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,

Plaintiffs-Respondents-Appellants,

-against-

PETER GARCIA,

Defendant-Appellant-Respondent.

App Div No.: 2017-03930

(Action No. 1)

PETER J. GARCIA,

Plaintiff-Appellant-Respondent,

-against-

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.

(Action No. 2)

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

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24618/2010 (Action No. 1)
28956/2010 (Action No. 2)

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PRELIMINARY STATEMENT

Peter Garcia, Defendant-Appellant-Respondent in Action No. 1 and Plaintiff-Appellant-Respondent in Action No. 2 ("Appellant"), hereby replies to the undated Brief of the Plaintiffs-Respondents-Appellants in Action No. 1 and Defendants-Respondents-Appellants in Action No. 2 ("Respondents"),[1] filed on March 26, 2018.

The Argument section of this Brief is divided into two parts.

Part "A" of the Argument section of this Brief addresses the first Point of the Respondents' brief, being the question of whether Appellant is, or is not an aggrieved party. Since *all* of the evidence in support of Respondents' argument in this regard is *dehors* the Joint Record pursuant to this Court's Order dated May 29, 2018 (M250679), this Court is warranted in rejecting the first Point of the Respondents' brief, *in toto*.

Since this Court retains the *discretion* to take judicial notice of a certain stipulation between the parties, as so-ordered by the trial Judge, the Hon. Lawrence Knipel on July 14, 2017, and entered as an Order of the lower Court on August 3, 2017 (the "So-Ordered Stipulation"), the balance of Part "A" of the Argument section of this Brief addresses why the very terms of that So-Ordered Stipulation belie and negate Respondents' first Argument point.

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[1] While Respondents have not yet moved to dismiss their cross-appeal, they have sought no affirmative Appellate relief in their Brief, and their Brief says: "Joaquin and Michael are not appellants herein." Resp. Brief at p. 32.

Part "B" of the Argument section of this Brief addresses the remaining three (3) points of the Respondents' brief, being:

i) Whether, as a matter of *procedural law,* the written ruling made by the Referee at the end of the liability phase of the trial is or is not subject to appellate review;

ii) Whether, as a matter of *substantive law,* the purported expulsions of Appellant from the two LLC's was, or was not proper; and

iii) Whether, as a matter of *substantive law,* if the purported expulsions of Appellant from the two LLC's was proper, was the valuation of his interests in the two LLCs properly made.

INTRODUCTION

Appellant, and his brother, Respondent, Joaquin Garcia ("Joaquin"), and Joaquin's son, Respondent, Michael Garcia("Michael"), together built two successful real estate businesses, JMP Properties, LLC ("JMP") and All-Boro Management Co., LLC ("All-Boro") from scratch in the mid-1990's and through 2011.[2] The lower Court found that the businesses had an aggregate equity valuation of many millions of dollarsas of the date of Appellant's purported expulsions from both companies, in August, 2011.[3]

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[2] Appellant's brother, Joaquin, had reduced involvement in the businesses after 2003. (R.445-6).

[3] As of that date, the trial Court found that JMP had an equity valuation of $9,567,665. (R.2778) and that All-Boro had an equity valuation of $2,452,582. (R.2782).

Though Respondents repeatedly characterize Appellant as having "stole[n] over $1 million dollars from the two limited liability companies in which he was a member" (Respondents' brief at P.1), and that expelling Appellant as a member of JMP and All-Boro was "the only sensible thing" Joaquin and Michael could have done (id.), the facts and the law tell a very different story.

Appellant and Respondent, Michael were the only two full-time working principals of JMP and All-Boro after 2003 (R.580; 593-4) and they had agreed to take equal monetary draws from those companies (R.152-1521).

The tax records of All-Boro, for example, from 2007 and 2008 show definitively that while Appellant drew more than Michael did in 2007, in the next year, 2008, Michael drew more than Appellant did.[4] The sheer vastness of the numerical differences of draw amounts paid to these two close relatives in those two years alone, put Respondents' feigned ignorance of such matters into stark relief, and render them unbelievable, as a matter of law.[5]

Thus, the *ad hominem* argument that Appellant 'stole" anything is belied by the facts.

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[4] All-Boro's K-1 for 2007 shows that: Appellant received $1,477,593. and Michael received $123,155. (R.952); and for 2008: that Appellant received $243,296. (R.955), and Michael received $863,902. (R.953-4).

[5] As noted by Justice Knipel in his findings on the record "It is extremely inconceivable that uncle and nephew, two people who closely work together in the same office, same desk, talk all of the time, wouldn't know that in their distributions in those two years from All-Boro so widely varied, and it was on their tax returns."

At trial, Appellant vehemently maintained that he openly discussed his plans to take – and repay – unequal draw amounts from the companies with his nephew, Respondent, Michael Garcia, with whom he worked side-by-side, for years. (R.289; 235-6; 455; 744-746). Notably, some of the Appellant's unequal draw amounts were even recorded in the companies' check registers in *Michael's own handwriting* as early as 2005.[6]

Respondents' claim of surprise when Michael allegedly *only learned* of these and other unequal draw amounts in early 2010 (R.187, 485, 744-746) is unbelievable on its face, rendering Respondents' action of voting to expel Appellant as a Manager and as a Member of both JMP and All-Boro in August, 2011 (R.815; 816), un-tethered to any purported concern over any alleged theft.[7]

Thus, expelling Appellant as a member of JMP and All-Boro was not "the only sensible thing" Joaquin and Michael could have done. They could have simply continued to equalize their respective draw accounts, as was already underway by 2008.

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[6] For example, three draw amounts used for Peter's relocation of his home after his daughter died (R.419-420; 976 & 984), as confirmed by Appellant (R. 458-9) and by the ledger entry for a draw amount of $125,000. for a Dubai investment (*see* R.419-420; 976).

[7] Appellant's un-contradicted testimony at trial indicated that all of the financial records of both JMP and All-Boro at all times accurately reflected the finances of the respective companies, and were at all times equally available to all three principals, likewise belies Respondents' central claim of "fault" herein. (R.454-6; 481).

In short, expelling Appellant as a member of JMP and All-Boro was not warranted under the law or the facts, and constituted an impermissible broadside attack on Appellants' property interests, which were equitably owned by Appellant's creditors.

The effect of Respondents' coordinated accusations of theft by Appellant and their later (post-pleading) efforts to expel Appellant as a manager and member of both LLCs ensured that Appellant and his creditors would have only a limited valuation of the companies' real estate holdings to divide between them.

Respondents, Michael and his father, Joaquin were able to leverage the companies' increasingly valuable real estate holdings to getting the lower Court to agree that Appellant and his creditors could be bought off for the limited valuation of those holdings as of 2011, while retaining for themselves the vastly enhanced, and continually enhancing value of those assets.[8]

The result of the Trial below was to unfairly deprive Appellant and his creditors of the continually enhancing value of Appellant's interest in the

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[8] The underlying real estate values increase over time. According to the U.S. Census, the price of new homes increased on average by 5.4% annually from 1963 to 2008. See, http://www.census.gov/const/uspriceann.pdf.

Historically, while real property values may fluctuate in the short term, the invariable historic trend is upward.

companies – in two very specific ways – while permitting only Respondents to benefit from all enhancements of value.[9]

ARGUMENT – PART A

REPLY TO RESPONDENTS' POINT I ASSERTION THAT APPELLANT IS NOT AN AGGRIEVED PARTY

POINT I

Respondents' Claim that Appellant is Not an Aggrieved Party is Not based on any Fact in the Joint Record and Should Therefore Not be Considered

Respondents' Point I is founded on New York's general rule that a party waives the right to prosecute an appeal where it has taken the benefit of the very judgment it seeks to modify or overturn (called herein, the "Taking-of-the-Benefit Doctrine"). Respondents claim that Appellant's appeal runs afoul of this rule because Appellant accepted some payment related to the appealed-from judgment.

Yet, this claimed fact is *dehors* the record—such payment not being evidenced at all in the Joint Record on Appeal.

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[9] The primary way the trial Court deprived Appellant and his creditors from the enhanced valuation that occurred after 2011 was by validating the expulsions themselves. Appellants' argument in furtherance of the primary substantive question on appeal is amplified, *infra*, at Part "B", Point II.

