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To Be Argued By:
MICHAEL T. SUCHER, ESQ.
Time Requested: 12 Minutes

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

JOAQUIN GARCIA, MICHAEL GARCIA, Individually and on behalf of JMP PROPERTIES, LLC and ALL-BORO MANAGEMENT CO. LLC,

App Div No.: 2017-03930

(Action No. 1)

Plaintiffs-Respondents-Appellants,

-against-

PETER GARCIA,

Defendant-Appellant-Respondent.

PETER J. GARCIA,

Plaintiff-Appellant-Respondent,

-against-

(Action No. 2)

MICHAEL GARCIA, JOAQUIN GARCIA, JMP PROPERTIES, LLC and ALL-BORO MANAGEMENT CO. LLC,

Defendants-Respondents-Appellants,

- and -

BROOKLYN PROPERTIES 21 LLC and GARCON, INC.,

Defendants.

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SECOND DEPARTMENT

BRIEF OF PETER J. GARCIA
Defendant-Appellant-Respondent Action No. 1
and Plaintiff-Appellant-Respondent in Action No. 2

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Kings County Clerk's Index Nos.:
24618/2010 (Action No. 1)
28956/2010 (Action No. 2)

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SUPREME COURT: STATE OF NEW YORK
COUNTY OF KINGS

--X

JOAQUIN GARCIA, MICHAEL GARCIA Individually and on behalf of JMP PROPERTIES, LLC and ALL-BORO MANAGEMENT CO. LLC,

Plaintiffs-Respondents-Appellants,

- against -

PETER GARCIA,

Defendant-Appellant-Respondent.

App. Div. No.: 2017-03930

(Action No. 1)
Kings County Clerk's Index No.: 24618/10

--X

PETER J. GARCIA,

Plaintiff-Appellant-Respondent,

- against -

MICHAEL GARCIA, JOAQUIN GARCIA, JMP PROPERTIES, LLC, ALL-BORO MANAGEMENT CO. LLC, BROOKLYN PROPERTIES 21 LLC and GARCON, INC.,

Defendants-Respondents-Appellants,

- and -

BROOKLYN PROPERTIES 21 LLC and GARCON, INC.,

Defendants.

(Action No. 2)
Kings County Clerk's Index No.: 28956/10

--X

STATEMENT PURSUANT TO CPLR 5531

1. The index numbers of the cases in the court below are 24618/10 (Action No. 1) and 28956/10 (Action No. 2).

2. The full names of the parties are as set forth above.

3. Action Nos. 1 and 2 were each commenced in the Supreme Court, County of Kings.

4a. Action No. 1 was commenced by the filing of a Summons With Notice and Complaint on October 30, 2010. The Summons with Notice and Complaint was served on the Defendant on or about December 1, 2010. Defendant thereafter filed an

Answer on March 3, 2011, which was served on Plaintiffs on or about March 2, 2011.

4b. Action No. 2 was commenced by the filing of a Summons and Complaint on November 24, 2010. The Summons with Complaint was served on the Defendants on or about December 7, 2010. Defendants thereafter filed an Answer on March 18, 2011, which was served on Plaintiff on or about March 14, 2011.

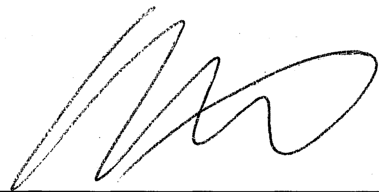
5a. The object of Plaintiffs' causes of action in Action No. 1 are to recover damages for breach of contract, money had and received, conversion, breach of fiduciary duty and fraud.

5b. The object of Plaintiff's causes of action in Action No. 2 are for dissolution of limited liability companies, a declaratory judgment, an accounting and for appointment of a receiver.

6. The appeal and Cross-Appeal are each from a Judgment After Trial dated March 1, 2017 of the Hon. Lawrence Knipel, J.S.C., that was entered in the office of the Clerk of the County of Kings, in each of Actions Nos. 1 and 2, on March 15, 2017.

7. The Appeal and Cross-Appeal are being prosecuted on the full record.

Dated: Brooklyn, New York
October 5, 2017



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QUESTIONS PRESENTED

I. Whether the parallel LLC Operating Agreements at issue sufficiently evidence a contractual intent to permit the extra-judicial expulsion of any LLC member?

– and if so

II. Whether the parallel LLC Operating Agreements at issue sufficiently evidence a contractual intent to grant a majority of LLC members the power to expel a minority LLC member for cause?

– and if so

III. Whether sufficient cause has been established to sustain the expulsions of Appellant as of August 19, 2011 from either or both LLCs at issue herein?

Appellant argues that all three questions, which were effectively answered in the affirmative by the Referee below, should properly be answered in the negative, but if this Court affirms the Referee's determinations, then

IV. Whether the Trial Court erred by not awarding sufficient money to Appellant on account of his Net Membership Interests in JMP and All-Boro?

PRELIMINARY STATEMENT

Peter Garcia, Defendant-Appellant-Respondent in Action No. 1 and Plaintiff-Appellant-Respondent in Action No. 2 ("Appellant"), appeals from a Judgment entered on March 15, 2017 (the "Judgment"; R.1-9), which granted him separate monetary awards against two closely-held, family-owned Limited Liability Companies ("LLCs"), JMP Properties, LLC ("JMP") and All-Boro Management Co. LLC ("All-Boro"), and granted other relief.[1]

Per CPLR 5501(a)(1), this appeal brings up for review a certain Decision and Order of Referee, Nina Kurtz dated February 16, 2016 (the "Kurtz Decision"; R.13a-13d) made on a hear-and-determine reference,[2] that upheld Appellant's extra-judicial[3] expulsions as a member (and manager) of both JMP and All-Boro.

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1 The Judgment appealed from also granted Peter Garcia dissolution and an accounting of Brooklyn Properties 21, LLC ("BP-21") and Garcon, Inc. ("Garcon"). These aspects of the Judgment were settled after trial and are not brought up for review on this appeal.

2 A prior appeal from the Kurtz Decision was dismissed by this Court "on the ground that no appeal lies from a decision." M220707, November 1, 2016. Nevertheless, the decision to uphold the expulsions forms the basis of the monetary awards in the Judgment, which *arise only because of said expulsions*.

3 The question of whether *the Court* should order expulsion was never within the scope of the reference. The Referee only determined the validity of Appellant's "extra-judicial" expulsions by the other members.

The threshold question on this appeal[4] is whether Appellant was properly expelled as a member (and manager) of JMP and/or All-Boro.

If this Court sustains Appellant's expulsion from either or both of these LLCs, the adequacy of the monetary awards granted to Appellant as his Net Membership Interests[5] in each company becomes a necessary subject of appellate review.

However, even if this Court reverses the Referee's determination and invalidates either or both of the expulsions, some aspects of the pecuniary relationship between the parties should still be reviewed, as detailed i*nfra*, in Part II hereof.

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[4] We use the singular word, "appeal" throughout, even though Appellant filed two notices of appeal – one in each of the two underlying jointly-tried, but never-consolidated Actions. Appellant's appeal in Action No. 2 against BP-21 and Garcon have been withdrawn.

Joaquin and Michael Garcia (herein, collectively "Respondents"), Plaintiffs in Action No.1, and Michael Garcia, Joaquin Garcia, JMP, All-Boro, BP-21 and Garcon, Defendants in Action No. 2, had initially filed a notice of Appeal from the Judgment, but have since notified the Court that those appeals have been "settled", despite never formally moving to withdraw those appeals.

[5] Appellant's "Net Membership Interest" comprises (i) his proportionate ownership valuation of each company, less (ii) the credit he owes back to each Company to equalize *disproportionate* membership advances.

In the event of reversal, Appellant would, *perforce*, resume his membership and management roles in whichever of the LLCs at which he is reinstated.

Upon remand and accounting, the Supreme Court would determine the value of the deprivation of Appellant's membership and management rights since August, 2011 – the day his brother and nephew wrongfully expelled him from the family businesses.

STATEMENT OF FACTS

I. Procedural Facts

Joaquin and Michael Garcia, individually, and on behalf of JMP and All-Boro, commenced Action No. 1 on October 6, 2010, seeking monetary damages against Peter Garcia, for breach of contract, money had and received, conversion, breach of fiduciary duty and fraud.[6] (R.19, *et seq*.)

Appellant commenced Action No. 2 on November 24, 2010 against Joaquin, Michael, JMP, All-Boro, BP-21 and Garcon seeking dissolution of all four (4) entities, declaratory judgment, accounting, and the appointment of a receiver to sell and distribute the assets of the four (4) entities.

Appellant was a member of JMP and All-Boro, two domestic LLCs formed in the 1990s. Almost a full year after Action No. 1 was commenced, on August 19, 2011,[7] his brother, Joaquin and nephew, Michael, the other purported members of those two LLCs, voted to expel him as a member and manager of both companies. (R.815; 816.)

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[6] The fraud cause of action was later withdrawn by stipulation.

[7] Appellant remained a member and manager of BP-21, and a shareholder of Garcon. These matters have since been settled.

The issue of the validity, *vel non,* of these "extra-judicial" expulsions was tried before Referee, Nina Kurtz, sitting without a jury and empowered, on consent, to "hear and determine" those issues, over six days between June 4 and August 19, 2015 (the "Referee Trial").

Referee Kurtz determined "that the expulsion of Peter from JMP and All-Boro was proper in that it was voted on by a majority of the membership interest of each company, and was for cause."[8] (R.13d.)

Thereafter, the balance of issues in the two underlying Actions came up for joint trial before the Hon. Lawrence Knipel, J.S.C., sitting without a jury, over nine days in November and December, 2016 (the "Damages Trial"). On the last day thereof, the Court spread its decision on the record (R.1773–1783), and found, in part, that:

- monies paid to Peter Garcia after his purported expulsions were to be treated as loans, and not distributions (R.1773);

- any Dubai deals' involvement was totally Peter's and did not involve the entities or the other individuals (R.1774);

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8 The findings and conclusions of a referee on a "hear and determine" reference, made within the scope of that reference, are entitled to the same effect as those made by a Supreme Court Justice. Couri v. Siebert, 48 A.D.3d 370, 371 (1st Dept. 2008).

- all excess monies received by Peter are to be treated as no-interest loans (R.1775);

- the differential in valuation between the two appraisers should be credited 75 percent in Plaintiffs' favor, and the balance in Defendant's favor (R.1776);

- there should be a five (5%) percent discount applied to valuation (R.1777);

- the parties agreed (in 2003) that Peter would have a 45% interest in All-Boro (R.1778); and

- that BP-21 LLC and Garcon, Inc. be dissolved; that a receiver be appointed to sell and distribute their respective assets to Michael and Peter Garcia, as 50% owners, each (R.1779).[9]

The Judgment, entered on March 15, 2017 (R.1-9), awarded Appellant the sum of $2,185,412. from JMP and $200,904. from All-Boro. (Id).[10]

II. Business Facts

JMP was formed in 1996 by Appellant and Respondents for the purpose of acquiring and managing real estate (R.171).

