SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

RAQUEL WOLF, as Executrix of the ESTATE OF HIRSCH WOLF,	:	Index No. 500661/2016
Plaintiff,,	:	Cal. No. 2019-000206T
- against -	:	**PLAINTIFF'S PRE-TRIAL MEMORANDUM**
SOL WAHBA, MICHAEL WAHBA, and SIGULA 1145 BROADWAY LLC,	:	
Defendants.	:	

Plaintiff, RAQUEL WOLF, as Executrix of the ESTATE OF HIRSCH WOLF, by her attorneys, Law Office of Daniel Friedman, respectfully submits this Pre-Trial Memorandum to apprise the Court of the relevant claims, facts and issues to be determined at trial.

Defendants took advantage of plaintiff, the widow of a co-owner and member of an LLC, which owned a building, by fraudulently inducing her to sell her 49% interest in the LLC for $2.75 million, while, behind her back, they simultaneously sold the property for $8.9 million without disclosing to her that they had surreptitiously made an agreement to sell it at the higher price. While plaintiff's rightful 49% share should have been $4.361 million, they only paid her $2.75 million, intentionally defrauding her of $1.611 million.

Defendants breached contractual and fiduciary obligations to disclose the $8.9 offer and contract, fraudulently inducing plaintiff to sell her 49% interest in the LLC for $2.75 million, by reason of which defendants where unjustly enriched in the actual sum of $1.611 million. Accordingly, by this action, asserting claims based upon Breach of Contract; Breach of Fiduciary Duty; Fraudulent Inducement to Contract; and Unjust Enrichment, plaintiff seeks to recover

actual compensatory damages of $1.611 million, plus interest. It is respectfully submitted that the morally reprehensible nature of defendants' fraudulent conduct, in flagrant breach of fiduciary obligations, also warrants punitive damages at least equal to, or exceeding, the actual compensatory damages.

The key facts are as follows:

1. The late Hirsch Wolf and defendant Sol Wahba were the co-owners and members of Richmond Properties LLC, a domestic limited liability corporation, the sole asset of which was the building and property located at 1145 Broadway, New York, New York (referred to herein as the "Real Property").

2. The Operating Agreement of Richmond Properties LLC (herein, the "Company" or the "LLC"), between Sol Wahba and Hirsch Wolf, dated March 7, 2000 (the "Operating Agreement") provides that Sol Wahba, would be the Managing Member and designated Manager of Richmond Properties LLC, owning 51% of the LLC, and that Hirsch Wolf would own 49%.

4. Paragraph 9.1 of the Operating Agreement, provides that: "Notwithstanding anything contained herein to the contrary, for so long as Hirsch [Wolf] holds a forty-nine (49%) percent interest in the Company he shall have a fifty (50%) percent voting right and Sol [Wahba] shall only have a fifty (50%) percent voting right."

5. Paragraph 9.2 provides that the Manager shall not sell the Real Property without the consent of 51% of the voting interests.

6. Paragraph 13.1 of the Operating Agreement, in Article XIII, entitled Sale of Property, provides as follows:

> "Notwithstanding anything to the contrary contained in this Agreement, if at any time Sol [Wahba] or Hirsch [Wolf] (each individual herein after referred to as the "Selling Group") shall receive a bona fide offer (the"Offer") from a financially

responsible third party (the "Offeror") to purchase all of the Company's interest in the Real Property and the Selling Group shall decide to accept said Offer, the Selling Group shall give notice (the "Original Notice") to the other group (collectively, the "Non-Selling Groups") stating therein the name and address of the Offeror, giving any information with respect to the financial capacity of the Offer available to the Selling Group, and stating that the Selling Group is willing to accept such Offer, and enclosing with the Original Notice a copy of the Offer signed by the Offeror which shall contain all the essential terms of such purchase, sufficient, upon written acceptance by all Members of the Company to constitute a legally binding contract of sale and purchase."

7. Accordingly, under the Operating Agreement of Richmond Properties LLC, defendants had a contractual obligation to provide written notice to plaintiff upon receipt of any bona fide offer, which they decided to accept, to purchase Real Property which was the sole asset of the parties' LLC. In addition, under Paragraphs 9.1, 9.2 and 24.1 of the Operating Agreement, the Members were contractually prohibited from selling the Real Property without the other Member's written consent.