The second way that the trial court deprived Appellant and his creditors from the enhanced valuation that occurred after 2011 was by failing to give Appellant credit for the "cap-rate" valuation factor of "equity appreciation". A description of this technical testimony, and the effect of the Trial Court's ruling is amplified, *infra*, at Part "B", Point III.

It their Brief at page 32, Respondents make reference to a "Supplemental Record" for the proposition that "Michael and Joaquin have paid in full the sum the judgment awards Peter for his interest in JMP and All-Boro." [10]

No such Supplemental Record has ever been filed on this Appeal.

In fact, Respondents moved this Court for an order enlarging the Joint Record to include a "Supplemental Record" (to which, Appellant made no objection), but that motion was denied by a panel of this Court on May 29, 2018. (M250679).

Generally, an appellate court does not consider factual material that is not in the Record on appeal. See, e.g., Allstate Ins. Co. v. Travelers Ins. Co., 39 N.Y.2d 784 (1976).

Yet, Respondents' brief at its Point I – is captioned: "Because the appellant has accepted the full benefits of the judgment---$2.39 million, he is not an aggrieved party and he cannot ask this court to reverse the judgment" is an argument which is purportedly based *entirely* on the Supplemental Record that this Court's order of June 8, 2018 did not permit the Respondents to include with the Joint Record *by enlargement*.

For this reason, Point I of Respondents' brief should be disregarded.

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[10] Respondents again refer to the un-filed, supplemental record on appeal at page 34 of their brief.

POINT II

To the Extent Respondents' Claim of Payment on the Judgment is Not Disregarded as *Dehors* the Joint Record, It Presents No Bar to This Appeal

1. This Court May, but Need Not Take Judicial Notice of the So-Ordered Stipulation

As noted above, Point I of Respondents' Brief urges that Appellant may no longer pursue this appeal because he (and his creditors, under his confirmed chapter 11 bankruptcy Plan) have already accepted the benefit of the judgment on appeal.

Notably, the underlying "fact" upon which Point I of Respondents' Brief is based can be found nowhere in the Joint Record on Appeal.[11] Respondents' only reference to this underlying "fact" is the so-called Supplemental Record, which a panel of this Court has rejected for inclusion in the Joint Record by its order denying Respondents' motion for enlargement of the Joint Record, *supra*.[12]

On March 26, 2018, when Respondents filed their Brief with this Court, they did not file any proposed supplement to the Joint Record on Appeal. Instead, Respondents moved to enlarge the Joint Record.

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[11] Pursuant to Rule 670.8(c) the parties consulted, and on or about October 12, 2017, filed the Joint Record herein – without any supplement.

[12] The papers included in the proposed joint Supplemental Record were a The So-Ordered Stipulation; a certain email dated March 27, 2017 and certain letter dated August 15, 2017, both authored by the undersigned.

Even though this Court denied Respondents' motion to enlarge the Joint Record, the "Facts" section of Respondents' Brief (at page 32) cites to the "Supplemental Record" that was never filed with this Court, and the entirety of Point I of Respondents' Brief depends *entirely* therefrom.

Nevertheless, an appellate court may take judicial notice of matters in the public record, even if presented for the first time on appeal. See, e.g., Caprio v. New York State Dept. of Taxation & Fin., 25 N.Y.3d 744 (2015); *see also*, Affronti v. Crosson, 95 N.Y.2d 713 (2001).

Court orders are the kinds of public records a court may take judicial notice of. Healing Art Acupuncture, P.C. v. 21st Century Ins. Co., 59 Misc. 3d 139(A) (App. Term, 2nd Dept. 2018).

The decision of whether to take judicial notice is generally considered to be one of discretion. See, e.g., Matter of Spooner-Boyke v. Charles, 126 A.D.3d 907 (2nd Dept. 2015).

Thus, it appears that this Court may, but is not obligated to, take judicial notice of the So-Ordered Stipulation, notwithstanding its recent order denying *enlargement* of the Joint Record.

If this Court in its discretion does not take judicial notice of the So-Ordered Stipulation, we respectfully submit that the entirety of Respondents' brief at its Point I should be disregarded and effectively stricken for the reasons set forth above, in our Point I of this Part of our Argument.

Alternatively, if this Court exercises its discretion to take judicial notice of the So-Ordered Stipulation and considers Point I of Respondents' brief, we respectfully submit that our opposition to that argument, which also depends from the text of the So-Ordered Stipulation, set forth, *infra*, be considered as well.[13]

2. The So-Ordered Stipulation Authorizes the Continuation of this Instant Appeal

While it is true that the *general rule* in New York decisional law disallows the continuance of an appeal where an Appellant has accepted some benefit of a judgment appealed from, there are at least three sufficient reasons to hold such a bar inapplicable in the instant case.

First, under the theory that acceptance of the benefit of a judgment waives a right to appeal, since waiver is a contract-based doctrine, one can *contractually* waive a waiver.

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[13] For the convenience of the Court, we reproduce selected paragraphs of the So-Ordered Stipulation here:

"15. Other than as aforesaid in this Stipulation, the balance of the rights of the respective parties in and to the Judgment and the appeal and cross-appeal shall remain in full force and effect.

16. Nothing contained in this Stipulation shall affect the viability of any other claim or defense of any party in the pending litigation or the pending appeal and cross-appeal, except as aforesaid.

17. Nothing contained in this Stipulation shall constitute an admission of any fact by any party.

18. No party shall be deemed the draftsperson of this Stipulation."

Second, because freedom of contract is such a highly valued public policy, the ability for civil litigants to chart the course of their litigation is widely respected and such right trumps the "lesser" policy objective of disallowing this private appeal, as championed by Respondents.

Third, as the continuation of this appeal, without prejudice to any payment, was embodied in a valid and subsisting Supreme Court Order, this Court has no jurisdiction to override that directive, as no appeal has been taken from that So-Ordered Stipulation.

We hereafter, *seriatim,* address these three objections to the substantive aspects of Point I of Respondents' brief.

a. By Signing the So-Ordered Stipulation Respondents Have Waived the "Waiver"

Caselaw describes that the acceptance of the benefit of a judgment, generally constitutes a waiver[14] of the right to appeal, or acquiescence in the judgment.

Upon an exhaustive review of New York precedent, it appears that only one case, Alexander v. Alexander, 104 N.Y. 643 (1887), squarely addresses whether parties can effectively contract to waive the general rule disallowing

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[14] "[T]he waiver results "from the inconsistent attitude of a party who at the same time collects the amount of a judgment in his favor and appeals for the purpose of reversing that judgment". In re Courthouse in New York, 216 N.Y. 489, 492 (1916).

continuation of an appeal after a party takes the benefit of the (order or) judgment sought to be appealed.

Alexander was a partition action in which the Appellant's counsel asked the court to find that, in accepting the monetary proceeds of a real property sale, and by taking certain costs allowed to him under the judgment, his client had not waived his right to continue the appeal—because the parties had contracted to 'waive the waiver' that such acceptance of a benefit normally animates.[15]

In Alexander, the Court of Appeals first stated the general Taking-of-the-Benefit Doctrine policy – and the logical principle underlying it – being that once an appellant accepts the "fruit of the judgment", he "cannot gain the right to recover more without incurring the hazard of recovering less." Id. at 645. The Court then reviewed counsel's argument that the doctrine should not be applied to the facts there at issue, because the waiver was itself waived. That is, counsel argued that application of the doctrine was vitiated by the defendant-appellant taking "his share of the residue with the plaintiff's consent, under an arrangement which, nevertheless, *contemplated* the [continued] prosecution of the appeal". (Id., emphasis added.)

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[15] The idea that a party can waive the defense of "waiver" is illustrated by Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC, 78 A.D.3d 746 (2nd Dept. 2010), where the court held that the affirmative defense of waiver was itself waived when not properly pleaded.

The major difference between the case at bar, and the facts at issue in Alexander is that there, Counsel asked the court to "*deduce*" (Id.) the existence of such an agreement by the implication of indirect statements in an affidavit filed by the Respondents' attorney, as juxtaposed with certain oral discussions between counsel, as described to the appellate court, that together (counsel argued) indicated an agreement between the parties to make Mr. Alexander's acceptance of the judgment proceeds subject to his rights on appeal.