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9 This last point was settled after trial and forms no part of this appeal.

10 Both of these sums have been paid, subject to this appeal.

At inception, each member had a one-third (⅓) interest in that LLC (R.172), which interest persisted though the date of Appellant's purported expulsion. (R.002.)

All-Boro was formed in or about 1998 by the same three parties, for the same purpose as JMP (R.175). However, at inception, All-Boro never acquired any property, and lay dormant, with each member only *nominally* owning a one-third (⅓) interest therein. (R.176, 225.)

In 2002, Appellant "was approached by a realtor with an opportunity to purchase a large package of buildings, 21 buildings." (R.445.) While the parties "were working through the planning of this very large purchase", Appellant testified that Joaquin came to Michael and him and said: "I think I'm going to buy a house [in Puerto Rico] and I'm going to move there." (R.445-446.) Appellant testified that because of Joaquin's plans, Joaquin orally agreed to participate in the new, 21-parcel acquisition venture, at the 10% level R.447. [11] Justice Knipel's decision after trial confirmed the fact of this agreement.

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[11] Justice Knipel found that even though the formal Amendment to the Operating Agreement of All-Boro, dated June 1, 2003 (R.2185), which memorialized this change was signed by Appellant *on behalf of* Respondent, Joaquin, the verbal agreement controlled, as it was honored by all sides for over five (5) years, despite Respondents' denials and protestations which the Court did not find credible (R.1778). The 2003-2008, All-Boro tax returns, for example, showed Joaquin as a 10% owner thereof. (R.952, *et seq.;* 929.)

In 2003, All-Boro purchased these 21 buildings, financed by private borrowing and a $12 Million Dollar bank loan (R.177; 797), which came due in 2008. (R.499.) Through July, 2008, 16 of the 21 All-Boro properties were sold, and the bank loan was satisfied. Id.

Appellant testified that in 2007 Joaquin had agreed to be "bought out" of All-Boro after the property sales were completed and after the proceeds "were distributed according to our ownership". (R.298.) Referee Kurtz' decision after trial rejected this fact. (R.13c.)

Appellant provided a reconciliation to Respondents of the net funds received from the 16 All-Boro sales. (R.504; 917.)

Appellant testified that in July, 2008, after the 16th All-Boro property was sold and all net proceeds distributed to All-Boro members, he sent Joaquin the amount of $202,142., marked "Buyout of interest of Jack[12] of All-Boro" (R.501; 956), which consummated the planned buy-out.

That buyout was documented by an Amendment to the Operating Agreement of All-Boro, dated July 8, 2008, which Appellant and Michael signed in their own names, confirming their then equal 50%-50% ownership of

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12 Also known as Joaquin.

All-Boro (R.806). As with the 2003 *reduction* of Joaquin's interest in All-Boro, Appellant signed the Amendment to the Operating Agreement of All-Boro and receipts *on behalf of* Joaquin, as business records. (R.807-8).

At the Referee Trial, Appellant gave detailed financial testimony as to how the buyout amount of $202,142 was arrived at. No countervailing testimony or evidence was adduced by any other party as to the meaning of that payment, or its financial analysis.

Nevertheless, Referee Kurtz found, without explanation, that the sum of $202,142 was a distribution to Joaquin – and not a buyout. (R.13c -13d.)

III. Facts Regarding the Dubai Investments and Their Aftermath

In early 2008, before the world financial crisis began unfolding in earnest,[13] Appellant, Respondent, Michael and a number of their mutual friends began to make investments in Dubai, UAE – all spearheaded by Appellant.

The early (and relatively small) investments were successful and highly lucrative for all involved. Though Respondent, Michael never directly invested

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[13] IndyMac failed on July 11, 2008. It was then the largest savings and loan association in the Los Angeles market and the seventh largest mortgage originator in the United States. https://en.wikipedia.org/wiki/Financial_crisis_of_2007–08#IndyMac.

in the first two opportunities in Dubai, he was rewarded with a share of the profits from these first two investments. (R.2551-2554.)

In April, 2008, when Appellant had an opportunity to make a larger investment in Dubai, he and Respondent, Michael discussed that Michael would be Appellant's 25% partner in the large profit expected to be earned on that investment. (R.1495.) In a memorandum of that meeting, Appellant disclosed to Michael that he was ahead in distributions from their companies. (R.2187.)

Because the large Dubai investment looked so good, Appellant raised Four Million ($4,000,000) Dollars from outside investors, and the balance of $1 Million Dollars from his brother, his nephew and himself. (R.473; 1217.)

News that this large Dubai investment was troubled first became known in the Fall of 2008. Upon receiving that news, Appellant tried to salvage it by personally traveling to Dubai—on numerous occasions through the end of 2009 (R.533; 1501; 1503)—ultimately obtaining money judgments against overseas wrongdoers, but recovering no part of that large investment. (R.1509.)

By late 2009, investors began suing Appellant seeking to recover their investments, which Appellant had personally guaranteed. (R.479; 495.) When Appellant looked to his nephew to share 25% of the *liability* he understood Michael had incurred, Michael demurred, saying in effect that he had never

agreed to do so, and that the meeting of April, 2008 resulted only in a discussion and not an agreement. (R.1216.)

IV. Facts Regarding the Unwinding of the Parties' Businesses and Peter Garcia's Bankruptcy

In late 2009 to early 2010, Appellant and Michael agreed to part ways, and began a process of unwinding their companies (R.481), which unfolded over the first half of 2010.

That process involved two separate aspects. First, they each prepared and shared various lists of the companies' assets and devised ways to split them equitably (R.1789; 1791 and 2186), so that:

- All three individuals would share the JMP values at one-third (⅓) each; and
- Peter and Michael would share the All-Boro values at one-half (½) each.

The second part of that process involved reviewing company financial records to determine how much, over all, their *disproportionate* receipts could be equalized.

After about six months of discussions, on or about August 17, 2010, Respondents abruptly physically barred Appellant from access to the company's offices and reduced his weekly draw. (R.155-156; 569; 1578.) Action Number 1 was commenced shortly thereafter, on October 6, 2010.

During pre-trial motion practice, by Order dated January 26, 2011, former Justice David Schmidt restored Appellant's weekly draw from both JMP and All-Boro, characterizing such payments as "a loan to [Appellant] without waiver of or prejudice to [Appellant's] right to argue that he is entitled to such payments as [his] distributions". (R.2815.)

Even though Appellant's purported "expulsions" did not occur until August 19, 2011, Justice Knipel treated *proportionate* monies paid to Appellant *before his "expulsions"* as loans – rather than as distributions.

In August, 2011, Respondents notified Appellant that they would vote to expel him as a member and manager of each company. Appellant objected (R.813-814), and sought an Order to Show Cause to preliminarily enjoin Respondents from expelling him from the companies. No stay was granted.

On August 19, 2011 both JMP and All-Boro extra-judicially adopted parallel resolutions expelling Appellant as a member and manager of those companies. (R.815-816.)

On November 28, 2011, certain of Appellant's Dubai creditors filed an involuntary petition against him with the U.S. Bankruptcy Court EDNY, docketed in that court as EBNY 11-49950.[14]

During the pendency of the automatic stay under 11 U.S.C. §362(a), on December 6, 2011, former Justice Schmidt issued an order,[15] *inter alia*, denying Appellant's then pending Order to Show Cause for a preliminary injunction, and stated that any injury Appellant would suffer would not be *irreparable*, and would be compensable by money damages. (R.836.)

In due course, the *involuntary* Chapter 7 bankruptcy proceeding was converted into one under chapter 11 of the Bankruptcy Code, and the two Actions below were removed to that Federal Court proceeding.

On October 15, 2014, Appellant's chapter 11 Plan was confirmed by the U.S. Bankruptcy Court and the two Actions were remanded back to the Supreme Court, where the matters proceeded to the two trials, described *supra*, with the proceeds thereof dedicated to Appellant's Creditors under his confirmed Plan.

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14 Though, technically *dehors* the record, the entire bankruptcy proceeding is a matter of public record that this Court may take judicial notice of. Affronti v. Crosson, 95 N.Y.2d 713 (2001).

15 No finding was ever made by the Bankruptcy Court that former Justice Schmidt's Order of December 6, 2011 did, or did not violate the automatic stay, nor was that stay ever modified or annulled with respect to that Order.

ARGUMENT

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED

PART I

A. NO CONTRACTUAL INTENT TO GRANT LLC MEMBERS THE PRESENT RIGHT TO EXPEL A CO-MEMBER FOR CAUSE EXISTS, EITHER EXPRESSLY, BY IMPLICATION, OR BY PROPER JUDICIAL INSERTION

The relevant provision of both Operating Agreements (the "Agreements") provide, identically, as follows:

> Article 11.1 Dissociation.
>
> A Person shall cease to be a Member upon the happening of any of the following events:
>
> (a) the withdrawal, retirement or expulsion of a Member….

The word "expulsion" appears nowhere else in the Agreements. They neither define nor provide any mechanism, process or standard(s) to clothe this naked mention of *expulsion* with agency or cogency. From this solitary provision and naked mention, the Court below *inferred* that:

i) It was presently possible to expel a member of the LLCs; and

ii) The power to expel a member was vested in the other members, of the LLCs, exercisable extra-judicially; and

iii) The only requirements to expel a member of the LLCs are "cause" and a majority vote of members.

Appellant respectfully argues that the aforementioned powers that the lower Court *found* in the quoted portion of the subject Operating Agreements (and from those Agreements taken as a whole), are:

i) Not expressly stated in the Operating Agreements;

ii) Are not properly inferable from the Operating Agreements;

iii) Are not properly judicially *insertable* into the Operating Agreements;

iv) Are not properly *construable* from the Operating Agreements; and

v) Are not consistent with any proof in the Record of the Members' intentions at the time the Operating Agreements were entered into.

i. The Operating Agreements Do Not Expressly Grant any Present Power of Expulsion of Members to Members

From a plain reading of the Agreements, one can readily determine that neither Agreement expressly provides for a present grant of power *to anyone* to expel a member of either LLC.

While the word "expulsion" is expressly mentioned in the context of a process whereby "a person shall cease to be a member", the express mention of

the word “expulsion” is thus a fact which causes dissociation – and by its terms, is not a grant of any “power” or the designation of any “process” that is necessarily presently exercisable.