8. Under the Operating Agreement, there was a contractual obligation to provide written notice upon receipt of a "bona fide offer" from a financially responsible third party to purchase the Real Property that a Member actually decided to accept, with said notice to contain all essential terms; and a contractual prohibition to sell without consent which, per Paragraph 24.1, must likewise be in writing.

9. Hirsch Wolf passed away in June 2011, and the business continued with Estate of Hirsch Wolf as the 49% owner in his place and stead. Sol Wahba continued to provide the Estate with monthly bank statements, annual K-1s and periodic distributions on an continuing ongoing basis. Raquel Wolf is the widow of Hirsh Wolf and the Executrix of his Estate.

10. On December 31, 2014, the Membership Interest Purchase Agreement was made by and among Richmond Properties LLC, Estate Of Hirsch Wolf, Sol Wahba And Sigula 1145 Broadway LLC, with Michael Wahba as Managing Member (herein the "December 31, 2014 MIPA"), pursuant to which plaintiff sold her 49% interest to a nominee of defendants for $2.75 million. Michael Wahba is Sol Wahba's son.

11. Unbeknownst to plaintiff, defendants had a bona fide offer to purchase the Real Property for $8.9 million, that was accepted, and then a signed contract for the sale at the $8.9 million price, with a $890,000.00 contract deposit in hand, at least 2 weeks before the December 31, 2014 MIPA was signed, and all while plaintiff was still a member and 49% owner of the LLC.

12. Actually, e-mails produced in discovery reveal that defendants' attorney, Nathaniel Shapiro, Esq. prepared the first draft of the Contract of Sale of the Real Property for $8.9 million, at the request of Michael Wahba and a broker, on October 29, 2014! Plaintiff should have been notified then, long before she signed the December 31, 2014 MIPA.

13. Plaintiff herein remained a member of the LLC, and retained her 49% interest in the LLC, until at least April 16, 2015, which is also the date that, unbeknownst to plaintiff, the sale of the Real Property closed.

14. If the Wahbas had informed plaintiff that they had an offer for $8.9 million, much less a contract in that amount, then, armed with that knowledge, plaintiff would not have sold the Estate's interest in the LLC for the clearly inadequate price of only $2.75 million.

15. Based on the Real Property sale price of $8.9 million, which is undisputed, plaintiff's rightful 49% share should have been $4.361 million. Defendants do not deny that they only paid $2.75 million, resulting in actual damages of $1.611 million.

16. The fully executed Contract of Sale of the Real Property for $8.9 million, dated "**December __, 2014**," which, unbeknownst to plaintiff, was signed by Michael Wahba on behalf of the Richmond Properties LLC, and by Nathaniel Shapiro, Esq., acknowledged receipt of the 10% deposit of $890,000.00 to be held in escrow. There was a subsequent assignment of the Contract of Sale from contract vendee Pan Brothers Associates to purchaser 1145 Nomad Partners LLC, a subsidiary or affiliated entity.

17. The HSBC wire transfer receipt shows the wire of the 10% deposit of $890,000.00 from Edward D. Fusco, Esq. attorney for the purchaser of the Real Property, to Nathaniel Shapiro's firm Shapiro & Stern LLP, on **December 18, 2014.**

18. The Operating Agreement of 1145 Nomad Partners LLC, the ultimate purchaser of the Real Property, was made and entered into on **December 10, 2014**, for the purchase of the Real Property, and it expressly references "the LLC real property located at 1145 Broadway") at Section 1.3[g], and 4.1 [b] thereof.

19. The signed "Commission Agreement for the Purchase by Pan Brothers Associates c/o George Panteldis, LLC to be formed (or its permitted assigns, "Buyer") of 1145 Broadway, New York, NY 10001 (the "Property)" provided that the Owner (Richmond Properties LLC) would pay to the broker (Azad Property Group): "a commission of $125,000 of total purchase price of $8,900,000 if and only if a closing of the transfer of title to the Property to Buyer is consummated pursuant to a contract of sale, upon terms and conditions acceptable to Owner, that has been executed by Owner and Buyer." The Commission Agreement, dated **December 18, 2014**, was signed on behalf of the Owner (which was Richmond Properties LLC) by Michael Wahba, as "Authorized Person."