The Alexander Court found that such purported contract *in that case* was ineffective, but only because no binding agreement between the parties was capable of being found to exist solely on the basis of *implication* and *inference*.

In the instant case, there is an express agreement embodied in the So-Ordered Stipulation, which expressly preserves Appellant's rights on appeal from the final judgment. See, fn. 13, *supra*.

The Parties' express agreement that Peter Garcia's appellate rights were preserved and the express language of the So-Ordered Stipulation, that "the appeal and cross-appeal shall remain in full force and effect" falls directly within the rule of Alexander v. Alexander.

In light of the express agreement between the parties as quoted above, if Respondents' Point I is not disregarded as based on "facts" that are *dehors* the record, the teaching of Alexander v. Alexander, appears conclusively and diametrically in opposition to Respondents' Point I, requiring its denial.

b. Freedom of Contract is the Overriding Public Policy Concern that Permits Private Parties to Chart Their Litigation Course

Even were this matter deemed to be of first impression, the general principles regarding private litigants' abilities to chart their own course, together with New York's strong policy favoring the free ability to contract, presents a compelling *de novo* basis on which to find an exception to the Taking-of-the-Benefit Doctrine. Accordingly, this Court should reach the merits of this Appeal, argued *infra* at Part "B", Points II and III.

In New York, freedom of contract is given hallowed treatment. Contracts are normally upheld even where they purport to effect modification of court rules or statutory or even Constitutional rights, and, excepting only matters that implicate overriding public policy concerns (such as the invalidity of a contract to engage in criminal acts, or to dispense with the best interests of a child), freely-made contracts will not be disturbed and their terms will be honored by Courts which interpret and enforce them.

Private parties are "free to [chart their own course in litigation] as long as it does not conflict with public policy." J & A Vending, Inc. v. J.A.M. Vending, Inc., 303 A.D.2d 370, 371 (2nd Dept. 2003).[16]

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[16] We have located no New York case that cites for the proposition that accepting the benefit of a Judgment, while appealing from that judgment violates public policy in any way, and Respondents have not cited any such case, either. Generally an agreement between private parties will not implicate public policy. See, also, 159 MP Corp. v. Redbridge Bedford, LLC, 71 N.Y.S.3d 87, 107, *et seq*. (2nd Dept. 2018).

This entire case has been an extended exercise in the parties charting their own unique course of litigation.

The agreement to bifurcate the trial is just such an example of the parties crafting the contours of their dispute resolution. Specifically, the very *singular* issue which occupied the first phase of the trial was exquisitely a creature of agreement – i.e., the question of the validity *or not* of the purported expulsions of Appellant by Respondents. (R.169.)[17]

Of course, both sides are bound by that procedural agreement, whether they ultimately benefited from the course they charted, or not. The same consideration should hold true with respect to the So-Ordered Stipulation, which expressly provides for the continuation of this Appeal, in light of the Taking-of-the-Benefit Doctrine.

The Court of Appeals has "repeatedly held that, unless public policy is affronted, parties to a civil dispute are free to chart their own litigation course.... They "may fashion the basis upon which a particular controversy will be resolved" … and in doing so "[they] may stipulate away statutory, and even constitutional rights." Mitchell v. New York Hospital, 61 N.Y.2d 208, 214 (1984) citing In re Petition of New York, L. & W. R. Co., 98 N.Y. 447 (1885), and other cases.

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[17] Notably, the purported expulsions took place in August, 2011 (R.815; 816) – more than one year after Action No. 1 was commenced, and about ten months after Action No. 2 was commenced – without any amendment or supplement ever being made to the pleadings, or even any motion to conform the pleadings to the proof—a very unorthodox but agreed-upon procedure.

If this case were *only* a tug of war between competing public policies denoted on the one hand as "Freedom of Contract", and on the other, the "Taking-of-the-Benefit Doctrine", the former should prevail.

We have found no case which has ever declared that the strong public policy of this State – Freedom of Contract – would be affronted by permitting a party to *agree* to take benefits under a judgment, while pursuing an appeal therefrom.[18] As the Court of Appeals noted in McCoy v. Feinman, 99 N.Y.2d 295, 302 (2002):

> Stipulations not only provide litigants with predictability and assurance that courts will honor their prior agreements, but also promote judicial economy by narrowing the scope of issues for trial. To achieve these policy objectives, a stipulation is generally binding on parties that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court.
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[18] The concerns underlying the fashioning of the Taking-of-the-Benefit Doctrine often speak to an avoidance of having to provide for restitution – but restitution itself is a well-documented and accepted remedy. See, e.g., CPLR 5523, which furnishes the primary remedy for the successful appellant when an un-stayed judgment or order that has been wholly or partially enforced during pendency of an appeal, is subsequently reversed or modified. Da Silva v. Musso, 76 N.Y.2d 436 (1990).

Thus, the avoidance of having to effect restitution does not seem, *in and of itself*, to be an overriding matter of public policy – and certainly not one that overrides the strong public policy of freedom of contract.

> When a stipulation meets these requirements, as it does here, courts should construe it as an independent contract subject to settled principles of contractual interpretation. As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress; or unless the agreement is unconscionable or contrary to public policy…. (Internal citations omitted).

See also, Herman v. Siegmund, 69 A.D.2d 871, 872 (2nd Dept. 1979), which blesses parties charting their own course, even in the context of "waiver".

There is accordingly, no significant matter of public policy that would potentially be "affronted" under the facts here, to override the very strong public policy with which New York treats parties' ability to fashion, vary and waive rights by contract, in hand with the wide latitude granted parties to chart their own course of litigation.

> Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce.… They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts. In re Petition of New York, L. & W. R. Co. *supra*.

c. Appellant is an Aggrieved Party

As Appellant can only recover more than the judgment appealed from in the event this Court grants appellate relief, Appellant is an aggrieved party within the meaning of CPLR 5511, and is entitled to prosecute this Appeal to completion, regardless of whether the merits as argued in either Point II or Point III of Part "B" hereof, *or both*, are accepted.

In Cornell v. T. V. Dev. Corp., 17 N.Y.2d 69 (1966), the Court of Appeals observed that "a party dissatisfied with the amount of the judgment is clearly an 'aggrieved party' within the meaning of CPLR 5511".

This Court has recently addressed this issue in Mixon v. TBV, Inc., 76 A.D.3d 144, 148 (2nd Dept. 2010), where it held, *citing* Bus Systems, Inc. v. Board of Education, 60 N.Y.2d 539 (1983), that: "Generally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal … The major exception to this general rule, however, is that the successful party may appeal or cross-appeal from a judgment or order in his favor if he is nevertheless prejudiced because it does not grant him complete relief. This exception would include those situations in which the successful party received an award less favorable than he sought … or a judgment which denied him some affirmative claim or substantial right …."

The Mixon Court is thus consistent with the Cornell Court, viz.: "[t]here is nothing inconsistent in a party's accepting the benefit of a judgment below and appealing in an attempt to increase the award." Id. Thus, the Cornell case provides the logical connection between the Respondents' argument, as set forth in its Point I, and the well known exception to the Taking-of-the-Benefit Doctrine.[19]

Cornell encapsulates the time honored exception to the Taking-of-the-Benefit Doctrine, in that "a judgment creditor's acceptance of payment does not preclude him from arguing on appeal that the sum awarded in that judgment is inadequate and should be increased by the appellate court". Id.

Notably, though Respondents filed a cross-appeal (R.12a-12g), that cross-appeal must be dismissed as abandoned since Respondents did not raise any argument in their brief with respect thereto. Castle Restoration & Constr., Inc. v. Castle Restoration, LLC, 155 A.D.3d 678 (2nd Dept. 2017), and because they admitted in their Brief that: "Joaquin and Michael are not appellants herein." Resp. Brief at p. 32.

