SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

KENNETH ROSENBLUM,

Plaintiff,

-against-

CRAIG TREITLER and STEVEN ROSENBLUM, Preliminary Executors for the Estate of BERNICE ROSENBLUM,

Defendants.

Index No. 654177/2015

Hon. Melissa A. Crane

REPLY POST-HEARING BRIEF OF DEFENDANTS CRAIG TREITLER AND STEVEN ROSENBLUM, PRELIMINARY EXECUTORS FOR THE ESTATE OF BERNICE ROSENBLUM

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Defendants respectfully submit this reply brief in further support of their position on the "fair value" of Plaintiff's membership interests in the LLCs. *See* NYSCEF 648.[1]

INTRODUCTION

Plaintiff's post-hearing brief confirms that, on multiple occasions, Plaintiff and his experts made unsupported decisions in a transparent attempt to drive up the amount of his "fair value" claim. Plaintiff's position is unreasonable and unsupported by the record. It should not be adopted.

Plaintiff's real estate appraisals are unreasonable for a host of reasons. Most notably, Mr. Feeney, Plaintiff's appraiser, used rental revenues that the properties were ***not*** achieving as of September 2019 and falsely claimed that those were the actual contract rents. His post-hoc attempts to justify his misdirection do not explain why he falsely represented the source of revenues he was relying on in the first place. Moreover, his "Market Rate Conclusion" is unsupported by the factual record, which revealed that the so-called comparable properties he relied on were not at all comparable. And, in any event, New York law is clear that Plaintiff cannot artificially inflate value, even assuming in-place contract rents are, as Mr. Feeney claimed, below market.

Further demonstrating the unreasonableness of Plaintiff's real estate appraisals, Mr. Feeney made the specious claim at the hearing that the new rent regulations, passed just three months before the September 2019 valuation date, had no meaningful impact on the value of Thompson Street and Christopher Street. His claim is contradicted by his own reports, his testimony about the impact of the rent regulations on the buildings he deemed "comparable" to the LLC properties, ***Kenneth's*** sworn affidavit testimony in July of 2019, and commonsense. Any reasonable investor would have viewed the new rent laws as negatively impacting the value of the LLC properties. Plaintiff's current refusal to acknowledge this reality renders his whole argument suspect.

[1] Capitalized terms have the meanings given them in Defendants' initial post-hearing brief.

In addition, Plaintiff's attempt to discredit Mr. Farrell's cap rate analysis is based on a misunderstanding of the purpose of a cap rate. A cap rate represents an investor's expected rate of return. Plaintiff apparently believes that simply repeating "location, location, location" a few times in his brief is enough to show that a hypothetical purchaser would value Thompson Street and Christopher Street at significantly higher rates than indicated by the market. There is no basis in the record for such a conclusion. And, in fact, in a sworn statement Kenneth made in 2019, he admitted that the value of the LLC properties had declined significantly during the pendency of this litigation. Yet, in another flip-flop, he now attempts to distance himself from that statement.

As for the business valuations, Plaintiff first takes issue with Defendants' treatment of (a) loans due to the LLCs from Standard Realty, an insolvent entity, and (b) certain monies that Kenneth was authorized to withdraw from the LLCs' bank accounts as of the valuation date. His arguments, however, amount to nothing more than an airing of grievances against Defendants. Plaintiff ignores the fact that "fair value" is determined from the perspective of an informed, willing purchaser. As Mr. Klein testified, that purchaser would not have ascribed any value to loans due to the LLCs from an insolvent entity or to funds that were about to leave the LLCs' bank accounts. And, on the marketability discount, Plaintiff's argument is premised on his expert's long-held (and oft-rejected) belief that the Court of Appeals and the First Department were wrong when they routinely applied such discounts to real estate holding companies in previous cases. Binding precedent should determine this issue, not Mr. Mercer's incorrect analysis of that precedent.