20. By the date of the Commission Agreement, i.e., **December 18, 2014**, which, unbeknownst to plaintiff, was signed by Michael Wahba on behalf of the Owner (Richmond Properties LLC), the Contract of Sale for the purchase of the Real Property for $8.9 million had already been "executed by Owner and Buyer." That is fully consistent with the Operating Agreement of 1145 Nomad Partners LLC, made and entered into on **December 10, 2014** and the wire transfer of the 10% deposit of $890,000.00 on **December 18, 2014**.

21. In any event, while the Contract of Sale was curiously left dated "**December __, 2014**," there is no avoiding the incontrovertible fact that defendants had a deal to sell the Real Property for $8.9 million in advance of the **December 31, 2014 MIPA**, and, of course, well in advance of the closing of the sale of plaintiff's interest in Richmond Properties LLC pursuant to the MIPA.

22. Moreover, as stated above, defendants' attorney, Nathaniel Shapiro, Esq. prepared the first draft of the Contract of Sale of the Real Property for $8.9 million, at the request of Michael Wahba and a broker, on October 29, 2014.

23. Pursuant to the December 31, 2014 MIPA, plaintiff agreed to sell its 49% interest in the LLC to an entity owned by Michael Wahba, for $2.75 million, to be paid with a $100,000 deposit and with the $2.65 million balance to be paid at closing.

24. The MIPA is dated December 31, 2014, and the cover letter shows its transmittal on that date from plaintiff's counsel to defendants' counsel at the time, Nathaniel Shapiro, Esq.

25. While there was no formal closing, defendant's counsel at the time, Nathaniel Shapiro, Esq., remitted payment for the purported balance on April 16, 2015, by personally hand delivering a cashier's check in the sum of $2,657,196.93, which included certain adjustments for rent, taxes and other such items. However, that was not the final figure actually due, as the

adjustments were still subject to review and, in fact, contained errors. An $11,428.54 adjustment was subsequently agreed upon, and a check in that sum was received from Nathaniel Shapiro, Esq., on May 13, 2015. On that date, the signed Assignment of Interest of Raquel Wolf, as Executor of the Estate of Hirsch Wolf, which was dated April 16, 2015, was transmitted to Nathaniel Shapiro, Esq.

26. As stated, plaintiff remained a member of the LLC, and retained her 49% interest in the LLC, until at least April 16, 2015, which is also the date that, unbeknownst to plaintiff, the sale of the Real Property closed. Salm v. Feldstein, 20 A.D. 3d 469, 799 N.Y.S.2d 104 (2d Dep't 2005) ("As managing member of the [LLC] and as co-member with the plaintiff, the defendant owed the plaintiff a duty to make full disclosure of all material facts") ; Blue Chip Emerald LLC v. Allied, 299 A.D. 2d 278, 750 N.Y.S.2d 291 (1st Dep't 2002) (Managing Members who agreed to buy-out the co-owner of an LLC, and then sold the LLC's sole asset, owed a fiduciary duty "until the moment the buy-out transaction closed." Further, "in negotiating the buy-out agreement, the … defendants had no right to keep to themselves or misrepresent material facts concerning their efforts to sell or lease the … Property, such as, for example, the prices prospective purchasers were offering to pay."); Madison Hudson Associates, LLC v. Neumann, 44 A.D.3d 473, 843 N.Y.S.2d 589 (1st Dep't 2007) (as to the fiduciary duty of the Neumann defendants, who owned an 85% interest an LLC, to the 15% owner: "the Neumann defendants were fiduciaries… until the moment the buy-out transaction closed").

27. In the Summer of 2015, an attorney representing of the Estate of Hirsch Wolf discovered, via perusal on the ACRIS website, which is the official New York City Department of Finance, Office of City Register, Real Property Automated City Register Information System,

that the Real Property was sold for $8.9 million, via a Deed dated and recorded on April 16, 2015.

28. The filing with ACRIS showed that the Deed, dated April 16, 2015 and recorded on that same date, was signed by Michael Wahba, as "member" of Richmond Properties LLC; and that, the Real Property was sold for $8.9 million to 1145 Nomad Partners LLC, a subsidiary or affiliate of Pan Brother Associates, which was represented on the transaction by Edward D. Fusco, Esq.