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[19] See also, Matter of Silverman, 305 N.Y. 13, 17 (1952), which acknowledges that the Taking-of-the-Benefit Doctrine "is not of universal application as there is a line of cases to the effect that the right to appeal survives the acceptance of benefits not inconsistent with an appeal from other parts of the judgment or when the right to the benefit is absolute … This principle has been most usually applied in proceedings for condemnation of land for public use on the theory that the claimants have received nothing to which they would not be entitled in any event."

Accordingly, Appellant's "right to the benefit is absolute" within the meaning of Matter of Silverman, *supra*.

Appellant's one-third interest in JMP has been conceded (R.20, ¶1), and Respondents' cross-appeal from the determination of Peter Garcia's 45% interest in All-Boro has been waived, thus rendering Appellant's ownership interests inviolate – there is no doubt as to the fact of Appellant's ownership of the LLC interests at issue.

The underlying *economic* question at issue in this hybrid case, is whether Appellant should benefit from the up-side in real estate values that have occurred after his purported expulsions in August, 2011.

If the expulsions are found to be invalid, it is likely that dissolutions would follow (as ordered in the Judgment appealed from with respect to BP-21[20]), which would result in later – and as shown, below, much higher – valuations of Appellant's interests.

Real estate values in Brooklyn have increased since 2011 significantly, as the public record shows, and this Court may take judicial notice of that fact. See, generally, In re Scuderi, 247 A.D.2d 393 (2nd Dept. 1998).

For example, the Elliman Quarterly Reports of Brooklyn Residential Sales, which is a publicly available record of the Brooklyn residential real

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[20] This claim was settled after judgment, and is not part of this Appeal.

estate sales market[21] by a major reputable real estate firm,[22] reveals that the average sales price of Brooklyn residential real estate rose 79% from the 4th Quarter of 2011 through the 4th Quarter of 2017, and the median sales price of Brooklyn residential real estate rose 69% during the same period.

Thus, even if Brooklyn residential real estate prices tumbled between now and any prospective new trial that might be ordered by this Court, *to the very extent that they tumbled during the great depression of 1929–1932*, Appellant would still be entitled to a larger award than represented by the judgment appealed from.

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[21] The Report for the 4th Quarter, 2012, can be found at: https://www.elliman.com/pdf/3b021c44f52a92293384e2f22195f4e3bf05fc7f

The Report for the 4th Quarter, 2013, can be found at: http://www.millersamuel.com/files/2014/01/Brooklyn_4Q_2013.pdf

The Report for the 4th Quarter, 2014, can be found at: https://www.elliman.com/pdf/fbafc777fe5a66ed4a7ad63a861863e68086f33a

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The Report for the 4th Quarter, 2017, can be found at: https://www.elliman.com/pdf/e1205db392e13dd3729ce298343d0bdb9d82d356

[22] Established in 1911, Douglas Elliman Real Estate is the largest brokerage in the New York Metropolitan area and the fourth largest residential real estate company nationwide. (https://www.elliman.com/about?gclid=EAIaIQobChMI1t7r4fCj2gIVSl6GCh0M_gGEEAAYASABEgIlT_D_BwE).

Accordingly, its reports may be considered "reliable documents, the existence and accuracy of which are not disputed" within the meaning of Brandes Meat Corp. v. Cromer, 146 A.D.2d 666, 667 (2nd Dept. 1989).

Judicial notice of Public records can be resorted to for proof of this fact, as well.[23]

This Court need look no further than this to conclude that, if Appellant's LLC interests were measured upon a reversal or remand, he (and his creditors) would only be entitled to a larger (i.e., fairer) sized award.[24]

That is, if the expulsions were reversed, and upon remand, *dissolutions were granted*: the LLCs' real estate holdings would be liquidated, and Appellant (and his creditors) would only be entitled to a larger (i.e., fairer) sized award.

Likewise, if the expulsions were reversed, *but upon remand dissolutions were not granted*: then Appellant would still have the unfettered right to "retire" from both JMP and All-Boro (R.88-9 & 115-6 [O.A.s *at* §§11.1 & 11.2) and receive a larger, and fairer sized award, based on today's much higher *contemporary* valuations of the real estate owned by the two LLCs.

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[23] Real Estate Prices During the Roaring Twenties and the Great Depression, Real Estate Economics, V41 2: pp. 278–309 (2013) ("During the 1920s prices reached their highest level in the third quarter of 1929 before falling by 67% at the end of 1932"). Arithmetically, a 67% reduction, after a 79% increase, still results in a 20% increase.

[24] Respondents argue in their Brief (pp.35-36) that there is a real concern here that were Appellant's award reduced, upon a reversal the monies paid could not be recouped "because money accepted by the appellant has actually gone to his creditors in bankruptcy". Appellant's response is that his award cannot be reduced, only increased. No reduction in Appellant's award is reasonably conceivable.

Even if the expulsions are upheld, there are at least four salient reasons why the amounts awarded to Appellant can only increase and not decrease.

First, Appellant argues that the valuation of the real estate interests each LLC owned as of the date of the purported expulsions were undervalued by the trier of fact,[25] and since no argument has been made upon the cross-appeal that they were overvalued, this component of overall valuation can only result in either an affirmance or an *increase in valuations* ordered by a modification by this Court directly, or upon remand.

Appellant's second reason is that two significant sums (i.e., $208,621. and $100,000.[26] were characterized by the Court upon the *damages phase* of the trial, as deductions Appellant was held responsible for *out of his share* (see R.1774-5), rather than sums that the Companies should have been held responsible for.

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[25] This argument was made extensively in Appellant's Main Brief at Part II, pp. 52 to 63, and relied primarily on Respondents' expert appraiser's improper mathematical derivation of the capitalization rates, and the fact that his own "unit costs" numbers, which should have served as a check on his opined values, varied significantly from his findings, and align more closely with Appellant's expert appraiser's conclusions of value.

Notably, Respondents do not even address this argument in their brief, and merely try to bolster the lower court's finding by making generalized comments regarding the location of some of the comparable properties.

[26] The $208,621., derives from "Dubai Investments" recorded on the "true-up" calculation (R.2186, bottom section, sum of lines 1 and 2, i.e. (i.e., $73,000. + $135,621. = $208,621.) For the $100,000., see R.2186 also at bottom section, line 5 ("payment of principal to Jack [i.e., Joaquin] on Dubai Investment…").

The $208,621. in Dubai Investments was at all times characterized in All-Boro's books, records and tax returns as an "investment", as corroborated by the testimony of the Companies' accountant,[27] which Appellant testified was money he never undertook any personal obligation to repay (see, R.1491 & 1500), and as to the $100,000., Appellant testified those monies were withdrawn at Joaquin's request, paid over to him the same day as withdrawn, and likewise, that he never undertook any personal obligation to repay them. (*See*: R.1507-9 and the $100,000. check to Joaquin at R.2777.) In sum, these two amounts were monies All-Boro was responsible for, and should not have been deducted from Appellant's share.[28] (See, generally R.01-09 and 2772-2797.)

Appellant's third reason that his award can only go up, is that the weekly distribution "draw" he received from January, 2011 through the date of his purported expulsions in August, 2011 – in amounts equal to the weekly draw taken by his then, co-equal co-owner, Respondent, Michael Garcia – should not have been deducted from Appellant's valuation share; as an equal distribution from the LLCS, and not a "loan", it should not have been required to be paid back.[29]

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[27] Mr. Fruchter testified that All-Boro's balance sheet as of September 30, 2011 (R.2019), containing such an entry, was created by the bookkeeping staff of All-Boro (R.1324).

[28] See, also, Appellant's Main Brief at pages 67 through 69; and Point III of Part "B" hereof.

[29] See Appellant's Main Brief at pp. 63 through 66.

None of these components of value can result in a lower overall award to Appellant as no appellate argument to do so was put forth by Respondents.

Appellant's final additional reason his award can only increase relates to his argument that his interest in All-Boro should properly have been set at 50%, and not the 45% decreed below after the *damages phase* of the trial.

Upon the initial *liability phase* of the bifurcated trial, the Referee found that Appellant did not have a fifty (50%) percent interest in All-Boro, as Respondent, Joaquin Garcia's interest was not "bought-out" in 2008. (R.13c).[30]

At the *damages phase* of the trial, Justice Knipel found that since 2003, Appellant's interest in All-Boro was 45% (R.03).[31]

For each of these reasons, a reversal or modification on appeal would result in a direct increase in the monetary award due Appellant and his

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This is notwithstanding the interlocutory Order of former Justice Schmidt, which did not bind Justice Knipel, nor did it address the equal nature of the co-equal owners' weekly draw amounts.