Finally, on prejudgment interest, the First Department already resolved this issue against Plaintiff, and Plaintiff should not be allowed to relitigate it now. In any event, the crux of his argument is based on a misrepresentation of a Court of Appeals decision, which, properly understood, shows why he is not entitled to prejudgment interest under

ARGUMENT

I. The Court should rely on Mr. Farrell's real estate appraisals in determining the value of the LLC properties.

The Court should rely on Mr. Farrell's real estate appraisals, and reject Mr. Feeney's appraisals, in determining value for five main reasons. *First*, Mr. Feeney used rental revenues that the properties were ***not*** achieving to inflate net operating income. *Second*, Mr. Feeney also used an artificially low cap rate that did not take into account the negative impact of the new June 2019 rent laws. *Third*, Plaintiff's attempts to undermine Mr. Farrell's cap rates are based on a misunderstanding of the purpose of a cap rate analysis. *Fourth*, Mr. Farrell's analysis is consistent with market trends Mr. Feeney identified. And, *fifth*, because Plaintiff's constant flip-flopping between 2019 and today undermines the credibility of his entire argument.

A. Mr. Feeney's reports are not reliable because Mr. Feeney overstates net operating income.

Plaintiff relies heavily on Mr. Feeney's "Market Rate conclusion"—his so-called analysis of the "contemporary [rental] market for similar properties in the West Village"—in an attempt to justify Mr. Feeney's decision to ignore the actual contract rents in calculating net operating income for Thompson Street and Christopher Street. NYSCEF 649 at 7–8; *see also* Ex. 1 at 67–70; Ex. 2 at 65–67. Plaintiff's attempted rehabilitation of Mr. Feeney fails as a factual and legal matter.

1. The facts do not support a finding that the units in the LLC properties would earn more than $350,000 in annual revenue than they were currently achieving as of September 20, 2019.

Plaintiff's attempt to defend Mr. Feeney's decision to ignore contract rents fails as a factual matter for three separate reasons:

First, Plaintiff is wrong about how Mr. Feeney used the "Market Rent Conclusion" portions of his reports. Mr. Feeney did not, as Plaintiff suggests, use those conclusions at all to calculate revenues for the occupied market units at the subject properties. For Thompson Street, Mr. Feeney

listed "Residential Revenue" for the "Market Rate" units as "$1,404,245." Ex. 1 at 73. That number is made up of three components:

Rent allegedly "currently achieve[d]" by the occupied units based on "the provided rent roll."	$1,002,180	Ex. 1 at 67.
3% "gross up" of occupied rental units.	$30,065 (*1,002,180 * 0.03*)	Ex. 1 at 71.
Forecasted rent for the six vacant units.	$372,000	Ex. 1 at 71.
TOTAL	**$1,404,245**	

Mr. Feeney confirmed on cross-examination that he used "$1,002,180" in revenue for the "occupied market rate units" because that was the annualized amount of rent he believed those units "were actually collecting in September of 2019." Tr. 39:22–40:2. He also confirmed that his understanding of the existing rents served as "the basis of the [revenue for the] market rate units" he used in his calculations. Tr. 39:11–15. He did not, as Plaintiff argues, substitute his own analysis of the rental market for the in-place contract rents. Instead, Mr. Feeney and Mr. Farrell agreed that they should use contract rents to calculate revenues for the occupied market-rate units. The only difference between Mr. Feeney's analysis and Mr. Farrell's is the fact that Mr. Feeney ignored the amounts actually due under the leases—at the direction of his client—in favor of much higher rent amounts that the existing tenants were not obligated to pay. *See* Tr. 39:2–45:25.