29. Although Sol Wahba was the original Manager of the LLC, his son Michael Wahba became the de facto Manager, actively managing the Real Property, signing leases and other documents. For example, a Lease with a tenant at 1145 Broadway was signed by Michael Wahba on August 3, 2012; the Contract of Sale of the Real Property which contains Michael Wahba's signature on behalf of the LLC; and the aforesaid Commission Agreement likewise contains Michael Wahba's signature on behalf of the LLC.

30. Michael Wahba became the de facto Manager, by actively managing the Real Property, and by signing documents on behalf of Richmond Properties LLC, all of which preceded the December 31, 2014 MIPA, and all of which, of course, preceded the closing of the sale of plaintiff's 49% interest in Richmond Properties LLC pursuant to the MIPA.

JUDGMENT IS WARRANTED AGAINST DEFENDANT SOL WAHBA BASED ON BREACH OF CONTRACT

Sol Wahba breached his contractual obligations by failing to give plaintiff the requisite notice of a bona fide offer to purchase the subject Real Property for $8.9 million, which offer that was accepted while plaintiff was still a member and 49% owner of the LLC. Indeed, defendants had a draft contract to sell the Real Property for $8.9 million in October 2014, and a

signed contract in December 2014, with an accompanying $890,000 deposit, at least 2 weeks before plaintiff contracted to sell her 49% membership interest in the LLC for only $2.75 million.

It is undisputable: (a) that a bona fide offer from a financially responsible third party to purchase all of the Company's interest in the Real Property was, in fact, actually received by defendants, and that they decided to, and actually did, in fact, accept said Offer, no later than December 18, 2014, by which time a Contract of Sale of the Real Property for $8.9 million had already been signed by both parties, and the $890,000 down payment had already been received; and (b) that it was not until December 31, 2014, that the Membership Interest Purchase Agreement, dated December 31, 2014 (the "MIPA"), between and among Richmond Properties LLC, Estate Of Hirsch Wolf, Sol Wahba and Sigula 1145 Broadway LLC, with Michael Wahba, pursuant to which plaintiff contracted to sell her 49% interest in the LLC for only $2.75 million, was signed.

Most significantly, until the December 31, 2014 was signed, either party could have walked away from the deal for any or no reason. Plaintiff certainly would have done so if the surreptitious $8.9 million sale were disclosed. To conclude otherwise would defy logic and common sense. Moreover, the buy-out transaction pursuant to the December 31, 2014 MIPA did not close until at least April 16, 2015. All the while defendants continued to keep their lucrative deal secret, until it was discovered months later.

Indeed, plaintiff remained a member of the LLC, and retained her 49% interest in the LLC, until at least April 16, 2015, which is also the date that, unbeknownst to plaintiff, the sale of the Real Property closed.

Accordingly, it is clear, as matter of law, and beyond peradventure, that Sol Wahba breached his contractual obligations by failing to give plaintiff the requisite notice of the bona fide offer to purchase the Real Property for $8.9 million that was accepted while plaintiff was still a member and 49% owner of the LLC, and before plaintiff contracted to sell her interest for only $2.75 million. Actually, the first draft of the Contract of Sale of the Real Property was prepared on October 29, 2014. Plaintiff should have been notified then, long before she signed the December 31, 2014 MIPA.

Accordingly, it must be concluded, as a matter of law, that Sol Wahba breached his contractual obligation to provide the requisite notice to plaintiff. The resultant damages are easily calculable. Based on the Real Property sale price of $8.9 million, which is undisputed, plaintiff's rightful 49% share should have been $4.361 million. Defendants do not deny that they only paid her $2.75 million, resulting in actual damages of $1.611 million.