30 The specific reply arguments as to why Appellant's interest in All-Boro should properly have been set at 50%, and not at 45%, is set forth in detail in Point III, *infra*.

31 Both finders of fact came to different conclusions regarding the admitted act of Appellant in signing Respondent, Joaquin Garcia's name to a business record of All-Boro, to memorialize a verbal agreement.

Referee Kurtz called that signature a "wrongful" act. (R.13d) In Respondents' Brief they call the act a "forgery". (Resp. Brief at pp.15 & 16).

Justice Knipel, on the other hand, in an uncontroverted finding, held that the earlier (2003) similar act was an effective and proper documentation of an oral agreement, was not wrongful, and in fact, was done with Joaquin's authority. (Bottom of R.1777 through top of R.1778.)

creditors. Thus, even if the Taking-of-the-Benefit Doctrine were applicable, Appellant is aggrieved, and should still be permitted to pursue this Appeal.

Thus, for both factual and legal reasons,[32] if Appellant is successful on this appeal, he cannot get less of a recovery after reversal, as his right to recovery is both absolute[33] and the amount of his recovery can only increase.

Appellant's absolute property rights cannot be diminished upon appeal, thus "making it possible to obtain a more favorable judgment without the risk of a less favorable result upon retrial". Williams v. Hearburg, 245 AD2d 794, 795 (3rd Dept 1997), *lv denied* 91 N.Y.2d 810.

As stated in Kriesel v. May Dept. Stores Co., 261 A.D.2d 837, 838 (4th Dept. 1999): "There is nothing inconsistent in a party's accepting the benefit of a judgment … and appealing in an attempt to increase the award". *See also* Cornell, *supra*.

Accordingly, this Court should reach the merits of this Appeal, as further argued *infra* at Part "B" hereof.

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32 Another critical result of such an appellate finding, should it occur, would be the *mandatory* dissolution of All-Boro.

Per the Operating Agreement of that company, at Art. XII, §12.1(d) (R.90), if there is ever [only] one member, the company would have to be dissolved and liquidated.

33 Primarily because there is no effective cross-appeal.

Though [t]his principle has been most usually applied in proceedings for condemnation of land for public use on the theory that the claimants have received nothing to which they would not be entitled in any event", In re Silverman, 305 N.Y. 13 (1953).

The identical principal is applicable here.

d. This Court has no Present Jurisdiction to Alter the So-Ordered Stipulation

Importantly, the So-Ordered Stipulation was never *itself appealed to this Court*. Accordingly, this Court should refrain from reviewing the So-Ordered Stipulation as there is no jurisdiction to review an order or judgment where a notice of appeal therefrom has not been filed. CPLR 5515, subd. 1; 7 Weinstein-Korn-Miller, NY Civ. Prac, par 5515.06; Gouvakis v. 490 Tenth Ave. Corp., 6 A.D.2d 1035 (1st Dept. 1958).

Neither is the So-Ordered Stipulation brought up for review under CPLR 5501(a)(1) – not only because it post-dates the Final Judgment appealed from, but because it does not "necessarily affect[s] the final judgment".[34] Even if this Court does have the power to review of the So-Ordered Stipulation, it should decline to do so.

Neither party is aggrieved therefrom, as both consented thereto.

Thus, the So-Ordered Stipulation's "decretal" provisions as set forth in footnote 13 hereof are binding on the parties – and this Court.

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[34] Arguably, one can state that the appealability of a final judgment itself constitutes an effect on that judgment. However, we respectfully submit that merely opening a route to review is not the kind of *necessary* effect to which CPLR 5501(a)(1) refers.

In any event, though Respondents did file a Notice of Cross-Appeal herein (R.12b), the validity of the So-Ordered Stipulation was never challenged in Respondents' brief, and is thus deemed waived. Castle Restoration & Constr., Inc., *supra*.

ARGUMENT – PART B

REPLY TO RESPONDENTS' *PROCEDURAL* AND *SUBSTANTIVE* ASSERTIONS

POINT I

This Appeal from a Final Judgment Brings up for Review All Properly Preserved Rulings and Decisions

In their Brief, at Point II, Respondents argue that CPLR 5501(a)(1) does not bring up the decision (or verdict) made after the *liability phase* of the trial for review on this Appeal.

Yet, CPLR 5501(a)(3) provides, in part, that an appeal from a final judgment also brings up for review "any ruling to which the appellant objected or had no opportunity to object."

The decision (or verdict) upon the *liability phase* of a bifurcated trial is just such a ruling that is brought up for review upon an appeal from a final judgment after the *damages phase* of a bifurcated trial.

Respondents' argue that because Special Referee Kurtz' *decision* after the *liability phase* of the bifurcated trial herein (R.13a-13d) was never memorialized into an Interlocutory Order or Interlocutory Judgment, such decision is now unreviewable. This argument simply ignores the long decisional and statutory law of New York, which has always held that properly preserved adverse ruling, decision, or verdict is *always* brought up for review upon a timely appeal from a final judgment.

Respondents argue that the language of CPLR 5501(a)(1), which states that an appeal from a final judgment brings up for review "any non final judgment or order which necessarily affects the final judgment", should be interpreted in the *exclusive* or *mandatory* voice (i.e., to bar review of any paper that is not an underlying "…judgment" or "order"), rather than be interpreted in the *inclusive* or *permissive* voice. Upon that interpretation, they urge that Appellant's challenge to the liability "Decision" of Referee Kurtz[35]—which formed the very basis of the Final Judgment appealed from—is barred.

Early in New York's history of bifurcating trials into a *liability phase* and a separate *damages phase*, there was some confusion as to whether a Defendant[36] who was dissatisfied with an initial decision or verdict of liability could appeal that initial determination or was required to await the conclusion of the damages trial in order to do so.

In such a case, the practice of entering an interlocutory judgment of liability arose, so there would be an interim appealable paper.[37] Generally, one is required to take an appeal only from an appealable paper. CPLR 5512(a)

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35 This paper was styled a "decision and Order" by Special Referee Kurtz in the caption of the paper. (R.13a) Nevertheless, this Court held that paper to be an unappealable paper (R.14).

36 Where a Defendant won a verdict of no liability, of course, the case was at an end, a final judgment could issue, and be appealable by a dissatisfied Plaintiff.

37 Verdicts and decisions, of course, are not appealable papers.

("An initial appeal shall be taken from the judgment or order of the court of original instance….").

Early on, there was split of authority between the First and Second Departments as to the permissibility of interim appeals after the *liability phase* of a bifurcated trial.

In Bliss v. Londner, 20 A.D.2d 640 (2nd Dept. 1964) this Court held that, "a finding in favor of plaintiff on the liability issue is merely a ruling in the course of the trial. An appeal from such a ruling must await the entry of a judgment." This language alone frames the issue. The "ruling" in the Bliss case was neither a "judgment" nor "order" Accordingly, under Counsel's exclusive bent in interpretation of CPLR 5501(a)(1)'s language, the lower court's "ruling" in Bliss would not have been brought up for review upon entry of a final judgment after the *damages phase* of the bifurcated trial therein.

In Hacker v. City of New York, 25 A.D. 2d 35 (1st Dept. 1966), the First Department, made a contrary determination on the same question. In Fortgang v. Chase Manhattan Bank, 29 A.D.2d 41 (2nd Dept. 1967), the Second Department reconsidered its previous position and held that an interlocutory order or interlocutory judgment entered after the *liability phase* of a trial finding in favor of the plaintiff was appealable as of right.

None of these cases, nor their progeny – nor any case cited by Respondents – ever *required* an interlocutory order or interlocutory judgment to be entered after the *liability phase* of a bifurcated trial for the issue of liability to be reviewable on appeal from the later entry of a final judgment. They only require that such an interlocutory paper be obtained in order to take an appeal at the interlocutory stage, before the *damages phase* of the bifurcated trial takes place.