We submit that the only fair and reasonable plain reading of both this clause, and the Agreements taken as a whole, is that without other contractual language, a supplemental agreement, or evidentiary course of dealing of the parties, or some future legislative enactment,[16] the naked mention of the word, “expulsion” cannot fairly be read as a present grant of authority to expel.

If read as unambiguous, no present grant of authority to expel is shown. The words, as written, *assume* a pre-existing, or external grant of such power, and thus indicate a *contingent* possibility.[17]

Since it is necessary to look to the objective manifestations of the intent of the parties as expressed by their words, *and the absence of words*, in determining what the terms of the parties' contractual agreement actually were. per, e.g., Brown Bros. Elect. Contr, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397

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16 Such as the Revised Uniform Limited Liability Company Act (“RULLCA”) §602(4) or (5).

17 A contingent meaning does not impermissibly render the word “expulsion” meaningless, nor fail to give it effect. *See* Beal Sav. Bank v. Sommer, 8 N.Y.3d 318 (2007). (“A reading of the contract should not render any portion meaningless”).

(1977), this Court may not affirm the lower Court's finding of validity of the expulsions based on the Agreements, as unambiguous.

Unless a contract is ambiguous or vague in its terms, the intention of the parties must be gleaned from the four corners of the instrument. A court may not rewrite into a contract conditions the parties did not insert. The intent of the parties must be distilled from the terms of the written agreement itself. Raner v. Goldberg, 244 N. Y. 438 (1927); Nichols v. Nichols, 306 N. Y. 490 (1954); 3 Williston, Contracts [Rev. ed.], §610, pp. 1750-1754.

If unambiguous, a court "should not, under the guise of contract interpretation, 'imply a term which the parties themselves failed to insert' or otherwise rewrite the contract". Aivaliotis v. Continental Broker-Dealer Corp., 30 A.D.3d 446 (2nd Dept. 2006); Petracca v. Petracca, 302 A.D.2d 576, 756 N.Y.S.2d 587 (2nd Dept. 2003); Lui v. Park Ridge at Terryville Ass'n, 196 A.D.2d 579, 581 (2nd Dept. 1993); Mitchell v. Mitchell, 82 A.D.2d 849 (2nd Dept. 1981). Notably, the absence of a term in a contract does not, in and of itself, render a contract ambiguous. *See*, e.g., Schmidt v. Magnetic Head Corp., 97 A.D.2d 151 (2nd Dept. 1983).

The absence of any express grant of present authority to expel a member and absence of any mechanism to effect an expulsion of a member, speaks more

to the contractual intent of the parties to not presently grant such a power, rather than to an invitation to the Court to write-in such a power. *See* Atterbury v. Bank of Washington Heights, 241 N.Y. 231 (1925). ("The courts will not make an agreement for the parties but will ascertain what their agreement was.") As the Court of Appeals has stated: "such lack of foresight does not create rights or obligations". Mutual Life Ins. Co. of N. Y. v. Tailored Woman, 309 NY 248, 253 (1955).

If this Court holds that the operating agreements are unambiguous[18] on this point, the court's power is limited to giving effect only to the parties' expressed intent. Friedman v. Handelman, 300 N. Y. 188, 194 (1949); Matter of Loew's Buffalo Theatres, 233 N. Y. 495, 501 (1922) (Crane, J.) ("Courts should not give to the agreement of parties, under such conditions, a meaning which it would prefer or which it may think the parties intended. Intention is to be found in the language used. It is the only sure guide.")

Since the express terms of the Agreement *assume* a pre-existing, or external grant of such power – which does not exist – this Court must conclude

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18 The question of whether a writing is ambiguous is one of law to be resolved by the courts. Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995). The lower Court never opined as to whether the Operating Agreement were ambiguous or were not ambiguous.

that there is no present power to expel Appellant – for cause or otherwise. *See*, e.g., Wilson Sullivan Co. v. International Papermakers Realty Corp., 307 N.Y. 20, 25 (1954) ("A simple answer is that since no such term expressly appears, it cannot be supplied by the courts under the guise of construction or interpretation, their power being limited to giving effect only to the parties' expressed intent… We "concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote"") (Internal citations omitted).

We respectfully submit that this is not a case where the Court "may as a matter of interpretation carry out the intention of a contract by transposing, rejecting, or supplying words to make the meaning of the contract more clear", as in Wallace v. 600 Partners Co., *supra*. "[S]uch an approach is appropriate only in those limited instances where some absurdity has been identified or the contract would otherwise be unenforceable either in whole or in part". Id. at 547-8, *citing* Castelli v. Burns, 156 A.D. 200 (1st Dept. 1913).

Thus, as the use of the term "expulsion" presents no ambiguity in the Agreements, the Judgment appealed from must be reversed.

ii. The Operating Agreements Do Not Grant any Present Power of Expulsion by Any Permissible Inference

After Trial, Referee Kurtz, adopted the reasoning of former Justice Schmidt, as set forth in his December 6, 2011 Order (the "Schmidt Opinion"; R.821 *et seq*.), which opined[19] that:

1) A procedure for expulsion can be reasonably implied from the terms of the operating agreements (R.830);

2) The failure to provide an express mechanism for expulsion does not affect the LLCs' right to expel Appellant; Id. and

3) An implied condition of any such expulsion is that it would be for cause. Id.

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[19] Referee Kurtz never articulated her own reasoning for finding as she did.

The Schmidt Opinion was made after a motion for preliminary injunction, and utilized the "likelihood of success on the merits" standard. It found that "a procedure for expulsion can be reasonably implied from the terms of the Operating Agreement" (R.830). Such ruling was not law of the case, and did not bind Referee Kurtz.

Additionally, as the Schmidt Opinion was made during the pendency of the automatic stay (11 U.S.C. §362(a)), in the context of Appellant's then-pending Chapter 11 Bankruptcy, it is considered "void". See, e.g., Valiotis v. Psaroudis, 69 A.D.3d 610 (2nd Dept. 2010). That, of course, is not to say that its reasoning may not be referred to – only that it cannot be binding in any sense.

Appellant respectfully submits that the lower Court's adoption of the conclusion that "A procedure for expulsion can be reasonably implied from the terms of the operating agreements" is logically and legally untenable on a variety of grounds.

Before one can potentially infer a "procedure for expulsion", one must conclude that: i) A power to expel a member was intended by the parties to be *presently* granted; ii) That power was intended to be exercised by the LLC, as opposed to, for example, *solely* by a court of competent jurisdiction; and that iii) a "for cause" standard was intended to be the basis for any expulsion, as opposed to, for example, a standard which requires proof of actions detrimental to the business itself.

None of these three *underlying assumptions* are to be found in the Agreements, and none were addressed by the Referee (or in the Schmidt opinion). Additionally, all three *underlying assumptions* are unwarranted, regardless of whether the Agreements are deemed unambiguous or ambiguous.

Each of these stated *or unstated inferences* are simply judicial insertions, not permissible inferences—which a Court should not add to the Operating Agreements under the guise of interpretation. Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp., *supra* at 400: "Generally, the aim is a practical interpretation of the expressions of the parties to the end that there be a

‘realization of [their] reasonable expectations’ (1 Corbin, Contracts, §1).”

There is no evidence on this Record that Appellant *or Respondents* had any reason to interpret the operating agreements as the lower Court has determined. Even if an intent to grant a present power to expel an LLC member is discerned from the four corners of the Agreements, it is far more reasonable that the parties would have intended to grant such a power of expulsion to a court to exercise, rather than to the other members.

Such a grant of a *judicial power* is, by far, the safer course to follow. It divorces whim, prejudice, unfair advantage, insider factions, etc. from such an important undertaking, and thus would be most consonant with the expectation of the parties – if an expectation of the present power to expel were found.

If the agreements are found to be ambiguous, and extrinsic evidence is permitted to shed light on the intention of the parties, one must look solely to the public record for such “evidence”, as no evidence of intent was adduced at the Referee Trial.

Appellant’s argument regarding such publicly available parol evidence, in the form of an alternative, tax-based rationale for the Agreements’ language, is explored *infra*.

iii. The First Department Case of Ross v. Nelson is not a Precedent for the Referee's Inference of a Present Power to Expel a Member

The case of Ross v. Nelson, 54 A.D.3d 258 (1st Dept. 2008) was cited in the Schmidt Opinion (and thus, relied upon by the Referee), for the proposition that: "The operating agreements expressly and unambiguously provide that expulsion is one means of member dissociation." (R.829-830).

This assertion is unremarkable as stated, but what it implies – and how the lower Court interpreted it and the Ross case (as identified by former Justice Schmidt) – is highly objectionable, and not warranted by any plain reading of the facts of that case.[20]

The Ross case involved the expulsion of a "member-manager",[21] that is, a manager, who happens to be a member – and is not an outside manager.

In the Ross case, the member was not expelled *as a member* – he was only stripped of his role as a "manager".

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[20] Neither the Referee, nor former Justice Schmidt ever stated anywhere that the Agreements were unambiguous with respect to either a present grant of power to expel, the actor to exercise such supposed grant, or the grounds upon which the exercise of that supposed grant may be made.

[21] The lower Court's use of the phrase, "member-manager" does not signify that the plaintiff in that case was also stripped of his membership in that LLC. A reading of the underlying decision of the lower court makes that plain. A copy of the unreported lower court decision in Ross is reproduced at R.1081.

His membership interest remained intact. The difference is critical, and is also reflected in New York's LLC Law. A "membership interest" status is personal property (LLCL §601). A "manager" status is not personal property according to any provision in New York's LLC Law, or any known case holding we have located.[22]

The Kurtz Decision cited this Court's 2010 decision in Man Choi Chiu v. Chiu, 71 A.D.3d 646 as "distinguishable", on the ground that "JMP and All-Boro's Operating Agreements provide for expulsion by a member, where as the operating agreement in Chiu did not contain such a provision." (R.13c).

As argued, *supra*, the Agreements here do not "provide for" expulsion, in the sense of unambiguously granting any present power to expel any member.[23] There is no statutory norm in New York for expelling members of an LLC, and there never has been.

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[22] We argue herein that so long as Appellant remains a member of either LLC, he also remains a manager thereof, per the operating agreement's provisions that all members are managers. Sec. 6.1, R.078; 106.

It follows that Appellant's purported expulsion as a *manager* was ineffective precisely because he could not be expelled *as a member*. The Ross case referred to LLCL §414, which declares the statutory norm for expelling *managers*, unless overridden, by the operating agreement, as here.

[23] This Court may have mis-cited the Ross case when it decided the Chiu case. As noted herein, the Ross case did not involve the expulsion of a member, *qua* member.

Referee Kurtz' statement that: "expulsion may be accomplished by a vote of the majority of the membership interest as provided for in the pre-1999 version of the Limited Liability Law §606" is also error.[24] Thus, the only New York authority Referee Kurtz relied upon in arriving at her remarkable conclusion that the naked use of the word "expulsion" in the context used permits two members to expel another member from a closely held LLC – was a case that demonstrably said no such thing.