JUDGMENT IS WARRANTED AGAINST
SOL WAHBA BASED ON BREACH OF FIDUCIARY DUTY

In addition to the contractual obligation to provide written notice to plaintiff upon receipt of, and the decision to accept, a bona fide offer to purchase the Real Property, Sol Wahba also had a separate and distinct fiduciary obligation to make full disclosure of all material facts; a duty not limited to any specific bona fide offer, and substantially broader in scope and time than the contractual obligation. Salm v. Feldstein, 20 A.D. 3d 469, 799 N.Y.S.2d 104 (2d Dep't 2005) ("As managing member of the [LLC] and as co-member with the plaintiff, the defendant owed the plaintiff a duty to make full disclosure of all material facts") ; Blue Chip Emerald LLC v. Allied, 299 A.D. 2d 278, 750 N.Y.S.2d 291 (1st Dep't 2002) (Managing Members who agreed to buy-out the co-owner of an LLC, and then sold the LLC's sole asset, owed a fiduciary duty

"until the moment the buy-out transaction closed." Further, "in negotiating the buy-out agreement, the … defendants had no right to keep to themselves or misrepresent material facts concerning their efforts to sell or lease the … Property, such as, for example, the prices prospective purchasers were offering to pay."), McGuire v. Huntress, 83 A.D.3d 1418, 920 N.Y.S.2d 531 (4th Dep't 2011) ("Defendants contend that the fiduciary duty that Huntress owed to McGuire Children ceased in October 2001, when Huntress and McGuire orally agreed that Huntress would buy out the equity interests of McGuire Children, despite the fact that the deal did not close until five months later, in March 2002. We reject that contention. As the Court properly determined, Huntress continued to owe fiduciary duties to McGuire Children, as the minority member of the Government Property LLCs, until those LLCs were actually dissolved"); Madison Hudson Associates, LLC v. Neumann, 44 A.D.3d 473, 843 N.Y.S.2d 589 (1st Dep't 2007) (as to the fiduciary duty of the Neumann defendants, who owned an 85% interest an LLC, to the 15% owner: "the Neumann defendants were fiduciaries… until the moment the buy-out transaction closed"). See PJI 3:59, Breach of Fiduciary Duty, Comments, page 666.

Plaintiff herein remained a member of the LLC, and retained her 49% interest in the LLC, until at least April 16, 2015, which is also the date that, unbeknownst to plaintiff, the sale of the Real Property closed. While there was no formal closing, defendant's counsel at the time, Nathaniel Shapiro, Esq., remitted payment for the purported balance on April 16, 2015, by personally hand delivering a cashier's check in the sum of $2,657,196.93, which included certain adjustments for rent, taxes and other such items. However, that was not the final figure actually due, as the adjustments were still subject to review and, in fact, contained errors. An $11,428.54 adjustment was subsequently agreed upon, and a check in that sum was received from Nathaniel Shapiro, Esq., on May 13, 2015. On that date, the signed Assignment of Interest of Raquel Wolf,

as Executor of the Estate of Hirsch Wolf, which was dated April 16, 2015, was transmitted to Nathaniel Shapiro, Esq.

Accordingly, Sol Wahba had a fiduciary obligation to make full disclosure of all material facts; a duty not limited to any specific bona fide offer, and substantially broader in scope and time than the contractual obligation; and that fiduciary obligation continued "until the moment the buy-out transaction closed" i.e., until at least April 16, 2015.

It can thus be concluded that, as a matter of law, that Sol Wahba breached his fiduciary obligations to plaintiff. The resultant damages are once again easily calculable as $1.611 million.

JUDGMENT IS WARRANTED AGAINST SOL WAHBA BASED ON FRAUDULENT INDUCEMENT TO CONTRACT

Having established Sol Wahba's breach of his fiduciary duty to plaintiff by failing to make the requisite disclosure, a claim for fraudulent inducement to contract follows logically. Obviously, Sol Wahba's failure to disclose the existence of an offer or agreement to sell the Real Property, which he was duty-bound to disclose, was a material omission of fact, which induced plaintiff to make and enter into the December 31, 2014 MIPA, and continued to induce plaintiff to complete performance thereunder. It is plain that he knew and concealed that material fact, knowingly inducing plaintiff to make and enter into the December 31, 2014 MIPA, and to complete performance thereunder.

Sol Wahba thus deceived plaintiff into selling her 49% interest in RICHMOND PROPERTIES LLC for only $2.75 million. Plaintiff justifiably relied upon, and was deceived by, defendant's material omission of fact; after all he was the Managing Member; and she was injured as result. While plaintiff's rightful 49% share should have been $4.361 million, she was only paid $2.75 million, resulting in a loss of $1.611 million.

