussed only the issue of 969 Third Avenue, which is the commercial section of 200 East 58th Street, having a separate street address.

The original partnership, created in 1966, owned not only 65 West 55th Street, 155 East 55th Street, and 210 East 58th Street, as well as 200 East 58th Street. There appears to have been a "Purchase Option dated, May 12, 1977 between Michael Palin and Capital Properties Company (the 'Option')"[45], pursuant to which Pain elected to "purchase an undivided" 50 % interest in all four properties. Closing was to occur on July 31, 1978. This closing never occurred. Rather, on July 1, 1981, pursuant to the Agreement, executed by Dworman and Palin, Palin became a 50% partner in Properties. The Agreement stated that the properties were "more particularly described in Exhibit A", which attached descriptions of 155 East 55th Street, 65 West 55th Street and 210 East 58th Street. 200 East 58th Street was not included on Exhibit A, and as Dworman subsequently wrote, in a letter dated, August 3, 1981: "it was eliminated from the Capital Properties transaction".

[45] This Option is referred to in Claimant's Exhibit No. 162; however, no copy has been submitted.

This August 3rd letter goes on to state, with regard to 200 East 58th Street, following a condominium conversion, Dworman would be purchasing the commercial section (although not explicitly stated, a reference to 969 Third Avenue) and that he would "convey it subject to financing the commercial interest to Capital Properties Company or another entity owned 50-50 and our interest will be 50-50 on costs, profits and losses)" (emphasis added). He added that he had agreed to return to Palin $300,000, which was the price Palin had paid for the option relating to 200 East 58th Street. This is the last document concerning 200 East 58th Street or 969 Third Avenue between Dworman and Palin. Claimant, relies on this letter to assert that 969 Third Avenue "would remain a Partnership asset shared by the two partners". To the contrary, the letter states that Dworman would convey it to "Capital Properties or another entity owned 50-50". Claimant has submitted no evidence to establish that the conveyance occurred and that, if so, it was to the Partnership. This absence of proof, itself is fatal to this claim.

In addition, there is a Memorandum to the File, dated November 5, 1987, written by Hoffman concerning his "understanding of how Mickey Palin acquired 50% of Capital Properties, which owns 155 East 55th St., 210 East 58th St., and 65 West 55th St." In this memorandum, Hoffman explains that Palin had exercised the option by acquiring a "50% interest in the three properties" as a result of his ownership of 50% of the Partnership. Hoffman's memorandum goes on to state that this 50% interest was "in exchange of the cancellation of his option in 200 East 58th [however] it was agreed that once 200 East 58th

St. became an effective condominium, the commercial section was to be sold to Capital Properties". Hoffman also noted that the $300,000 which Palin had paid was "fully repaid as of January 1987". To reiterate, no evidence has been submitted by Claimant to prove that this ever occurred. Rather, Claimant has submitted a transfer deed, dated December 12, 2000 and recorded on December 21, 2000, which shows the transfer of "969 Third Avenue Commercial Unit" from Dworman to ADWOR, one of Dworman's entities. This transfer was not from Capital Properties. It was subsequently transferred to Third and Fifty-Eight LLC. Claimant states that "Respondent's counsel refused to produce any records concerning 967 Third Avenue on the ground that it was never a Partnership property" (which ground is disputed by Respondent). However, if 969 Third Avenue had been transferred to Capital Properties, why Claimant would not have obtained a copy of the relevant transfer deed from public records, as it did with regard to the 2000 and 2001 conveyances?

The evident conclusion from this history is that 969 Third Avenue was never an asset of Capital Properties. It was not listed in the 1981 Agreement. In the 1981 letter, which Claimant relies on, 969 Third was to be conveyed to "Capital Properties or another entity owned 50-50"[46], and it was not referred to in the First Amendment. Hoffman in 1987, recognized this fact, when he wrote, that it "was to be sold to 'Capital Properties'". It was not listed in the 1993 First Amendment. It is also very significant that the

[46] There is no evidence concerning such other entity; however, it certainly was not Capital Properties.