In the aftermath of the Fortgang case, the debate centered on whether, at a Defendant's request, a interlocutory judgment *should* be entered, or not, and that debate was resolved upon the question of whether the two *phases* of the trial would be continuous, or not. It had been held that "the right of (interlocutory) appeal does not apply to "continuous" trials "because in such cases, the final judgment would promptly ensue and the defendant could appeal from the entire judgment without any undue prejudice". Jack Parker Constr. Corp. v. Williams, 35 A.D.2d 839 (2nd Dept. 1970).

The notion that an interlocutory judgment is permitted – but not required – was underscored in a later Second Department case, Schabe v. Hampton Bays Union Free School Dist., 103 A.D.2d 418, 429 (2nd Dept. 1984) ("a liability verdict has sufficient force of law to warrant the entry of judgment on it.") (Emphasis added).

In fact, there is no rule that requires the entry of an interlocutory order or judgment after the liability phase of a bifurcated trial. Uniform Rule 202.42, which encourages Judges to "order a bifurcated trial of the issues of liability and damages" in certain circumstances, makes no mention of any requirement for the entry of an interlocutory order or interlocutory judgment.

Respondents' Counsel's argument thus confuses the inability to *separately* appeal a liability verdict or decision unless it is incorporated into an appealable paper – which is certainly the law, with the unsupported and erroneous assertion that a liability verdict or decision that is *not* incorporated into an interlocutory appealable paper is not reviewable upon an appeal from the final judgment.

Respondents' counsel's confusion is embodied in the way counsel cited the case of Higgins v. Higgins 50 A.D.3d 852 (2nd Dept. 2008) (at page 38 of their brief), which is properly cited for the proposition that: "[F]indings of fact and conclusions of law are not separately appealable" (emphasis added).

Notably, in Respondents' recitation of the holding of the Higgins case, (as well as the case cited therein, Matter of County of Westchester v. O'Neill, 191 A.D.2d 556 [1993]), Respondents' counsel omitted the critical adjective "separately", and therein blurred the distinction between the time-honored principle that an interlocutory finding is "separately appealable" only when it is reduced to an interlocutory order or interlocutory judgment, and the erroneous "principle" Respondents' counsel urges upon its brief, that a finding

of liability on a bifurcated trial is only appealable where an interlocutory order or interlocutory judgment is entered thereon.

Long history, regular practice, and law hold that interlocutory rulings, verdicts, decisions, and findings are generally only appealable only upon a timely appeal from a final judgment, and only if an objection thereto is properly preserved.[38]

In this case, the liability decision by Referee Kurtz was made in writing some weeks after the *liability phase* of the bifurcated trial was completed, and thus, the only possible way to interpose and objection, was by service and filing of a timely Notice of Appeal, which was done.

Since this Court held that such liability decision by Referee Kurtz was not a *separately* appealable paper, that decision, perforce, is brought up for review on this appeal from the final judgment per CPLR 5501(a)(3).

The general rule has always been – and continues to be – that rulings in the course of the trial, which are not reduced to an appealable paper, are reviewable upon the timely appeal from the entry of a final judgment. Prince v.

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[38] See, e.g., Code of Civil Procedure "§ 996. Ruling excepted to; how reviewed. A ruling, to which an exception is taken, as prescribed in the last four sections, can be reviewed only upon an appeal from the judgment, rendered after the trial; except in a case, where it is expressly prescribed by law, that a motion for a new trial may be made thereupon."

See, also, Civil Practice Act §583: "A ruling to which an exception is taken can be reviewed only upon an appeal from the judgment rendered after the trial, except in a case where it is expressly prescribed by law that a motion for a new trial may be made thereupon."

O'Brien, 256 A.D.2d 208 (1st Dept. 1998) ("no appeal can be taken from this ruling because it was never incorporated into an appealable order, nor has it been subsumed in a final judgment… Rulings made during the course of the trial would only be reviewable upon an appeal from the judgment").

For all of the foregoing reasons, Special Referee Kurtz ruling on the Liability phase of the trial, as expressly relied on by Justice Knipel in fashioning and rendering his judgment that is appealed from, was necessarily brought up for review and should be considered by this Court as part of its reversal.

POINT II

The Purported Expulsions Were Invalid

a. Respondents Failed to Address Appellant's Arguments

Respondents entirely fail to address Appellant's two main substantive arguments for invalidating the expulsion he suffered at their hands.

At the core of Appellant's primary argument is the fact that neither the operating agreement of JMP, nor that of All-Boro, delegates the power to expel a member of either LLC to anyone, and that failure of delegation evidences an intent to *not delegate* such power, presently.[39]

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[39] The failure of the operating agreements to delegate the power to expel a member of the LLC to anyone is effectively an ambiguity in the agreement, upon which extrinsic evidence, such as the various legislative facts identified in the Appellant's main Brief can shed light on.

Appellant's secondary argument is that neither operating agreement identifies the grounds upon which any member may be expelled.

Respondents never address Appellant's central argument, that where the New York State Legislature has rejected enacting a statutory response to these two questions, as some other states have done, and the parties have not provided a contractual answer either, a Court should not write in a contractual term for parties, where the parties themselves neglected to negotiate, agree or write down those terms themselves. Schonfeld v. Saucedo, 159 A.D.3d 756, 758 (2nd Dept. 2018).

Respondents never explain why the Court should "fill the gap" in the operating agreements, to provide for substantive terms that the parties themselves did not consider, or agree upon.

b. Respondents Misstate Appellant's Argument for Ambiguity

In non-responsive fashion, Respondents argue at their Point III(a) (at p.43), *inter alia*, that there is no contractual ambiguity associated with the operating agreements' use of the term "expulsion", simply because the word "expulsion" *itself* is not ambiguous—as if Appellant's arguments depended from a claim that the English word's meaning is *itself* hazy; as if Appellant ever sought to convince this Court that the word "expulsion" is incapable of an easily and unambiguous definition, such as, in any of the examples Respondents use to prop up their *red-herring* argument.

Of course, one can say that because of Appellant's "involuntary separation from membership" in JMP and All-Boro, he was "expelled".

While the word, "expulsion" is easily definable, the question of who has the power to expel, and upon what grounds may a member of an LLC be expelled, are not definitionally nor dogmatically answerable.

Respondents' argument presents a classic logical fallacy, as it takes this structural form:

- Since we all know what an expulsion *is*; and
- Since we all know that an expulsion is *possible* as the operating agreements mention it; and
- Since all powers of an LLC are vested in a majority of members, unless excluded; and
- Since the powers to expel a member is not an excluded power …
- Therefore, a majority of members possess the power to expel a minority member.

The logical (and unwarranted) jump taken by Respondents (and the lower Court) is that just because expulsion is *possible*, the power to expel must be vested in a majority of LLC members. The truth is that no such conclusion logically follows. The power to expel an LLC member could just as easily be vested in a Court or an arbitrator, or be a stand-by power to be vested later.

Therein lies the ambiguity that Respondents simply do not address. The dictionary definition of expulsion is not ambiguous, but its plain definition is not the ambiguity we highlight.

Just because Respondents chose to attempt expulsion by acts that, in some *other LLC operating agreements* or by the statutes of *some other states*, might be expressly allowed, and thus have an *appearance* of reasonableness, is no basis to import that delegation or methodology into the silent contracts here. The basic rules of contract interpretation simply forbids what Respondents champion – and what the lower Court, on Reference, permitted.

We all know what an expulsion *is*. What we don't know is the "who, what and how" of expulsion, as it relates to a New York limited liability company. That is why the parties must agree to those details – if they are to be enforced by a Court. Operating Agreements are to be construed in accordance with the same rules as any contract is to be interpreted – enforcement must be consistent with the expressed intent of the parties.

The ambiguity Appellant has identified in the operating agreements of JMP and All-Boro are not susceptible to cure by the simple expedient of giving any ambiguous word its "ordinary" and "commonly understood" meaning, as was possible in some of the cases Respondents cite. Indeed each case cited is inapposite, because what caused the expulsion therein was either defined in a subject contract at issue, unlike here, or what an "expulsion" was in them was a "self-defining" matter, in the context, unlike here.