Mr. Farrell's analysis is far more reasonable than Mr. Feeney's approach and should form the basis for the Court's determination of the net operating income for the LLC properties. It is undisputed that the occupied market units at Thompson Street were ***not*** "currently achiev[ing]" $1,002,180 in annualized income, as Mr. Feeney claimed, but were instead achieving $852,432. *See* Ex. A (rent roll); Tr. 63:13–64:13; *see also* Exs. B–C, L–R (leases). Mr. Feeney was flat wrong when he stated otherwise in his report, an error he tried to absolve himself of by "assum[ing] no responsibility for the authenticity or completeness of lease information provided by others." Ex. 1

at 90. Moreover, Mr. Feeney admitted that, if he had the correct information when he prepared his report, he would have used the lower amounts that the units were actually achieving while the leases were in effect. Tr. 45:10–25. In other words, Mr. Feeney would have used the same rent revenues Mr. Farrell used. *See* Ex. 3 at 64. For Thompson Street alone, Mr. Feeney ignored the fact that nine of the market units were achieving significantly less in annualized revenue than the amount he included in his analysis. *See* Ex. A (units 1, 6, 19, 22, 30, 31, 36, 38, and 39). Of those nine units, ***eight of the leases*** did not expire for eight to eleven months after the valuation date. *Id.* (expiration dates ranged from May 31, 2020 through August 31, 2020). Those eight units had no ability to achieve anywhere near Mr. Feeney's inflated rents in the near or even intermediate term. Because the rental revenues were already locked in for almost all of the first year following the valuation date, there is no factual basis in the record to support Mr. Feeney's inflated revenues.[2]

Second, further demonstrating the unreasonableness of his approach, Mr. Feeney ***already included in his report*** additional income that he claimed "reflect[ed] forward looking revenues as leases roll," specifically, his 3% gross up. Ex. 1 at 71. According to Mr. Feeney, he used the 3% gross up to "adjust [existing revenue] for the ensuing 12 months" after the in-place leases expired. Tr. 39:11–21. His analysis therefore double-counted the potential for the properties to earn additional revenue as "leases roll" because he assumed that, once existing leases expired, the units would ***both***: (a) rent for much more than they currently rented for, ***and*** (b) also rent for an additional 3% on top of that already inflated figure. There is no basis in the record to support Mr. Feeney's assumptions. Moreover, Mr. Feeney's own decision to apply a 3% gross up for expiring leases also shows that he had no basis to ignore the contract rents actually in place at Thompson

[2] For Christopher Street, the difference in revenues is $210,696, making the total difference for the two buildings $360,444. *See* Exs. W, X; *see also* Exs. S–V.

Street. On the valuation date, the occupied market units at Thompson Street were achieving $852,432 in annualized rental revenues. Tr. 63:13–64:13; *see also* Ex. A. For those revenues to balloon to $1,002,180, as Mr. Feeney assumed, the rents would need to be grossed up by ***more than 17.5%*** (149,748 / 852,432). That level of "gross up" is ***almost six times*** the 3% gross up even Mr. Feeney claimed would have been appropriate for Thompson Street. Nothing in the record indicates the market would bear such an increase.

Third, the so-called "comparable" rentals Mr. Feeney cited to support his claim that Thompson Street could charge higher rents are unreliable and do not justify his decision to ignore the in-place contract rents. Mr. Feeney did not provide critical details about his "comparables." *See* Ex. 1 at 67–70. He did not, for example, include details about floor plans, the style of the units (e.g., whether they were lofts or had high ceilings), or the amenities they offered (e.g., elevators, live-in supers, gyms, doormen, etc.). The only specific information in the record about the quality of the "comparable" apartments shows that they were ***not*** at all comparable to Thompson Street. One of Mr. Feeney's "best comparables"—546 Broadway—is a loft building with "some loft units . . . that are 1,000 to 1,500 square feet." Tr. 90:2–18. There are no comparable units in Thompson Street, a fact Mr. Feeney admitted on cross-examination. Tr. 90:12–18; *see also* Ex. 1 at 47 (units in Thompson Street ranged from 400 to 600 square feet). Mr. Feeney's attempt to inflate the "market price" for rents at Thompson Street by comparing units in that building to an entirely different, much nicer loft building casts a shadow over his entire analysis. That analysis should not be relied on to ignore in-place contract rents that, by Mr. Feeney's own admission, were negotiated and agreed to by "competent management." Ex. 1 at 90; *see also* Tr. 86:16–87:2.