JUDGMENT IS WARRANTED AGAINST SOL WAHBA BASED ON UNJUST ENRICHMENT

The elements of a cause of action for unjust enrichment have also been established; i.e., that Sol Wahba, who had a direct relationship with plaintiff, was enriched at plaintiff's expense, and that equity and good conscience require restitution. Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d 511 (2012).

SUMMARY JUDGMENT IS WARRANTED AGAINST MICHAEL WAHBA BASED ON BREACH OF CONTRACT OR INDUCING BREACH OF CONTRACT

Moving on to Michael Wahba, his de facto status as a Managing Member. by actively managing the Real Property, and by signing documents on behalf of Richmond Properties LLC, is clear. Michael Wahba, who cannot deny the fact that he took on the actual management role, signed key documents on behalf of the LLC, including Leases on behalf of the LLC, the Contract of Sale of the Real Property owned by the LLC and a Commission Agreement obligating the LLC to pay the broker on the sale of the Real Property owned by the LLC. He signed each those documents on behalf of the LLC, acting, representing and holding himself out to be a Managing Member.

Alternatively, even if it cannot be found that Michael Wahba was a party so as to have breached the contract itself, it is certainly easy to conclude that he induced his father, Sol Wahba, to breach the contract. In the classic case of Israel v. Wood Dolson Co., 1 N.Y.2d 116 (1956), Samuel Israel had a contract with Wood Dolson. In the first cause of action, Mr. Israel alleged that defendant Wood Dolson breached the contract, and in the second cause of action Mr. Israel alleged that defendant Alexander Gross induced Wood Dolson to breach the contract. The Court of Appeals held that: "For Israel to succeed on his second cause of action against Gross, he would have to prove: (1) the existence of a valid contract between Wood Dolson and himself; (2)

the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract by Wood Dolson, and (4) damages."

We have will establish: (1) the existence of a valid contract between Sol Wahba and plaintiff; (2) defendant Michael Wahba's knowledge of that contract; (3) Michael Wahba's intentional procuring of the breach of that contract by Sol Wahba; and (4) damages.

The valid contract is the subject Operating Agreement, a copy of which was an Exhibit to the December 31, 2014 MIPA that Michael Wahba signed. Thus, there can be doubt that Michael knew of the Operating Agreement.

As for the intentional procurement of the breach, defendants herein do not deny that they failed to inform plaintiff of the offer to purchase, and of the contract to purchase, the Real Property, and that the Real Property contract was signed by Michael Wahba, purportedly on behalf of the LLC which plaintiff was still a member of, at least 2 weeks before the December 31, 2014 MIPA was signed. Actually, defendants' attorney prepared the first draft of the Contract of Sale of the Real Property for $8.9 million, at the request of Michael Wahba and a broker, on October 29, 2014. Michael knew, full well, that his father Sol had a contractual (and fiduciary) duty to make that disclosure, but doing so would have thwarted their nefarious plan to sell the Real Property for $8.9 million while buying her 49% interest in the LLC for only $2.75 million, thereby cheating the former partner's widow out of exactly $1.611 million.

JUDGMENT IS WARRANTED AGAINST MICHAEL WAHBA BASED ON BREACH OF FIDUCIARY DUTY, AND/OR AIDING AND ABETTING SOL WAHBA'S BREACH OF FIDUCIARY DUTY

As a de facto Managing Member, as described above, Michael Wahba had the same fiduciary duty that his father had to make the requisite disclosures "until the moment the buy-out transaction closed" i.e., until at least April 16, 2015. Michael knew that his father Sol had a

contractual and fiduciary duty to make that disclosure, but doing so would have thwarted their nefarious plan to sell the Real Property for $8.9 million while buying her 49% interest in the LLC for only $2.75 million, thereby cheating the former partner's widow out of exactly $1.611 million.

Alternatively, even in the absence of an independent fiduciary duty, and even if we assume arguendo that Michael Wahba was not a Manager, Michael is nevertheless subject to liability, as matter of law, for aiding and abetting his father Sol Wahba's breaches of fiduciary duty. Wechsler v. Bowman, 285 N.Y 284, 291 (1941) ("Anyone who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby."); Caprer v. Nussbaum, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2d Dep't 2006) (even in the absence of an independent fiduciary obligation to the injured party, one who aids and abets a breach of a fiduciary duty is liable for that breach as well).