$300,000 had been repaid in 1987. Finally, no evidence has been submitted showing that 969 Third Avenue had ever been transferred to Capital Properties. This establishes that 969 Third Avenue never was an asset of the Partnership. Accordingly, Claimant is not entitled to "offsets" concerning 969 Third Avenue,[47] in the accounting of the to be dissolved Partnership, i.e., Capital Properties Company.

XV. ACCOUNTING

Both parties agree that this arbitration hearing constituted an accounting. Of course, the formal accounting, pursuant to section 43 of the Partnership Law, must await the sale and disposition of all of the properties, which, will occur under the oversight and supervision of the Special Liquidator, appointed by me, and whose duties are described in below. Following the conclusion of the sales process, the Claimant and Respondent are directed to settle the account, or "true-up", taking into account the damages computed in this Award, all funds held on behalf of the Partnership by Halstead Management LLC, as well as all funds held in the bank account pursuant to the order of the Supreme Court (Kornreich, J.). All disputes concerning this accounting will be brought before the

[47] This conclusion, that 969 Third Avenue was never an asset of the Partnership, renders it unnecessary to consider Respondent's arguments that the statue of frauds, the statute of limitions, or the doctrine of laches, would bar consideration whether 969 Third Avenue was ever an asset of the Partnership. Also, unnecessary, is consideration of Claimant's argument that his failure to demand "immediate remuneration from Dworman" was "emblematic of the business relationship between the two partners" and that he "had no reason to doubt that, at the end of the day, Dworman would make him whole. At no point in his testimony does he state that 969 Third Avenue was actually transferred to Properties. Rather, his testimony was Dworman "wanted to condo [200 east 58th Street]. And whatever I was supposed to get from that, he switched to 969 3rd Avenue, my equity". This does not establish, that there was even an oral agreement that the property would become an asset of the Partnership.

undersigned Arbitrator, who retains jurisdiction[48] for the purpose of the final accounting, for the purpose of supervision of the Special Liquidator, and for any other purposes relating to this arbitration, until the winding-up, and termination, of the Partnership is concluded.

XVI. PUNITIVE DAMAGES, PRE-JUDGMENT INTEREST AND ATTORNEYS FEES:

Respondent seeks an award of punitive damages, in addition to compensatory damages. He also seeks pre-judgment interest (CPLR 5002), attorney's fees and costs. Claimant opposes these applications.

With regard to punitive damages, it is axiomatic that bad faith, warranting such relief, exists where the conduct "is morally culpable or is actuated by evil and repressible motive", and is warranted "not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted from indulging in similar conduct in the future" (e.g., Cohen v NY Property Underwriting Assn., 65 AD2d 71, 77, 410 NYS2d 597, 600 [1st Dept., 1978]). Here the conduct has not risen to the level warranting punitive damages. Regarding, pre-judgment interest, it is a matter of right in an arbitration (E.g. Dermigny v. Harper, 127 A.D.3d 685 [2nd Dept., 2015). Finally, as to attorney's fees and costs, while such may be awarded in a derivative shareholder action,

[48] Such retention, of course, does not concern any disputed matters or subjects, which are properly within the province the court.

this arbitration is not a shareholder derivative proceeding, rather it a suit amongst partners. It is well settled in New York, and elsewhere, that "'American rule' precludes the prevailing party from recouping legal fees from the losing party 'except where authorized by statute, agreement or court rule'" (Gotham Partners, L.P. v. High River Ltd. Partnership, 76 AD3d 203, 205 (1st. Dept., 2010, lv. to app. den., 17 NY3d 713 [2011]). Clearly, there is no statutory or court authorization, and the only provision in the Agreement, does not provide attorneys' fees or costs, to the prevailing party. Rather, it states that "[t]he fees of the arbitrator and the expenses of the arbitration shall be borne by the Partners in accordance wit [sic] their Percentage Interests". This is not prevailing party attorney's fees provision. Accordingly, the request for pre-judgment interest is granted; the other two requests are denied.