Mr. Feeney's "comparables" analysis is further undermined by other information in his own report—information that he never even tried to explain. In addition to 546 Broadway, Mr.

Feeney identified Comparable No. 2 as another one of his "best comparables" for Thompson Street. Ex. 1 at 69. But, in relying on Comparable No. 2, Mr. Feeney ignored the fact that the building only had a ***47.1% occupancy rate***, which translates to a ***52.9% vacancy rate***:

2	59-61 Thompson Street New York	34	1921	6	47.1%

Ex. 1 at 68. That is compared to a city-wide vacancy rate that is, according to Mr. Feeney, "significantly lower than 5.0 percent." Ex. 1 at 32, 66. The mere fact that ***over half of the units*** at Comparable No. 2 were ***not occupied*** as of the valuation date shows that the higher rents charged by that building—which are equivalent to the "market rents" Mr. Feeney claimed Thompson Street could charge—were not market at all. There is nothing in the record to suggest Thompson Street would succeed where Comparable No. 2 failed. In valuing Thompson Street, no reasonable investor would assume they could increase rents by more than 15% when so-called "comparable buildings" showed that allegedly similar units were ***not*** renting at those high prices.

Mr. Feeney had no factual basis to ignore the in-place contract rents at Thompson Street and Christopher Street in favor of much higher rents that were not actually being achieved at those properties. His analysis of the residential revenues for the market rate units should not be credited.

2. Mr. Feeney's decision to ignore contract rents in his analysis is also incorrect as a matter of law.

In addition to having no factual support to ignore the rents actually being achieved at the LLC properties, Mr. Feeney's treatment of residential revenues is also incorrect as a matter of law. In a case directly on point, the Second Department rejected a different expert's similar attempt to artificially increase rental revenues in a "fair value" case to reflect the fact that the property at issue was "subject to a below-market-value lease." *Cinque v. Largo Enters. of Suffolk Cnty.*, 212 A.D.2d 608, 609 (2d Dep't 1995). According to the Court in *Cinque*, "the fair market value of the property is limited to the income due under the lease." *Id.* Mr. Farrell concluded that the contract

rents for the LLC properties were "arm's length, recent leases" that were "representative of market levels as of the valuation date." Ex. 3 at 64; Ex. 4 at 69; *see also* Tr. 301:5–10 (Mr. Farrell testifying that "the units that would be the most comparable would be the units in the subject property itself"). Mr. Farrell's conclusions are amply supported by the record and consistent with Mr. Feeney's assumption that the properties were operated by "competent management" that agreed to the leases in the first place. Ex. 1 at 90; Ex. 2 at 87. And, moreover, Mr. Farrell's conclusions are also in line with the Second Department's holding in *Cinque*. By comparison, Mr. Feeney's analysis is factually unsupported, contradicted by his own decision to assume competent management in valuing the properties, and, in any event, legally impermissible under *Cinque*.

3. Plaintiff's other attempts to discredit Mr. Farrell's decision to use the actual contract rents lack merit.

In an attempt to otherwise discredit Mr. Farrell's decision to use the actual contract rents in his analysis, Plaintiff raises a hodgepodge of additional arguments—none of which have merit.