JUDGMENT IS WARRANTED AGAINST MICHAEL WAHBA FOR FRAUDULENT INDUCEMENT TO CONTRACT

Michael Wahba fraudulently induced plaintiff to make and enter into the December 31, 2014 MIPA. His failure to disclose the existence of an offer or agreement to sell the Real Property, which he was duty-bound to disclose as the de facto Managing Member, was a material omission of fact, which induced plaintiff to make and enter into the December 31, 2014 MIPA, and continued to induce plaintiff to complete performance thereunder. It is plain that he knew and concealed that material omission of fact, knowingly inducing plaintiff to make and enter into the December 31, 2014 MIPA, and to complete performance thereunder.

Michael Wahba thus deceived plaintiff into selling her 49% interest in RICHMOND PROPERTIES LLC for only $2.75 million. Plaintiff justifiably relied upon, and was deceived

by, defendant's material omission of fact; after all he was the de facto Managing Member; and she was injured as result. While plaintiff's rightful 49% share should have been $4.361 million, she was only paid $2.75 million, resulting in a loss of $1.611 million.

JUDGMENT IS WARRANTED AGAINST MICHAEL WAHBA BASED ON UNJUST ENRICHMENT

The elements of a cause of action for unjust enrichment have also been established; i.e., that Michael Wahba, who had a direct relationship with plaintiff, was enriched at plaintiff's expense, and that equity and good conscience require restitution. Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d 511 (2012).

CONCLUSION

Defendants had a bona fide offer from a financially responsible third party to purchase all of the Company's interest in the Real Property that was, in fact, actually received, and that the Selling Group decided to, and actually did, in fact, accept said Offer, no later than December 18, 2014, by which time a Contract of Sale of the Real Property for $8.9 million had already been signed by both parties, and the $890,000 down payment had already been received; and (b) that it was not until December 31, 2014, that the Membership Interest Purchase Agreement, dated December 31, 2014 (the "MIPA"), between and among Richmond Properties LLC, Estate Of Hirsch Wolf, Sol Wahba and Sigula 1145 Broadway LLC, with Michael Wahba, pursuant to which plaintiff contracted to sell her 49% interest in the LLC for only $2.75 million, was signed.

Actually, e-mails produced in discovery reveal that defendants' attorney, Nathaniel Shapiro, Esq. prepared the first draft of the Contract of Sale of the Real Property for $8.9 million, at the request of Michael Wahba and a broker, on October 29, 2014! Plaintiff should have been notified then, long before she signed the December 31, 2014 MIPA.

Thus, defendants had contractual and fiduciary obligations which were breached, or they otherwise aided and abetted same. Until the December 31, 2014 was signed, either party could have walked away from the deal for any or no reason. Plaintiff certainly would have done so if the surreptitious $8.9 million sale was disclosed. To conclude otherwise would defy logic and common sense. Moreover, the buy-out transaction pursuant to the December 31, 2014 MIPA did not close until at least April 16, 2015. All the while defendants continued to keep their lucrative deal secret, until it was discovered months later.

The actual damage calculations are simple. Specifically, based on the Real Property sale price of $8.9 million, which is undisputed, plaintiff's rightful 49% share should have been $4.361 million. Defendants do not deny that only paid her $2.75 million, resulting in actual damages of $1.611 million. It is also plain that defendants were unjustly enriched in that sum.

Plaintiff also seeks punitive damages. In this regard, PJI 2:278, Damages – Punitive, provides as follows on Comments, pages 901-902: "In Giblin v. Murphy, 73 N.Y.2d 769, 536 N.Y.S. 2d 54 (1988), the Court of Appeals held that, in tort cases such as those involving alleged breaches of fiduciary duty, 'harm aimed at the public generally' is not required 'so long as the high threshold of moral culpability is satisfied,' see Swersky v. Dreyer and Traub, 219 A.D.2d 321, 643 N.Y.S.2d 33 (1st Dep't 1996); V.J.V. Transport Corp. v. Santiago, 173 A.D.2d 537, 570 N.Y.S.2d 138 (2d Dep't 1991)."

Dated: Brooklyn, New York
November 12, 2019

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SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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Plaintiff,

Index No.: 500661/2016

Cal. No. 2019-000206T

-against-

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Defendants.

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PLAINTIFF'S PRE-TRIAL MEMORANDUM

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