The Ross case is no precedent for holding that the naked use of the word "expulsion" in the operating agreements vests a present power in the other members to expel a co-member, for cause or otherwise.[25]

The Ross Court permitted the statutory norm controlling expulsion of a *manager* to become operational – because it did not contradict the operating agreement. Here, the lower Court validated Appellant's expulsion, both as a member *and as a manager*. Accordingly, the expulsions must be reversed.

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[24] Former LLC Law §606 related to withdrawal of a member – not expulsion. This was apparently a mis-reading of the Schmidt Opinion, which correctly attributed former §606 to retirement and withdrawal. See, R.429.

[25] Ross holds that even though an operating agreement lacks a specific provision for removal of a manager, where it clearly and unambiguously allows for a manager's removal by "expulsion", such manager may be removed *as a manager* by the majority vote of the other members in reliance on LLCL §414.

iv. Judicial "Insertion" of a Present Power of Expulsion by Members Into the Operating Agreements is Unwarranted and Improper

The process of supplying an omitted term to a contract is one that is addressed by the Restatement of Contracts (Second) §204,[26] and requires that the term proposed to be inserted is "essential to a determination of their rights and duties". Such pre-condition does not exist here. Simply put, expulsion is not an "essential" power for LLC members to possess. Partnerships and corporations get along quite well without having such a power.

The judicial power of "insertion" is a rarely used principle and is inappropriate here. It is not supposed to be used to enlarge or modify the expressed rights of the parties. Quadrant Structured Prods. Co., Ltd. V. Vertin, 23 N.Y.3d 549 (2014) ("Even where there is ambiguity, if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission.")

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[26] "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

The Schmidt Opinion does not cite §204, instead citing the hoary case of Ostrom v. Greene, 161 N.Y. 353 (1900), as authority for its judicial insertion of a present power by LLC members to expel a co-member, for cause.

Additionally, the proposed *judicial* insertion fails the "reason to know" test[27] identified by Professor Richard Speidel in his article, "Omitted Terms and Contract Method", 67 Cornell L Rev 785 (1982), as cited by this Court in Schmidt v. Magnetic Head Corp., *supra*.

The *judicial* insertion below of a "present power to expel", and of a "grant of power to expel to a majority of members", and of a "for cause" standard for expulsion of a co-member, is particularly odious in the context of a closely-held family business, and should not be countenanced.

None of these insertions can be objectively made, and for this additional and independent reason, all are inappropriate. Indeed, the reasoning of the lower Court to underpin its insertions of multiple terms all register in the subjective; ungrounded in any empirical methodology or dispassionate foundation. See, 166 Mamaroneck Ave. Corp. v. 151 East Post Rd. Corp., 78 N.Y.2d 88 (1991) ("where … there exists an objective method for supplying a

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[27] Respondents had no reason to know (at the time the operating agreements were signed) that they could successfully vote to expel Peter as a member of JMP and All-Boro, by asserting "cause". Even as late as 2010, Respondents did not include expulsion in their complaint.

Appellant likewise, had no reason to know that by signing those Agreements, he was exposing himself to the risk of expulsion on the impossible-to-know, impossible-to-understand, or impossible-to-predict ground of "cause".

missing term, the court should endeavor to hold the parties to their bargain (see, 1 Williston, Contracts §46, at 152-153 [3d ed]). There is simply no *objective* way to do what the lower Court did.

This is a very different case from Reiss v. Financial Performance Corp., 279 A.D.2d 13 (1st Dept. 2000), the only other appellate level New York case located, which cites Restatement of Contracts (Second) §204.[28]

Court are to enforce—not rewrite—contracts, and they may not "by construction add or excise terms, nor distort the meaning of those used and thereby 'make a new contract for the parties under the guise of interpreting the writing'". Shames v. Abel, 141 A.D.2d 531, 533-534 (2nd Dept. 1988).

v. Even if Ambiguous, the Operating Agreements, When Read Together With Available Parol Evidence, Reveal No Intent to Grant Members a Present Power to Expel Co-Members For Cause

"A contract is unambiguous if the language it uses has a definite and

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[28] The paucity of case citations of Restatement of Contracts (Second) §204 alone indicates how rarely courts act to insert and enforce unstated contract terms, *inferentially*.

Reiss may properly be understood as a case of contract interpretation, rather than one of term insertion. See, Restatement of Contracts (Second) §204, comment (c). ("Where there is tacit agreement or a common tacit assumption or where a term can be supplied by logical deduction from agreed terms and the circumstances, interpretation may be enough.")

precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion". Millennium Holdings LLC v. Glidden Co., 146 A.D.3d 539 (1st Dept. 2017) citing Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002).

The mention of the word "expulsion" in the Agreements fails this test, and thus cannot be deemed to have an unambiguous meaning.

Appellant respectfully submits that the use of the term "expulsion of a member", as appears in the subject Operating Agreements, is ambiguous in at least three senses: First, because it can mean that either a *present* power to expel a member was intended, or a *contingent* power to expel a member was intended; second, because no standard to expel is expressed, it can mean that any one of a variety of standards might have been intended to support expulsion; and third, it can mean that the party (or parties) who were intended to be able to properly exercise such expulsion power, are:

1) Only a majority of co-members of the LLC, or
2) Only a Court, upon application of the LLC, or
3) Both.

Appellant further submits that the solitary use of the term "expulsion of a member" in the subject Operating Agreements is ambiguous, as well, because there is no defined mechanism attendant to it.

Contract language is ambiguous when, as here, it is reasonably susceptible of more than one interpretation. Extrinsic, or parol evidence may then be examined to determine the parties' intent as to the meaning of that language. Chimart Assoc. v. Paul, 66 N.Y.2d 570 (1986); RE/MAX of N.Y., Inc. v. Energized Realty Group, LLC, 135 A.D.3d 924 (2nd Dept. 2016). Ordinarily, the interpretation of written agreements pose a question of law for the court to resolve on the basis of the writing alone without resort to extrinsic evidence. Posh Pillows, Ltd. v. Hawes, 138 A.D.2d 472 (2nd Dept. 1988).

As this Court is warranted in finding that the phrase "expulsion of a member" in the subject Agreements is ambiguous, extrinsic, or parol evidence may be resorted to in order to determine the intent of the parties.

Since Respondents never adduced *any* evidence at either trial tending to make any possible meaning of the phrase "expulsion of a member" in the subject Operating Agreements more or less likely, they have utterly failed to sustain their burden of proof, and the Judgment must therefore be reversed.

vi. Dissociation by Expulsion of an LLC Member Has No Statutory Norm in New York Law

"Dissociation" is a concept created by the Uniform Law Commission ("ULC") in or about 1992 "to denote the change in the relationship caused by a

partner's ceasing to be associated in the carrying on of the business".[29][30] Dissociation is a concept foreign to New York statutory law.

Under NY Partnership Law §60, when one partner is no longer associated with a partnership, that partnership is dissolved.

Under the Revised Uniform Partnership Act of 1994 ("RUPA"), and under the Uniform Limited Liability Co. Act. ("ULLCA"), the dissociation of a partner (or member of an LLC) does not necessarily cause a dissolution.

ULLCA §601 identifies very detailed grounds and mechanisms for "dissociation" by expulsion to occur, including unique provisions never adopted in New York, such as the requirement that it be "unlawful to carry on the company's business with the member" (subd. 5); or that the member "engaged in wrongful conduct that adversely and materially affected the company's business" (subd. 6).

When New York adopted its LLCL in 1994, it did not enact the concept of dissociation into law. To this day, and after a number of amendments, New

[29] ULC's Comments to Article 6 of the amended Uniform Partnership Act in 1992 declares "dissociation" to be "an entirely new concept" used in lieu of the term, "dissolution". http://www.americanbar.org/content/dam/aba/administrative/business_law/rupa/section_11.authcheckdam.pdf.

[30] The Uniform Law Commission used precisely the same concept and language in Article 6 of ULLCA.

York's LLCL still does not mention the "dissociation" concept, nor does it define any default ground, process or mechanism to support expulsion of a member of an LLC. There is thus no statutory "norm", express grant of power, or default ground, process or mechanism to support dissociation in New York.

Notably, since its inception, New York's LLC Law contained the word "expulsion" in exactly one place – contextually, as one of the preconditions to a possible dissolution (not "dissociation") of the company, and placed it within LLCL §701 – which is labeled "Dissolution".

This glaring statutory omission was observed by this Appellate Division in Man Choi Chiu v. Chiu, *supra*.[31]

The fact that both Agreements also use the word "expulsion" in exactly one place without any mechanism, ground, or procedure to effectuate it, should lead this Court to the same conclusion, i.e., that the parties never intended to grant an expulsion power by the language used.

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[31] "Although Limited Liability Company Law §701 mentions expulsion of members, there is no statutory provision authorizing the courts to impose such a remedy. Rather, the reference to expulsion of members contemplates the inclusion of such a provision in an operating agreement. As the LLC did not have an operating agreement setting forth a mechanism for the expulsion of members, the plaintiff failed to state a cause of action for this relief". Id.

vii. Expelling a Member of an LLC is Akin to Extinguishing a Property Right, and Should Not be Permitted Absent Express Consent

Courts are, and should be loathe to, extinguish an owner's right to property *by implication*. Since a membership interest in an LLC is personal property (LLCL §601), much the same way a partnership interest is personal property (Partnership Law §52), and a share of stock in a corporation is personal property, see, e.g., Burton v. New York State Dept. of Taxation & Fin., 25 N.Y.3d 732 (2015), great care should be taken before that property interest is extinguished.

In Morpheus Capital Advisors LLC v. UBS AG, 23 N.Y.3d 528, 535 (2014), the Court of Appeals held that because "the general principle that an owner's freedom to dispose of her own property" is so important, it "should not be infringed upon by mere implication." This Court has held that: "[A]ll doubts and ambiguities must be resolved in favor of the natural right to the free use and enjoyment of property and against restrictions". Rautenstrauch v. Bakhru, 64 A.D.3d 554, 555 (2nd Dept. 2009). Thus, "[w]here a restrictive covenant is ambiguous, the covenant is strictly construed against those seeking to enforce it and the court must interpret the covenant to limit its restriction." Id.

Consistent with this principle, shareholders of a corporation cannot expel a fellow shareholder, and Co-Partners in a partnership cannot expel a co-partner, absent an express contractual agreement.