For instance, Respondents cite Gelder Med. Group v. Webber, 41 N.Y.2d 680 (1977), which involved a partnership where the partnership agreement expressly treated procedures for expulsion. As stated in the

Opinion, the "partnership agreement also provided a procedure for the involuntary withdrawal of partner … While there is no common-law or statutory right to expel a member of a partnership, partners may provide, in their agreement, for the involuntary dismissal, with or without cause, of one of their number".

In People v. Ocasio, 28, N.Y.3d 178 (2016), also cited by Respondents, the court simply had to interpret whether an instrument was a "billy club", within the meaning of a statute listing that term, by looking at how dictionaries define that instrument, and in turn, whether the item wielded by the defendant was within the ambit of the vernacular meaning.

There is no equivalent of that simple exercise to solve the ambiguity in the instant case. The ambiguity rests not upon the word – but its exercise.

Finally, in Aaron v. Ward, 136 A.D. 818 (2nd Dept. 1910), cited by Respondents, the physical act of removing a person from an establishment, where she had bought a ticket for the privilege of using its bathing facilities, is self-defined as an "expulsion" of the person. Yet, on this appeal, we have no physical removal, and unlike in Aaron, where the owner of the Premises certainly had the power to revoke the license, there is no license at issue, and no grant of power for an LLC member to expel another member. The entire discussion of damages in Aaron is besides the point.

In a limited liability company, the LLC does not own the members – the members own the LLC. That distinction is emblematic of the problem faced in this case. One cannot say that the right to expel an LLC member is "inherent", as Respondents imply, as the LLC form is a creature of statute – not of the common law. It is simply not possible to understand or *infer* what would properly cause an expulsion of a member from a New York LLC without reference to an express agreement of the parties – not one that is silent on the "who, what and how" of an expulsion. Only by the expedient of looking to parol or *extrinsic* evidence could that gap in meaning be *hypothetically* filled in.

Yet, when evidence *extrinsic* to the operating agreements is turned to, there is nothing in the Record indicative of the intent of the parties at all. The only *extrinsic* evidence implicated is of *legislative facts*—that the contracts contained boilerplate dissociation language, including the word "expulsion", lifted from other states' LLC forms, crafted to try to take advantage of favorable, federal pass-through tax treatment in vogue at the time.

Since parol evidence is incapable of filling the gap, the lower court could not validate the procedures, mechanisms and standards unilaterally chosen by Respondents, to purportedly cause Appellant's expulsion. The parties' "lack of foresight [on this matter did] not create rights or obligations". Mutual Life Ins. Co. of N. Y. v. Tailored Woman, 309 NY 248, 253 (1955).

The lower court's validation of the non-judicial expulsion scheme adopted by Respondents was, under the guise of contract interpretation, nothing less than rewriting into a contract conditions the parties did not insert, or intend – which is not permissible. Raner v. Goldberg, 244 N. Y. 438 (1927); Aivaliotis v. Continental Broker-Dealer Corp., 30 A.D.3d 446 (2nd Dept. 2006).

c. Respondents Misread the Operating Agreements

Respondents' Brief argues at section C of their Point III (p.48), that the language of the Operating Agreements, Art VI, §6.1 (R.78 and R.105) treating "Management Rights", fills the "procedural gap" that Appellant has argued exists,[40] by mandating that LLC decisions are to be made by a majority vote of the members.

The actual language of the Operating Agreements does not support Respondents' aspirationally wide reading, showing it too begs the very question at issue. This is because the provision assumes the existence of some *other provision*, that *already defines expulsion* as a matter that may be bindingly decided by the "vote or consent of the members". The contractual provision states:

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[40] This argument of Respondents supposedly "answers" Appellant's primary argument, that neither of the operating agreements delegates the power to expel a member of either LLC to anyone.

It does not.

> Any matter that requires the vote or consent of the Members shall be decided by the Members holding at least a majority of the membership Interests....

Respondents quote this contractual provision in their attempt to "prove" that Appellant's expulsion was properly effected by "a majority of the membership Interests."

What Respondents fail to even address is the *premise* of the provision, that is, whether a member's expulsion is, *a priori*, a "matter that requires the vote or consent of the Members".

The predicate language of this provision says nothing to indicate that *every* matter between the members, (e.g., expulsion of a member) is to be decided by a vote of the members, as Respondents ask this Court to conclude. In fact, no provision of either Operating Agreement says any such thing.[41]

Rather, the quoted provision only says that where some matter is already subject to adjudication by "the vote or consent of the Members", then it (i.e., *that* precise question – not *any* question) shall be resolved by a majority vote.

Who may expel (i.e., the members, or a court, or an arbitrator) is a matter not provided for in the contract, but which could have been agreed to by the parties – had they chosen to address this question.

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[41] That is precisely Appellant's primary argument. The parties made no such agreement that affects the point at issue herein.

As has been widely held, the function of a court is *not* to make agreements for the parties, but to enforce the agreement that the parties *themselves* have made. Here, because the parties made no applicable agreement, the Court should not write one for them.

d. This Court's Ruling in *Man Choi Chiu v. Chiu* Has Analogously Resolved Appellant's Primary Argument

Both Appellant and Respondents cite Man Choi Chiu v. Chiu, 71 A.D.3d 646 (2nd Dept. 2010) as precedent for their position on appeal – but reach opposite conclusions on its meaning.

In Man Choi, this Court was faced with the question of whether the singular mention of the word "expulsion" in New York's LLC statute was sufficient, *without more*, to permit a majority Member of a New York LLC to expel a minority Member of that New York LLC.

This Court stated therein:

> [T]though 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.

We respectfully submit that this Court's opinion in Man Choi, is analogously *on all fours* with the foundational question the instant appeal takes on, and represents direct precedent for reversal herein.

When this Court observed in Man Choi that the *singular* mention of the word expulsion in the statute was insufficient *without more* to permit a majority Member of an LLC to expel a minority Member of an LLC, it plainly required both a grant of authority to expel and a mechanism, i.e., a statement of grounds, and process.

When an LLC operating agreement contains the *singular* mention of the word expulsion, *without more,* the identical reasoning should prevail, and be *mandated* by the reasoning in Man Choi. That is, unless a New York LLC operating agreement "set[s] forth a mechanism for the expulsion of members," it should be incapable, *without more,* of authorizing a majority of Members of that LLC to expel a minority Member of that LLC.

In sum, when this Court found in Man Choi that the *mere mention* in LLCL §701 of expulsion was incapable of supplying the rich terms needed to gap-fill by "setting forth a mechanism for the expulsion of members" in the absence of an operating agreement providing those mechanisms,[42] so too, the

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[42] The *mere mention* of the word "expulsion" in the operating agreements is not thereby rendered surplusage, for the reasons stated in Appellants Main Brief. That is, a future act or agreement can designate the holder of a power to expel and regulate its exercise, but the fact of expulsion would still result in a dissociation as that term is defined in the operating agreements.

mere mention of the word "expulsion" in an operating agreement is just as impoverished an enabling provision, as it is in the bare statute.

Without setting forth "a mechanism for the expulsion of members" Id. an operating agreement's naked mention of "expulsion" does no more than the bald statute's mention—and should lead this Court to the same conclusion, i.e., that the parties never expressed any contractual intent, and indeed failed to grant an expulsion power to the majority of members of JMP and All-Boro.

Thus, Respondents' argument that the operating agreements' mere mention of the word "expulsion" met the test in Man Choi should be rejected, and the expulsions reversed.

POINT III

The Judgment Fails to Correctly State the Values of Appellant's Interests in the LLCs as of the Date of His Purported Expulsions

a. Respondents Arguments in Support of Affirmance are misplaced

Respondents argue that Justice Knipel properly weighed the values of properties that were in "comparable" locations to the properties owned by both JMP and All-Boro, and thus the discretion of the trial court in determining the final values of JMP and All-Boro were fairly and properly determined.

Even if it were true that some of the properties identified as comparable "sales" by Respondents' expert were more comparable than the properties identified by the Appellant's expert, the internal checks and balances used by

the both appraisers belies this simplistic approach. This weight of the evidence argument was made in the Appellant's main brief at page 57, *et seq*., and never rebutted by Respondents.