XVII. SPECIAL LIQUIDATOR:

During the oral argument, I asked if the parties could agree upon the selection of a Special Liquidator, or if not, would it be agreeable to provide me with respective names of acceptable JAMS neutrals. Thereafter, on June 15, 2018, as requested, I received an *in camera*, submission from the Claimant and Respondent, containing a list of names of acceptable JAMS neutrals, and based upon their rankings, I selected the Hon. Allen Hurkin-Torres (Ret.), to serve as such Special Liquidator. Following the necessary administrative details attendant to his retention, his duties are:

- To select a reputable, New York based, licensed investment sales company, or if agreed upon by the parties – a similarly New York based licensed real estate broker, preferably from a list to be jointly provided by the parties, within fifteen (15) days of the filing of his retention, unless this time; and
- To oversee, direct and supervise, the sales process, i.e. a public bidding on an "as-is" basis of the three properties, i.e., 65 West 55th Street, 155 East 55th Street, and 210 East 58th Street, as a combined portfolio or on an individual basis, in order to maximize the monetary recovery of these assets, which are being sold; and
- To consult with representatives of both parties throughout the sales process and if, and when necessary, to report and seek direction from the undersigned Arbitrator; and
- To arrange that all funds resulting from the sales process shall be placed and held in the bank account, established pursuant to the order of the Supreme Court; and
- To file, or cause to be filed, a financial statement, at the conclusion of the sales process, with the undersigned Arbitrator, stating with regard to each property, the initial asking price, the ultimate sales price, and the net proceeds after the payment of all sales costs, debt prepayment costs, and tax costs.

The parties are advised that the duties of Judge Hurkin-Torres, do not include involvement, in any manner, with the merits of this arbitration or with the related litigations. He has been appointed as Special Liquidator for the purposes of assuring the efficient and effective liquidation of the three properties.

XVIII. DAMAGES SUMMARY:

Summarizing the damages which have been determined in the Partial Final Award, they are as follows:

4% Management Fee	$2,708,954.50
Partnership Loans	$17,967.58
Bricin Below-Market Leases	$585,000
Bricin Parking Garages	$714,385
Diminished Property Value	$21,444,693
Improperly Leased Units	$5,963,230
TOTAL	$31,434,230.08

XIX. CONCLUSION

The foregoing constitutes the findings and conclusions of the undersigned Arbitrator in this arbitration. All arguments and contentions have been carefully considered, and the fact that an argument or contention has not been discussed, is due to a determination that discussion is unwarranted, in reaching the findings and conclusion in this Partial Final Award.

Bernard J. Fried

Hon. Bernard J. Fried (Ret,), Arbitrator

Dated: July 30, 2018

I, Hon. Bernard J. Fried (Ret.), do hereby affirm that I am the Arbitrator described in, and who executed, this instrument which is my Award.

July 30, 2018 Bernard J. Fried

Date Signature

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Capital Enterprises Co. vs. Dworman, Alvin
Reference No. 1425022927

I, Brittany Faulconbridge, not a party to the within action, hereby declare that on July 30, 2018, I served the attached Corrected Partial Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at New York, NEW YORK, addressed as follows:

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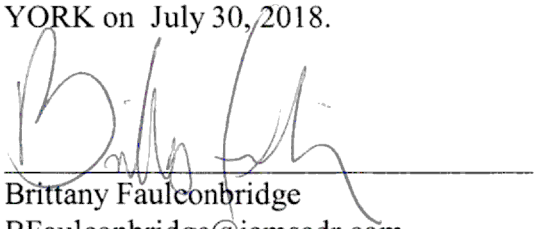
I declare under penalty of perjury the foregoing to be true and correct. Executed at New York, NEW YORK on July 30, 2018.



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