The remedy for an unhappy partner, in the absence of an express agreement to the contrary, is dissolution-at-will, *exclusively*.[32] Gelder Med. Group v. Webber, 41 N.Y.2d 680 (1977), *citing* Millet v. Slocum, 4 A.D.2d 528 (4th Dept. 1957); *accord* Framson, Inc. v. Queens Inner Unity Cable Systems, 168 A.D.2d 419 (2nd Dept. 1990); *see also* Ehrlich v. Howe, 848 F.Supp. 482 (S.D.N.Y., 1995); and Dawson v. White & Case, 88 N.Y.2d 666 (1996).

The Ostrom case, *supra*, relied upon in the Schmidt Opinion, is distinguished by the fact that there, the operative entity, Sullivan County Ladies' Soldiers and Sailors' Monument Ass'n., was a "voluntary association" –-manifestly not a business entity. Its membership was not "property".

Accordingly, the Referee decision violates a cardinal rule of construction, and should be reversed. "The law will not by implication supply, or add to, a contract unless the parties have invited such assistance …." Assets Realization Co. v. Howard, 211 N.Y. 430 (1914).

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[32] The variety of grounds for a judicial dissolution of a corporation may be found in Article 11 of the Business Corporation Law.

viii. Available Parol Evidence Indicates that the Use of the Term "Expulsion" in the Operating Agreements Was Likely Intended Solely For Tax Purposes

On the issue of the parties' intent, in the absence of any other parol evidence, "a page of history is worth a volume of logic".[33]

If the Court finds the operating agreements ambiguous, we submit that it may properly consider *legislative facts* to ascertain the likely intent of the parties in using the term "expulsion of a member" therein.

In 1977, Wyoming enacted the first modern LLC act in the United States. The Wyoming statute provided, *inter alia*:

> A limited liability company formed under the Act is dissolved upon the occurrence of any of the following events: (1) when the period fixed for the duration of the company expires; (2) by the unanimous written consent of all the members; or *(3) by the death, retirement, resignation, expulsion, bankruptcy*, dissolution of a member .... Ch. 158, 1977 Wyo. Sess. Laws 577. (Emphasis added).

Based in part on the language emphasized above by *underlined italics*, the character of this new type of business entity effectively negated the

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33 NY Trust Co. v. Eisner, 256 U.S. 345 (1921) (Holmes, J.).

corporate characteristics of "continuity of life" and "free transferability of interests". The language was included specifically for the purpose of rendering this new entity form subject to taxation *like a partnership*, while keeping the advantages of limited liability enjoyed by the corporate form.

After years of wrangling between the IRS and the Wyoming Bar seeking this tax advantage, the IRS ultimately promulgated Revenue Ruling 88-76 in 1988, which treated a Wyoming LLC not as a corporation for tax purposes – i.e., not requiring 'double taxation' – but as a partnership, with pass-through tax liability for federal income tax purposes.[34]

Since all LLCs contain the corporate characteristic of limited liability, they were required under prior law to be structured to lack two of the remaining three corporate characteristics to avoid entity-level corporate taxation.

That is why some states drafted statutes that guaranteed that an LLC formed in that state would meet then current requirements for partnership

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[34] The regulations classified organizations based on four corporate characteristics: centralization of management, continuity of life, free transferability of interests, and limited liability. Treas. Reg. §301.7701 (1992).

An entity that had more corporate than non-corporate characteristics was taxed as a corporation. Id. The IRS found that the Wyoming LLC possessed the characteristics of centralized management and limited liability, but lacked the characteristics of continuity of life and free transferability of interests, thereby enabling it to be taxed as a partnership. Rev. Rul. 88-76, 1988-2 C.B. 360.

taxation (i.e., they would lack two corporate characteristics). See, generally, Maizes, Rachel (2012) "Limited Liability Companies: A Critique," St. John's Law Review: Vol. 70: Iss. 3, Article 3 at 582.

Once the IRS published Ruling 88-76 in 1988, and effectively "blessed" the Wyoming statutory scheme for LLC creation, other states, including New York, mirrored the Wyoming statute in order to receive similarly favorable partnership taxation treatment for their state's LLCs. The original 1994 version of New York's LLC dissolution provision set forth in (former) LLCL §701(d) was virtually identical to the dissolution provision contained in the (approved) Wyoming law, ensuring that a New York LLC would be eligible for similarly favorable partnership taxation treatment as was accorded a Wyoming LLC.

This history opens a window onto how and why New York's LLC Law came to include the word "expulsion" as a trigger for Dissolution – even while it rejected the notion of drafting any mechanism for the expulsion of LLC members, which was left to the contracting parties, if at all.

This history also sheds light on how the "boilerplate" Agreements at issue came to include the word "expulsion" as a trigger for the new concept of "dissociation" – even where they neglected to provide for any mechanism, procedure or express grant of authority for the expulsion of any member.

The foregoing *parol evidence* indicates that the inclusion of the words "expulsion of a member" as a trigger for "dissociation" in the Agreements was intended to permit the LLCs to maintain partnership taxation under the law as understood at the time the agreements were executed[35] – and not to permit members to expel co-members.

B. THE REFEREE'S FINDING THAT THE SUM OF $202,142 PAID TO JOAQUIN IN JULY 2008 WAS A DISTRIBUTION AND NOT A BUY-OUT WAS AGAINST THE WEIGHT OF THE EVIDENCE

Appellant argues that the Referee's decision that that he "mislabeled" a distribution as a buy-out (R.13d), was against the weight of the evidence.

Appellant testified that in July, 2008, he accounted for all of All-Boro's remaining assets, made distributions to all three members,[36] and consistent with his prior oral agreement with his brother, sent Joaquin a check for $202,142. (R.956) marked as a buy-out.

Respondents deny that Joaquin agreed to be bought out, or that R.956 effected his buy-out.

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[35] The Operating Agreements became effective upon entity formation: JMP on 1/20/96 and All-Boro on 11/4/98, per public Secretary of State Records.

[36] 45% to Michael, 45% to Peter and 10% to Joaquin.

The evidence, though detailed, is straightforward and compelling.

Appellant's "distribution" to All-Boro members from the last property sold by that company in July, 2008 is reckoned by reference to a spreadsheet of proceeds and expenses of All-Boro buildings that were sold in the 1½ years up through July, 2008, in chronological columns, left to right, with Appellant's contemporaneous handwritten updates and annotations. (R.917.)

From R.917, one can observe that as of July 2008, the total of the proceeds from these 16 All-Boro property sales was a bit more than $6 Million Dollars.

From these gross proceeds, Appellant deducted expenses (from the right-hand column), and noted in his handwriting:

" Total Available to Pay off JMP + Distribute	= 2,984,719
JMP Loan Payoff	= - 1,129,185
AB Total Distribution	= 1,855,534 "

Ten (10%) percent of the "AB Total Distribution" came out to $185,553.40, which after a slight adjustment was noted on R.917 as:

JG 181,949

This sum, exactly $181,949. is what Joaquin received by check dated July 9, 2008 – *as his distribution* – marked unambiguously: “Distribution on Sales of All-Boro”. (R.914). This un-rebutted evidence establishes that Joaquin received all of the distributions he was entitled to from All-Boro in July, 2008, by that payment of $181,949.

Therefore, the other check of $202,142. (R.956) received and deposited by Joaquin days later was not another “distribution” – but explicitly a buy-out payment of ten (10%) percent of All-Boro’s remaining equity.

In perfect consistency, after showing that R.956 was not a “distribution” to Joaquin, Appellant showed how the total net asset value of All-Boro was about ten times more than what Joaquin got – i.e., about $2.02 Million Dollars, in July, 2008.

Appellant testified that All-Boro’s remaining assets as of July 9, 2008 included the balance in All-Boro’s accounts, about $55,100 (R.553-555; 956); the remaining value of its antenna contracts,[37] estimated at about $75,000 and the net equity value of its five (5) buildings. (R.534.)

Appellant testified that he obtained the net values of the five (5) buildings

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[37] Certain buildings had entered into antenna contracts whereby the company was paid for the use of its roof to house a cell phone antenna.

by multiplying their rent rolls[38] by a factor of eight (8) times, arriving at an aggregate gross value of just under $6 Million Dollars (R.542), and deducting the aggregate mortgage debt on these buildings of $4.1 Million Dollars,[39] arriving at the net equity value of the 5 buildings of about $1.9 Million Dollars.

Adding those three sums resulted in a total net asset value of All-Boro as of July, 2008 of just under $2,030,100, virtually ten (10%) percent of which was paid to Joaquin on July 9, 2008 marked as a buy-out of his interest in All-Boro in the sum of $202,142. (R.956). [40]

On the other side of the ledger, the claim that this was a distribution, was solely evidenced by assertion, and found to be a distribution against the weight of all detailed calculations on the tangible assets in evidence. The result below, that the payment was a "distribution" makes no [mathematical] sense whatever. Such payment as a *distribution* ended Joaquin's membership in All-Boro for all purposes. This Court should so find, and reverse.

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[38] The 2008 rent rolls of these five (5) buildings was put into evidence as part of R.918 – the 2008 All-Boro Federal tax return. (R.538-540.)

[39] Four of the five buildings had refinanced mortgages. The fifth was owned, free and clear of any mortgage lien at that time.

[40] Appellant testified that he had a folder at the company office documenting these calculations in 2008, but that file "vanished" when he returned to the office,(R.534), requiring his to reconstruct that valuation process at trial. Id.

C. PETER'S CONDUCT DID NOT CONSTITUTE "CAUSE" JUSTIFYING EXPULSION

In reviewing a determination made after a nonjury trial, the power of the Appellate Division is as broad as that of the trial court. This Court may thus render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses. Fernandez v. State of New York, 130 A.D.3d 566 (2nd Dept. 2015).

Assuming *arguendo* that all respondents had to prove was "cause, we respectfully submit the same was not made out.

Even if Appellant took money for his own purposes, *without* the advance knowledge or permission of others, he had the right to do so under the operating agreements.[41] There is substantial proof that all transactions were openly and properly recorded. Nothing was hidden. No evidence indicates secrecy, furtiveness, or any other indicia of wrongdoing.

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[41] The Agreements (R.79; 106), at Section 6.5 "Conflicts of Interest", states in part: "Members shall account to the company and hold as trustee for it any property, profit or benefit derived by the member, without the consent of all of the other members in the conduct and winding up of the company business or from a use or appropriation by the member of Company property …. " (Emphasis added).

This language provides that Appellant's actions should, at worst, have been remedied by an Accounting – not expulsion.

The best proof that all records were properly and openly kept, is that in early 2010, both Michael and Peter came up with virtually the same numbers, upon independently examining the books. (R.272; 817; 948; 1789-1791; 2186.)

There is simply no warrant for expulsion under these circumstances. Indeed, the initial complaint sought money only. (R.20, *et seq*.) There are sufficient provisions in the operating agreement, and at law, to permit equalization of the parties' capital accounts.