First, Plaintiff claims that Mr. Farrell's "reports contain no actual analysis of what the **market rents** would be for any of the apartments listed in the rent roll." NYSCEF 649 at 9. His claim is not true. Mr. Farrell relied on the "rent roll[s]" for the subject properties because the "*existing contract rents*" reflected on those rent rolls "are arm's length, recent leases" that Mr. Farrell "compar[ed] to nearby comparable properties." Ex. 3 at 64; Ex. 4 at 69. According to Mr. Farrell's review of those nearby properties, he determined that "the contract rents are . . . representative of market levels as of the valuation date." Ex. 3 at 64; Ex. 4 at 69. And, as Mr. Farrell testified, he relied on rents from comparable buildings to confirm "that the rents in the building are market." Tr. 303:11–304:10 (Mr. Farrell testifying that he analyzed rents from "the building that's directly across the street" from Thompson Street and other buildings "that you can see from standing at the front door").

Second, Plaintiff's claim that Mr. Farrell's appraisals would not satisfy uncited "bank regulations" is of no moment. NYSCEF 649 at 9. As an initial matter, because Plaintiff did not bother to cite the regulations he is relying on, Defendants cannot adequately respond to the claim. And, for the same reason, the Court cannot (a) confirm Plaintiff's claim either, or (b) even if confirmed, assess the claim's impact on the current "fair value" determination. This is a "fair value" case; the Court is not a bank, nor is it determining whether an appraisal satisfies regulations applicable to banks. Further, assuming there is some on-point bank regulation out there, New York's "fair value" legal regime does not require any type of "comparable analysis for residential rents," *id.*, because "the fair market value of the property is limited to the income due under the lease." *Cinque*, 212 A.D.2d at 609. Defendants respectfully submit that the Court's analysis should be guided by relevant New York law and not some unsourced "bank regulations."

Third, while trying to undermine Mr. Farrell's rental conclusion, Plaintiff points to a portion of Mr. Farrell's report dealing with his separate "sales comparison approach." NYSCEF 649 at 9–10 (citing Ex. 3 at 92; Ex. 4 at 97). From there, Plaintiff tries to push a theory that the LLC properties must have below-market rent because Mr. Farrell's comparables had higher "existing income levels." Ex. 3 at 92; Ex. 4 at 97. Plaintiff's attempt to conflate Mr. Farrell's sales comparison approach and his rental analysis should not be credited. Mr. Feeney followed the same approach. He also made adjustments in his sales comparison analysis "to reflect differences in" the buildings' economics, including average rents. Ex. 1 at 64; Ex. 2 at 61. Mr. Feeney concluded that all of the comparables he used for his sales comparison approach had "[i]nferior" economics compared to Thompson Street and Christopher Street. Ex. 1 at 62; Ex. 2 at 59. If Plaintiff's argument had merit, then, under his same analysis, Mr. Feeney's sales comparison approach indicates that Thompson Street and Christopher Street had ***above-market*** rents because their

economics were superior to Mr. Feeney's comparable buildings. Such a conclusion would be at odds with Mr. Feeney's claim that the units were renting at below market rates. Ultimately, the Court should recognize Plaintiff's argument for what it is, an apples-to-oranges comparison of two completely different analyses that has no bearing on whether the in-place contract rents were at, above, or below market. *See* Tr. 184:14–19 (Mr. Farrell testifying that "contract rents in a building like this would be one of the best indicators of what is attainable in the buildings").

Fourth, Plaintiff incorrectly claims that Mr. Farrell did not include any rental revenues for the six vacant units at Thompson Street. NYSCEF 649 at 10–11. Mr. Farrell testified at length about the vacant units, and calculated on the stand how he included $300,000 in revenue for those units. *See* Tr. 156:7–17, 177:4–178:14. Although, as Mr. Farrell acknowledged, his report could have more clearly identified the $300,000, this issue should not be subject to serious dispute. Mr. Farrell used the in-place contract rents for the occupied market units, which, as the record shows, annualized to $852,432. *See* Ex. A (rent roll); Tr. 63:13–64:13; *see also* Exs. B–C, L–R (leases). Mr. Farrell's total, annualized "Market Apt. Rental Revenue" was $1,152,432. Ex. 3 at 82. The difference between total revenue and the in-place rents—$300,000—is revenue attributable to the vacant units at Thompson Street. Plaintiff's continued focus on a simple, easily-explained documentation issue is illustrative of his failure to find any true issues with Mr. Farrell's analysis.