Specifically, we refer to the internal check used by Appellant's appraiser called a "Per Unit Price" analysis. See, Id. at page 61, *et. seq*.

Essentially, Appellant's appraiser's conclusions of value – dictated by his derived choice of "cap-rate" – furnished an approximate value of each apartment of about $105,000. Id.[43]

As pointed out in the Appellant's main brief at page 62, Respondents' expert's own comparables – which Respondents argue are so much better than the ones Appellant's expert chose – work out to an average "price per unit" of $118,169. – a striking result that demonstrates just how unreasonably low Mr. DiGeronimo's estimates of value really were.

Notably, Respondents do not address how their own expert's supposedly better comparables could yield such a suggestion of value that is so distant from their own expert's conclusions of value.

These facts alone militate towards a finding that the lower Court's valuations should be vacated, or increased, as they are manifestly not supported by the weight of the evidence.

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[43] This means that a *comparable* 10-unit apartment building would be expected to be worth 10 times $105,000, or $1,050,000.

b. Respondents Failed to Rebut Appellant's Arguments Regarding the Proper Determination of the "Cap-Rate"

Justice Knipel properly found that the "cap-rate" to be utilized in valuing the various properties owned by JMP and All-Boro was the valuation method chosen by both sides to this litigation.

Accordingly, the proper derivation of the appropriate cap-rate to be used – and the internal consistency checks on the cap-rate chosen by both sides – is important to review before this Court can determine whether the cap-rate chosen by the trial court is appropriate or erroneous.

While this process may appear technical – and in some regards, it is – it is important to note that since this Court is reviewing the findings after a bench trial, and in this regard, credibility of the witnesses is not the salient feature on appeal, a *de novo* review of the respective processes used by the two experts is warranted.

Appellant's Main Brief at pages 53 through 63 describe the methods that both experts used in deriving *and checking* their cap-rates.

Notably, Respondents do not challenge Appellant's description of the similar methodologies, nor even address the processes used by the two experts.

Briefly, to recapitulate, both experts used *mathematically* derived cap-rates and "comparable" sales data.

Respondents challenged three of the "comparable" properties selected for these purposes by Appellant's expert, but as noted in Appellant's Main Brief at page 59 – even if these three "inferior" comparables were disregarded, the resulting average cap-rate is little changed.

Respondents fail to address this point in their brief.

Instead, Respondents rest their argument for affirmance of the values found by the trial court on the "observation" that two of Appellant's "comparable" properties were in "better" areas than the bulk of the subject properties owned by the two companies. Notably, Respondents make no argument that the *result* of the examination of the data derived from these "inferior" comparables changed any values in any material way – as noted above, they did not.

Appellant's twin arguments for reversal and increase from the values found by the trial court rests not primarily upon the comparable properties Appellant's expert identified – but instead upon: 1) the defects in the *mathematical formula* used by Respondents' expert, and the fact that Respondents' expert's own comparables do not coincide with his own *mathematical* calculations, but instead, coincide far more closely with the *mathematical* calculations used by Appellant's expert.

Ultimately, it is the failure of the internal checks to "proof out" Respondents' expert's calculations that Respondents' brief does not even address.

Nor does Respondents' brief even address the fact that *Respondents' own comparables* yield conclusions of value far closer to those reached by Appellant than do those championed by Respondents.

It is for this reason that the trial court's determination to find value at three quarters (75%) of the difference (between the two experts respective opinions) lower than as championed by Appellant, is error.

To put a fine point on this critical issue of valuation methodology, the two experts came up with cap-rates that were 1.55% apart – which resulted in a $6,200,000 difference in overall valuation of the basket of underlying properties. The lower court held that three quarters (75%) of that difference should benefit Respondents.

Yet, *mathematically*, that 1.5% difference in cap-rates came about because Respondents' expert simply did not include two factors that Appellant's expert deemed relevant, one being the likelihood of appreciation, and the other being the increase in equity over time as mortgages are paid down.

While both of these factors are logically related to a hypothetical buyer's determination to purchase property, Respondents' brief is silent on these issues.

Respondents' expert simply ignored the fact that given two similar properties, with identical net operating incomes, the more valuable of the two to any potential investor, would be the one that that investor deems more likely to appreciate in value faster. That conclusion could be because of any number of observable factors, such as nearby upscale construction; a decision that one neighborhood is "hotter" than another, or any other possible reason.

The point is not to guess at the specific reason a hypothetical investor would make such a decision – but, to point out that a hypothetical investor would be swayed by whatever tends to convince her that one property is likely to appreciate faster than the other.

That is the reason a property appreciation factor is included in the *mathematical* formula for deriving cap-rates in the first place, and another reason why the absence of such a factor in Respondents' expert's calculations should be seen as error.

These factors further demonstrate how the lower Court's finding of valuation should be reversed and remanded, or simply increased, as being against the weight of the evidence presented at trial.

CONCLUSION

As shown in Part "A", Respondents' entire argument Point I is predicated on facts that are nowhere in the Joint Record, and for this reason, such argument should be disregarded in its entirety.

In the event, the Court exercises its discretion, and considers the So-Ordered Stipulation, it must consider the merits of this Appeal, because of the contractual provisions thereof which effectively chart the course of this appeal, and by reason of the un-appealed nature of the So-Ordered Stipulation itself.

In such case, Appellant must be viewed as an aggrieved party, entitled to have this appeal considered on the merits for all the reasons set forth herein, *viz*:

i) That the So-Ordered Stipulation itself is a contract by which Respondents agreed that the Taking-of-the-Benefit doctrine would not apply and thereby charted their course of litigation to "waive the waiver";

ii) Because the So-Ordered Stipulation is an order of the court that has not itself been appealed, Justice Knipel's ruling therein – that the payment of the judgment would not affect Appellant's appellate rights – is inviolate; and

iii) Because the facts of this case meet the well known exception to the doctrine, under which the taking of the benefit is inapplicable where the

appealing party is only seeking an increased award, and there is no reasonable likelihood that Appellant could be awarded less than was awarded by the Judgment appealed from.

As demonstrated in Part B herein, Respondents failed to address the seminal arguments in Appellant main brief. They mischaracterize the ambiguity Appellant actually points to—that the contracts are silent on the mechanism of expulsion—with the simplistic ambiguity, never argued by Appellant, that what an expulsion *is*, is the ambiguity at issue.

As was further shown, the reasoning of this Court in Man Choi Chiu v. Chiu, if applied by analogy, appears dispositive of this appeal. Just as this Court would not write into LLC §701 the rich detail of a mechanism for expulsion of a member in that case, where the legislature was silent on enabling provisions for "expulsion" merely because the statute mentions that word, so too, the lower court committed reversible error by writing into the contracts the rich detail of who could expel, and what could cause an expulsion, where the LLC operating agreements were silent on enabling provisions, after merely mentioning the word "expulsion".

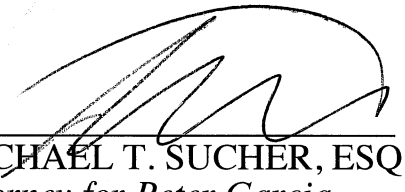
Lastly, it was shown that by awarding seventy five percent (75%) of the opinion spread between the parties' two experts in favor of Respondents, the lower court acted against the weight of the evidence, which favored Appellants to a fare-thee-well.

For all of the reasons set forth herein, and upon Appellant's Main Brief, the purported expulsions of Appellant from JMP and All-Boro should be reversed, as improper, and if not so reversed, the monetary awards to Appellant on account of such purported expulsions should be increased.

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
June 5, 2018

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

----------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

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

1. The foregoing Reply 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 Reply 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 10,093.

Dated: Brooklyn, New York
June 5, 2018

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

ANDREW M. SHABASSON, 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 June 5, 2018 affirmant served two (2) true and complete copies of the within Reply Brief, on the each of the individuals named below, at their respective business addresses listed below, by depositing such true copies, enclosed in post-paid, properly addressed wrappers, in an official depository under the exclusive care and custody of the United Parcel Service (UPS), within the State of New York, for overnight delivery.

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Affirmed: Brooklyn, New York
June 5, 2018

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