Appellant never denied that he owed *disproportionate* distributions from JMP and All-Boro. The tax returns themselves show that. The Memo of the April, 2008 meeting shows that. (R.993.) Respondents' belated feigning of ignorance is pure manufactured theatrics.

Appellant's actions do not constitute the kind of "cause" that should sustain expulsions from membership in these LLCs. Appellant never refused to "equalize" his admitted *disproportionate* distributions.

Referee Kurtz' decision that "Peter's diversion of significant company funds for personal use … alone was sufficient cause for expulsion" (R.13c-13d.) is error, as a matter of law.

In Polin v. Kaplan, 257 N.Y. 277 (1931), the Court of Appeals reinstated an expelled union member after concluding that the underlying "offense" … "violated no express provision of the constitution and by-laws, for which expulsion was provided as a penalty" and "displayed no disloyalty to the union, performing "no act injurious to the society or tending to its disruption**.**"[42] (Emphasis added.)

The Polin court also cited with approval an association's standard for expulsion of a member, as: "conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute."

In Barry v. The Players, 147 A.D. 704 (1st Dept. 1911), the constitution of a social club provided that any member may be expelled "for cause"; but provided no precise definition of what constituted cause. The court held that to justify expulsion the conduct must "in some fair sense be said to be 'improper and prejudicial to the club' (citations omitted; Id. at 706), i.e., "conduct which in some way, or to some degree, tends to injure the club materially, or in reputation, or is contrary to and destructive of [its] purpose".

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42 Presciently predictive of the operative provisions of RULLCA §602(5).

Notably, no evidence of either pecuniary or reputational harm to JMP or All-Boro has ever been alleged or proven.

Regarding the discrete transactions at the top of R.951, Appellant testified that for the most part, they arose out of personal crises, or investment opportunities that Michael was well aware of.

The first *disproportionate* withdrawal by Appellant in 2004 was triggered by the tragic death of Appellant's teenage daughter and his need to buy a house not inextricably tied to her memory. (R.453.) Appellant acknowledged that he did not ask permission to withdraw this particular sum.

Instead, Appellant explained that he told Michael: "I don't think I have enough money for this whole thing [the house acquisition and construction]. I have most of the money, but from time to time I may need money from the business." Appellant further testified:

> And Michael's answer to me is what my answer to him would have been. If it's there, you need it, you take it. As I would say to him, if it's there, and [to] my brother, if it's there and you need it, you take it.

At which point the Referee interjected: “So he [Michael] may not have known particularly that you took this amount, but he knew you were taking amounts for the house.” Appellant answered: “Yes.” (R 455-56.)

Notably, Michael entered the following notation into the check register: “983 P. Garcia – L/P 86,500”. (R.984.)[43]

Similarly, the facts surrounding the next two *disproportionate* withdrawals of $100,000. and $60,000. illustrate the unique circumstances surrounding the financial dealings among Appellant and Respondents and demonstrate the lack of any deception or impropriety on Appellant’s part. While Appellant was consummating the acquisition of his replacement house, Joaquin asked Appellant to loan him $300,000. (R.459-460.)

Appellant testified that this loan was made with the understanding that it was to be repaid by the end of 2004. (R.461.) When Joaquin did not return the money in timely fashion (R.462), Appellant told his older brother, Joaquin: “I was going to take those moneys temporarily from All-Boro.” Id.

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[43] Sylvia Lawrency, a prior employee of the companies, confirmed that this notation was in Michael’s handwriting. (R.418.) Notably, while Yesina Santa, another employee, gave some contradictory testimony about other signatures, she never refuted Ms. Lawrency’s testimony about this notation.

Appellant testified that "Michael was aware" of all of these facts, because they were very close. Id.[44]

Other *disproportionate* distributions noted on R.951 were either for an investment opportunity that was offered to Michael, or for construction of Appellant's Summer residence that Michael knew about.

At the bottom of R.951 are two amounts totaling $700,000. that Respondent, Michael not only knew about, but actually wrote the checks for himself. (R.328-330).

These facts illustrate not only how these *disproportionate* distributions were openly documented in the books and records of the companies, but were part of Appellant's important life events that his family members certainly had knowledge of.

The parties enjoyed an informal course of doing business, which negates any inference that Appellant intended to, or actually harmed Respondents, or their businesses.

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[44] Appellant's testimony regarding Michael's knowledge and consent is supported by Sylvia Lawrency's testimony (R.418-419; 976; 984); (and confirmed by Appellant at R.458), that the check register entries for these three checks are in Michael's handwriting.

Even Referee Kurtz, at one point said: "I can tell you whose handwriting it is by now, but that's okay." (R.421, *l*.19-20.)

D. **THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW <u>TO SUPPORT THE DECISION BELOW</u>**

Because no power to expel any LLC member was granted by either statute or agreement, the evidence adduced below is insufficient as a matter of law to support the Judgment appealed from.

There is no valid line of reasoning and permissible inferences which could possibly lead a rational judge to the conclusion reached by the Referee below on the basis of the evidence presented at trial, and the law as it presently stands. See Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493 (1978).

i. Michael Garcia was Estopped, as a Matter of Law, to Vote for Peter's Expulsion From All-Boro

Indisputably, Michael signed the Amendment to the Operating Agreement of All-Boro, that confirmed the purported withdrawal of his father from that company in 2008. (R.806.)

By that official act, Michael recognized that his father, Joaquin, was no longer a member of All-Boro.

By later voting with Joaquin to purportedly expel Appellant as a member of All-Boro—an official company act that necessarily recognized Joaquin was then a member of All-Boro—Michael committed an inconsistent, official act.

It has long been held in New York that a shareholder who participates in an activity may not subsequently challenge its legality. *See* Diamond v. Diamond, 307 N.Y. 263, 266 (1954). An estoppel arises to bar a company's official actor from taking contradictory positions on matters of company business. *See*, e.g., Kranich v. Bach, 209 App Div 52, 54 (1st Dept. 1924); Winter v. Bernstein, 149 Misc 2d 1017, 1020, aff'd as mod, 177 A.D.2d 452 (1st Dept. 1991).

Michael's latter inconsistent official act, i.e., his "vote" to expel Peter from All-Boro, may not be recognized nor given any evidentiary weight.[45] In equity, Michael was not permitted to take this contradictory company act.

Michael's subsequent vote with Joaquin to purportedly effect Appellant's expulsion, implicitly recognized Joaquin *as a then member of All-Boro*, and thus must be deemed ineffective by this principle – even if Joaquin actually retained his membership interest in that company.

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[45] Thus depriving Joaquin's sole vote as combining with Michael's, to reach a majority interest in membership.

Additionally, Michael testified that he filed his own tax returns based on the K-1s supplied to him by All-Boro – after 2008, and thus adopting the position that he was a 50% owner of that company after 2008. It has been held that a party to litigation may not take a position contrary to a position taken in an income tax return. Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415 (2009).

To allow Michael to recognize Joaquin *as a member of All-Boro* in 2011, and vote with him to expel Appellant as a member of that company, would be in violation of this principle as well.

Furthermore, it is also certain that – *were it true* – Michael should, and would have known of Joaquin's (later-claimed) denial of having relinquished his membership interest in All-Boro.

He would *and should* have known of that position held by his father with the exercise of even the most minimal diligence (e.g., simply speaking to his father once on this topic between July 2008 and January 2010).

Michael's failure to object – for years – constitutes a waiver of any possible claim that his signature on R.806 was somehow the product of mistake or excusable neglect. See, e.g., Tatko v. Sheldon Slate Prods. Co., 2 A.D.3d 1030 (3rd Dept. 2003).

PART II

A. THE MONETARY AMOUNTS AWARDED IN THE JUDGMENT ARE ERRONEOUS

i. Preliminary Statement

Appellant challenges, in turn, three findings arrived at after the Damages Trial, as incorporated into the Judgment, on appeal.

First, Appellant challenges the lower Court's finding that the real estate valuations of each company, *taken globally*, should be determined by the "differential in valuation between the two appraisers [which] should be credited 75 percent, three-quarters in plaintiffs' favor." (R.1776.)

Second, Appellant challenges the lower Court's finding that the weekly distributions received by Appellant from both companies, after former Justice Schmidt's Order of January 26, 2011 (R.2815) – but before the alleged expulsions – must be treated as "loans" to be repaid. (R.1773.)

Third, Appellant challenges the lower Court's finding that two specific sums paid to Appellant, i.e., $208,621.[46] and $100,000.[47] were "loans" that Appellant was required to repay. (R.01-09; 2772-2797.)

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[46] R.2758, bottom section, sum of lines 1 and 2 thereof.

[47] R.2758, bottom section, line 5 thereof.

ii. The Real Estate Valuations of Each Company Should Not Have Been Determined by the Differential in Valuation Between the Two Appraisers, Credited 75 Percent in Plaintiffs' Favor

At the Damages Trial, the Court had to determine the fair market value of fifteen (15) properties as of August 19, 2011.

Both sides adduced testimony and reports from expert appraisers, and according to the lower Court, both appraisers relied on the "Income Capitalization Approach" in order to give their opinions. (R.1776.)

Both sides were in substantial agreement as to the income and expenses for all buildings at issue. Thus, the only difference between the appraisals was the capitalization rate[48] chosen for each property.

As will be shown, the conclusion of the trial court in apportioning valuation 75% in Plaintiffs' favor, because "[t]he spread of comparables used by plaintiffs' expert does appear to more nearly represent the spread of properties that is the subject of this litigation", is clearly erroneous, and against the weight of the evidence.

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48 Capitalization rates ("cap-rates") and valuation move in opposite directions. That is, the lower the capitalization rate, the higher the valuation.

To understand how the lower Court arrived at its conclusion – and why it is erroneous, and against the weight of the evidence – we first look to how each appraiser arrived at, and justified his chosen cap-rates for each property.

Based on the evidence, it appears that each appraiser used opposite approaches in deriving their respective cap-rates.

Respondents' appraiser ("DiGeronimo") testified that his primary method of obtaining cap-rates was "market defined" (R.1247), that is, he utilized market data to identify appropriate cap-rates. He reported 15 supposedly comparable sales[49] with "market derived cap rates to support [his] cap rate conclusion". (R.1242).

DiGeronimo then supposedly "checked" his results against a mathematical method called a "Band of Investment" formula, which was said to support his chosen cap-rates (of either 7.0%, 7.25% or 7.75%) (R.1873-1875). No other data-checking method was used.[50]

Appellant's appraiser ("Guzowski"), on the other hand, used a similar mathematical method – also called a "Band of Investment" formula – to

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49 Actually, 16 lines of data are reported, but 1433 Bedford Avenue is listed, and calculated twice.

50 No explanation was ever given why one cap-rate was assigned to some properties, and other cap-rates assigned to different properties.

initially derive separate cap-rates for each of the properties.[51] (R.1440.) However his mathematical method included two separate internal calculations (which increased valuation) which DiGeronimo's method failed to consider.

Guzowski testified that DiGeronimo erred by failing to account for, and utilize allowances for, "appreciation" and for "equity build-up" in his otherwise similar mathematical model (R.1444).[52]

Guzowski testified that: "Leaving that out, you're saying in the end … you will have never paid off any building, and it will never go up in value, which is preposterous. They do appreciate over time." (R.1445.) Over time, "Equity increases and the mortgage decreases." (R.1451).

The failure to account for these two cap rate adjustments unfairly undervalued the properties.

It is certainly common sense in the real estate industry that in neighborhoods where property values appreciate faster, cap-rates are lower, and properties command a higher price for the net income produced.

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51 Guzowski's 15 separate mathematical derivations which identified the 15 cap-rates he used for the subject valuations are found at R.2293; 2308; 2323; 2338; 2354; 2370; 2387; 2403; 2418; 2433; 2472; 2488; 2504; 2519; and 2535.

52 Guzowski testified that both of these two allowances are very instrumental in determining the "internal rate of return for properties, real property that you purchase for investment." Id.

The fact that better neighborhoods command a lower cap-rate in comparison to less desirable neighborhoods was a *central point of Respondents' argument and their proof*. See, e.g., R.1256-7.

Yet, without a mathematical provision for "appreciation", i.e., the mathematical translation into monetary terms of the *expectation* that values will go up faster, the only way to accurately capture value is to *hope* one's comparables were correctly chosen. This is exactly why an "appreciation" component is necessary to include in a mathematical cap-rate derivation formula – to provide a proper "check" as to whether one has chosen his comparables correctly.

As any Brooklyn resident knows, properties in Bed-Stuy and Bushwick were depressed for years, and then as these neighborhoods got "hot", their property valuations skyrocketed. Notably, all of the 15 subject properties in this suit are in Bed-Stuy or Bushwick. (R.1257.) DiGeronimo's failure to account for property appreciation, as seen from 2011, unfairly prejudices Appellant.

Additionally, since the equity portion of property ownership increases over time as mortgage payments are made, an adjustment for "equity build-up" over time must be included in the mathematical cap rate derivation formula, as well. (R.1444).

By checking his initially derived cap-rates in a far more comprehensive fashion than the opposing appraiser did, Appellant's expert's methodology has earned far more credit than was given to it by the lower Court under a "weight of the evidence" analysis.

a. Appellant's Appraiser's Cap-Rates Most Closely Conformed to Reliable Market "Checks"

Appellant's argument is that the "weight" of the evidentiary "checks" against each appraiser's initial cap rate selections favors Guzowski's cap-rate choices – by far.

As noted above, the first two methods of finding and checking cap-rates as used by the two appraisers were exactly the reverse of one another.[53]

Since a discussion of cap-rate choices, and methods of checking then requires ready awareness of the cap-rates chosen by each expert, we have reproduced the following table, and set forth the arithmetic averages.[54]

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53 DiGeronimo started with the comparables and "checked" them against the mathematical model.

Guzowski started with the mathematical model, and "checked" the results against comparable sales.

54 DiGeronimo's cap-rates are extracted from R.1840-1854. Guzowski's cap-rates are extracted from R.2291; 2306; 2321; 2336; 2352; 2368; 2385; 2401; 2416; 2431; 2470; 2486; 2502; 2517 and 2533.

TABLE OF FINAL CAP-RATES USED BY APPRAISERS

#	**All Boro**	DiGeronimo's Cap-Rates	Guzowski's Cap-Rates	Difference in Cap-Rates
1	330 Lewis Avenue	7.75%	5.75%	2.0%
2	588 Throop Avenue	7.5%	6.0%	1.5%
3	605-7 Gates Avenue	7.25%	6.75%	0.5%
4	609 Gates Avenue	7.25%	5.75%	1.5%
5	951 Putnam Avenue	7.75%	5.75%	2.0%
	All-Boro Averages:	7.500%	6.000%	1.50%
	JMP	DiGeronimo's Cap-Rates	Guzowski's Cap-Rates	Difference in Cap-Rates
6	114-122 Quincy Ave.	7.25%	5.75%	1.5%
7	25 Malcolm X Blvd.	7.25%	5.75%	1.5%
8	344 Gates Avenue	7.25%	5.75%	1.5%
9	390 Vernon Avenue	7.25%	5.75%	1.5%
10	460 Throop Avenue	7.25%	5.75%	1.5%
11	51 Quincy Street	7.25%	5.75%	1.5%
12	57 Herkimer Street	7.25%	5.5%	1.75%
13	758 Marcy Avenue	7.25%	5.75%	1.5%
14	994 Bushwick Ave.	7.5%	5.75%	1.75%
15	998 Bushwick Ave.	7.50%	5.75%	1.75%
	JMP Averages:	7.30%	5.725%	1.575%
	Overall Averages:	7.37%	5.82%	1.55%

Notably, the actual average difference in cap-rates used by the two appraisers – over both portfolios – differed by only about 1.55%. Yet, this seemingly small percentage difference in cap-rates amounted to a huge aggregate differential in valuation of $6,200,000.[55]

55 The lower Court credited Respondents with 75% of that differential in valuation (i.e., $4,650,00). The evidence does not support this result.

DiGeronimo identified his cap-rates by looking at comparables, and "checking" them against a mathematical model. Guzowski noted that if DiGeronimo had used the proper mathematical model, the cap-rates would have been brought down by between 1.5% and 2.0% (R.1452; 2517), which accounts, almost precisely, for the overall average differential in the two appraiser's *final* cap-rates.

Guzowski identified his cap-rates by his enhanced mathematical model and then "checked" them against comparables. However, Respondents challenged three of Guzowski's comps because they were in different neighborhoods than Bed-Stuy or Bushwick—i.e., Berry Street[56] (R.1420); 137 Nelson Street[57] (R.1422); and 120 Riverdale Avenue.[58] (R.1429.)

If we simply disregard these 3 challenged cap-rate comps, and average the balance of Guzowski's cap-rate comps, the resulting average cap-rate is little changed. Guzowski's opinion was still far more "conservative" in his cap-rate conclusions than was DiGeronimo's in his cap-rate conclusions, as follows.

Guzowski noted that the average (mean) of the cap-rates of all his chosen comparables was 5.34%. (R.2472.)

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56 In the Greenpoint-Williamsburg section.

57 In the Redhook-Carroll Gardens section.

58 In the Brownsville section.

If the three "objectionable" properties (and the one duplicate listed property) are omitted, the average of the remaining cap rates is 5.49%, very close to the original average.

Most importantly, Guzowski ultimately used an average cap-rate for his valuation opinions of 5.82% (see table above) – a higher, and thus more conservative rate, which resulted in a lower valuation than his comps indicated.

Thus, on the basis of this first cross-check, DiGeronimo's cap-rates are about 1.5% too high, and Guzowski's cap-rates are almost precisely dead-on.

The second check Guzowski used is called a gross rent multiplier ("GRM") analysis (R.1440), which was used, "in every property valuation" he reported. (R.1458; R.2506.)

Guzowski testified that by looking at his comparable sales,[59] he derived an average relationship between the gross annual rent of a property and the sales price – or valuation – a "multiplier" of about 8.86 times. (R.1459.) The expert testified that his valuations were "less than that," i.e., more conservative than even this data indicated. Id.

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[59] For this purpose and the next cross-check Guzowski identified at least twenty (20) different comparable properties from which to extract that data, none of which were objected to by Respondents in any way.

Notably, DiGeronimo did not even attempt a GRM analysis, and none is included in either his report or his testimony.

The third cross-check used by Guzowski is called the "sales-approach" which results in a "per-unit price" analysis. Guzowski testified that he "identified comparable sales" (R.1460), and based on the data from these comparables,[60] derived an "average sale price per unit". (R.1461.)

From all of this comparable data, Guzowski identified an average "per-unit price", which ranged from a low of $85,427, to a high of $115,363.[61]

To keep these numbers in perspective, for the 200 residential units (R.1254) in the 10 JMP properties, Guzowski derived an aggregate portfolio value $21,050,000., which works out to $105,250. per unit (on average) – well within the comparable range.

For the 67 residential units (R.1254) contained in the 5 All-Boro properties, Guzowski derived an aggregate portfolio value $7,010,000., i.e., $104,627. per unit (on average) – also well within the comparable range.

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60 The list of all twenty (20) comparable sales, which are listed in overlapping groups of five for each of the subject properties, is located at R.2296; 2311; 2326; 2342; 2357; 2373; 2391; 2406; 2421; 2436; 2475; 2492; 2507; 2522 and 2538.

61 These per-unit price derivations from Appellant's comparables are found at R.2298; 2313; 2328; 2344; 2359; 2375; 2393; 2408; 2423; 2438; 2505; 2539; 2569; 2599 and 2631.

On the other hand, DiGeronimo valued the 10 JMP properties at an aggregate of $16,320,000, which works out to $81,600 (on average) for each of the 200 residential units, an unreasonably low figure, not only when contrasted with Guzowski's comparables, but with his *own comps*, as well.

DiGeronimo valued the 5 All-Boro properties at an aggregate of $5,550,000, which is $82,686 (on average) for each of the 67 residential units, also lower than the price per unit of either expert's comparables.

DiGeronimo's own comparables work out to an average price per unit of $118,169. – a striking result that demonstrates just how unreasonably low DiGeronimo's estimates of value really were.

From this data—including DiGeronimo's own comparables—one can readily see that the trial court's reasoning about valuation was palpably wrong, and against the weight of the evidence.

The valuation evidence so preponderates in favor of Appellant, that the lower Court's determination on this point could not have been reached on any fair interpretation of that evidence. Lolik v. Big V Supermarkets, 86 N.Y.2d 744 (1995); Sanchez v. Dawson, 120 A.D.3d 933 (4th Dept. 2014); Ganai v. 6910 Fort Hamilton Parkway Corp., 149 A.D.3d 914 (2nd Dept. 2017). *See also*, Northern Westchester Professional Park Associates v. Bedford, 60 N.Y.2d 492 (1983).

As the Court of Appeals noted in Saratoga Harness Racing v. Williams, 91 N.Y.2d 639 (1998), *quoting* Grant Co. v. Srogi, 52 N.Y.2d 496 (1981):

> The determination of market value essentially is a question of fact. As such, the Appellate Division is empowered to make new findings of value where the trial court "has failed to give conflicting evidence the relative weight which it should have."

Reversal is warranted here, as the fact finding of the trial court failed to give Guzowski's opinion the weight it deserved in accordance with the evidence adduced.

The Judgment should be vacated and remanded for recalculation in accordance with Guzowski's opinions on valuation of the underlying properties.

iii. Distributions Paid to Appellant Between January 26, 2011 and August 19, 2011 Are Not Loans That Must be Repaid

The monetary portions of the judgment appealed from were determined by the lower Court, as the "value of the Member's Membership interest in the Company," per section 11.2(b) of the operating agreement, which provides for the rights of a Dissociating Member. (R.089.)

The trial Court accomplished this task by first determining the values of the 15 properties owned by JMP and All-Boro as of August 19, 2011, the date of the purported expulsions; then applying Appellant's proportionate ownership interest in each company (33.3% for JMP and 45% for All-Boro); then deducting a "discount" of 5% from each fractional value; and then reducing each result by the amount Appellant received from each company *disproportionate to his interest* in that company.

At the damages trial, there was no serious disagreement as to the *disproportionate* amount Appellant received the benefit of from each company.

That was the aggregate amount of $1,828,731. (R.2758.)[62]

This section describes separate, additional amounts that the trial Court directed Appellant to credit back, i.e., the sum of $68,000. to JMP, and the sum of $51,000. to All-Boro, which are not "*disproportionate*".

Both of these sums were paid, in weekly installments, to Appellant between January 26, 2011 – the date of a certain pre-trial order below, and August 19, 2011 – the date of Appellant's purported expulsions.

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[62] The next section takes issue with two such credits that Appellant objected to below, and on this appeal.

As noted above, prior to January 26, 2011, Respondents caused JMP and All-Boro to stop paying Appellant his weekly draw.[63]

By pre-trial motion practice, Appellant challenged the cessation of his draw, and by Order of former Justice Schmidt dated January 26, 2011 (R.2815), Appellant's weekly draw was reinstated.

That Order said, in pertinent part:

> Such payments shall be characterized as a loan to Plaintiff without waiver of or prejudice to Plaintiff's right to argue that he is entitled to such payments as Plaintiff's distributions. Id.[64]

The trial Court required Appellant to credit those funds against his interests in JMP and All-Boro, saying of former Justice Schmidt's Order:

> I don't see any convincing reason to change it over to distributions. We're going to treat it as a loan as per his order." (R.1773.)

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63 Prior to stopping Appellant's weekly draw, both he and Michael had received equal draw from both JMP and All-Boro, going back many years.

64 The amounts are not in dispute: $68,000 from JMP; $51,000 from All-Boro.

Notably, prior to the expulsions, neither Appellant nor Michael received a salary. Both consistently received equal weekly draw from both companies. The tax returns of the companies, their testimony and their K-1 statements, all attest to that fact.[65]

The same was conceded by Michael on cross-examination. (R.1202).

Prior to his expulsion, for the entire year of 2011, both Appellant and Michael—who each then owned equal membership interests in both JMP and in All-Boro—received the same amount of money from each company. During that time, both Appellant and Michael were entitled to receive the same amount of money from each company.[66]

Thus, these sums were taken *proportionately*.

At trial, Michael was asked directly whether he claimed that these monies had to be "repaid back to those companies?" Unambiguously and directly, Michael answered: "No". (R.1205.)

That answer alone requires remand and recalculation.

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[65] See, e.g., All-Boro's 2010 income tax return prepared by Respondents' accountant (R.2195); and its K-1 statements from 2003-2008 (R.2215).

[66] Had Michael elected not to receive any draw, then the *disproportionate* money Appellant received *would* have been properly recoupable.

iv. The Sum of $100,000. – Transferred from All-Boro to Appellant and Paid to Respondent, Joaquin on the Same Day – is Not a Loan Appellant Had to Repay

The Judgment required Appellant to credit $100,000. back to All-Boro. That is, said amount was included in, and *reduced* appellant's aggregate monetary award, at alternative paragraph "[B] of the Judgment (R.3)—as derived from the parties' post-trial calculation submissions. See, e.g., R.2771, *et seq*., identified in the "true-up" calculation at R.2776, bottom part, line 5.

Yet, while Appellant admitted that he received this sum from All-Boro, on February 13, 2009. (R.1507-1509), he testified that on the same day he transmitted the exact same sum to his brother, Joaquin, Id, at Joaquin's request, and *produced a copy of the cancelled check showing that transaction*. (R.2777.)

Appellant argues that since the money from All-Boro was paid to his brother as an accommodation – at Joaquin's request – Appellant should not be held liable for that sum.

The only reason Appellant said he put the money through his own account first was for accounting convenience. Id.

For these reasons, the trial Court's decision regarding this money should be reversed and the Judgment remanded and recalculated.

v. The Sum of $208,621. Transferred from All-Boro to Appellant Was All-Boro's Investment, and Not a Loan That Appellant Had to Repay

Appellant was required to credit $208,621. back to All-Boro. (*See*; the post-trial calculation analysis submissions – R. 2771, *et* seq.; R.2776, bottom part, lines 1 and 2 – (i.e., $73,000. + $135,621. = $208,621.)

Appellant objects to paying these monies back, testifying that both sums were All-Boro's investment in certain of the Dubai investments, discussed *supra*, which he never personally guaranteed.

Appellant noted that the books and records of All-Boro carried an investment amount of $144,985. This was proved by Respondents' accountant, Fruchter, who testified that All-Boro's balance sheet as of September 30, 2011 (R.2019), as created by the bookkeeping staff of All-Boro (R.1324), contained such an entry.

Mr. Fruchter testified that on All-Boro's 2010 tax return, he indicated on its internal Schedule "L" that there was "due from Peter Garcia" the amount of $144,985. (R.1321; 2202).

Mr. Fruchter, testified that "in prior years the books and records of the company labeled it as investment in Dubai". Id. The "books and records" Mr.

Fruchter referred to were the 2009 All-Boro tax return, which indicated that the $144,985. was an investment of that company. (R.1321; 2568).

No other Dubai investment was ever testified to – other than monies paid to Appellant.

Appellant testified that $135,621 was invested in Dubai,[67] and was not taken for his personal benefit. (R.1500.) All investments in Dubai were run through Appellant's checkbook for his accounting convenience.

Appellant testified that the $73,000.—recorded at line 1, bottom of R.951—was in reality All-Boro's initial $100,000. investment, reduced to $73,000., because of currency exchange expenses. (R.1491.)

Since there was no countervailing evidence to show that these monies were not invested in Dubai, or that Appellant ever personally guaranteed any All-Boro investment, the trial Court's decision regarding these sums should be reversed and the Judgment remanded and recalculated.

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67 The amount recorded on line 2, bottom of R.951 (notably, *not* $144,985).

CONCLUSION

Since the Operating Agreements of JMP and All-Boro grant no power of expulsion to members, either expressly, inferentially, or by proper judicial insertion, Appellant's expulsions should be declared invalid.

Alternatively, if valid, the Judgment should be vacated and recalculated in accordance herewith.

WHEREFORE, it is respectfully requested that this appeal be granted; the Judgment appealed from be reversed as argued herein; and for such other and further relief as to this Court may seem just and proper.

Affirmed: Brooklyn, New York
October 11, 2017

Respectfully submitted,

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SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

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JOAQUIN GARCIA, MICHAEL GARCIA Individually and on behalf of JMP PROPERTIES, LLC and ALL-BORO MANAGEMENT CO. LLC, Plaintiffs-Respondents-Appellants, - against - PETER GARCIA, Defendant-Appellant-Respondent.	App. Div. No.: 2017-03930 (Action No. 1) Kings County Clerk's Index No.: 24618/10

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PETER J. GARCIA, Plaintiff-Appellant-Respondent, - against - MICHAEL GARCIA, JOAQUIN GARCIA, JMP PROPERTIES, LLC, ALL-BORO MANAGEMENT CO. LLC, BROOKLYN PROPERTIES 21 LLC and GARCON, INC., Defendants-Respondents-Appellants, - and - BROOKLYN PROPERTIES 21 LLC and GARCON, INC., Defendants.	(Action No. 2) Kings County Clerk's Index No.: 28956/10

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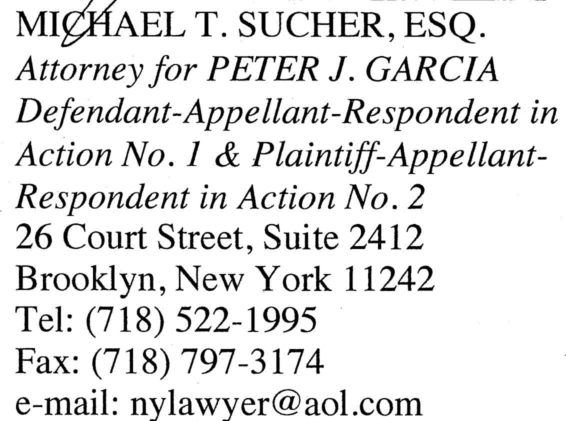
CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR §670.10-c(f)

1. The foregoing Brief of Peter J. Garcia, Defendant-Appellant-Respondent in Action No. 1 and Plaintiff-Appellant-Respondent in Action No. 2, was prepared on a computer using Microsoft Word 2008 for Macintosh, version 12.1.1.

2. A proportionally spaced, serifed typeface was used, as follows: Times: Point Size: 14 point. Line Spacing: double; one and one-half line spacing used for indented quotations

3. The total number of words in the Appellant's Brief, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 13,985

Dated: Brooklyn, New York
October 11, 2017



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STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

ANDREW M. SHABASSON, ESQ., an attorney duly licensed to practice law in the courts of the State of New York, affirms under the penalties of perjury that he resides in Brooklyn, New York, is not a party to this action, and is over eighteen years of age.

That on October 12, 2017 affirmant served two (2) true and complete copies of the within Appellant's Brief on the Attorney named below, by delivering the same to said attorney at his office address listed below, and leaving them with a person authorized to accept same, who gave her name as Sandra Bermudez.

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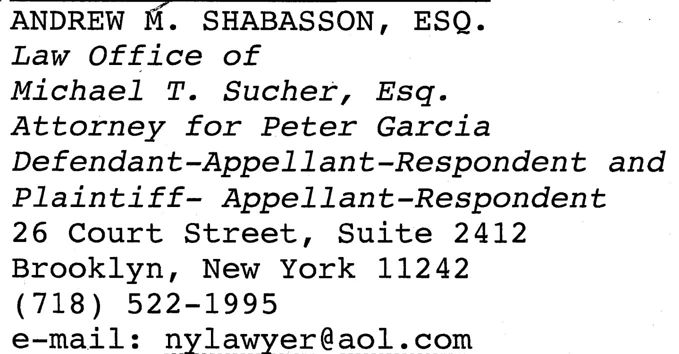
Affirmed: October 12, 2017



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