Fifth, Plaintiff again tries to explain away the fact that Mr. Feeney ignored the "'rent preferences' or rent adjustments" reflected on the rent rolls by arguing that, "[b]y definition, such preferential rents are below market" because the rents are "lower than those that could legally be charged." NYSCEF 649 at 11. Plaintiff does not explain what he means by rates that "could legally be charged." The impacted apartments are all market-rate units; they are not rent regulated or controlled. *See* Ex. A; Ex. W; Ex. X. Kenneth, Bernice, and/or management could have charged

whatever rents for those units the market would bear, and, in each instance, the market would only bear the actual contracted amounts. Although denoted as "rent preferences" or "rent adjustments" on the rent roll, four of the leases contain no reference to the higher "Rent" amounts. Ex. B at 1; Ex. L at 1; Ex. U at 1; Ex. V at 1. And the other leases all state that the tenants are only legally obligated to pay the lower preferential amounts. *See* Ex. C at 9, 16; Ex. M at 9, 26; Ex. N at 9, 21; Ex. O at 9, 24; Ex. P at 21, 51; Ex. Q at 9, 26; Ex. R at 9, 30; Ex. S at 9, 28; Ex. T at 9, 24. As Mr. Feeney conceded, the rents were negotiated and agreed to by "responsible ownership and competent management." Ex. 1 at 90; Ex. 2 at 87; *see also* Tr. 86:16–87:2. The contracted amounts reflect market rents that should form the basis for the Court's determination of fair value.

4. Plaintiff did not even try to defend the serious issues with Mr. Feeney's analysis of the vacant units.

As Defendants detailed in their opening post-hearing brief, there were significant issues with the manner in which Mr. Feeney determined how much revenue to attribute to the vacant units at Thompson Street. *See* NYSCEF 648 at 15–16. Most notably, at the direction of Plaintiff, Mr. Feeney treated Unit 7 as a three-bedroom, market-rate unit that he assumed could rent for $5,500 per month within one month of his valuation date. Tr. 69:13–72:9. As the hearing demonstrated, however, Unit 7 was a rent-controlled unit that could not be rented at all unless significant renovations were first made. Tr. 159:16–21; Ex. H; *see also* Tr. 157:8–12, 159:5–14. Mr. Feeney did not include any costs associated with renovating Unit 7, and he conceded that, had he known Unit 7 was rent controlled, he "[u]ndoubtedly" would have included a "much lower" rent than $5,500 per month in his analysis. Tr. 71:19–72:2. Plaintiff himself admitted Unit 7 was rent controlled, and, as of the valuation date, its legal rent was $962 per month. NYSCEF 414 ¶ 5. Kenneth told Mr. Feeney a different story in an attempt to inflate revenues for Thompson Street and, in turn, inflate his "fair value" claim. Mr. Feeney accepted Kenneth's representation without

question and denied any responsibility for the error. *See* Ex. 1 at 90. This error—combined with the errors discussed above relating to Mr. Feeney's market rent comparables, *see supra* at 6–7, amply explain the $72,000 difference between Mr. Feeney's analysis of the vacant units ($372,000) and Mr. Farrell's more reasonable analysis ($300,000). Mr. Farrell's analysis should be relied upon in deciding the value of Thompson Street.

* * *

In sum, Defendants respectfully submit that, in determining the value of the LLC properties, the Court should rely on Mr. Farrell's net operating income for those properties: $869,222 for Thompson Street, and $757,912 for Christopher Street. *See* Ex. 3 at 82; Ex. 4 at 87.

B. Mr. Feeney's reports are also unreliable because his cap rates do not take into account the new rent laws and thus are artificially low.

In his only attempt to defend Mr. Feeney's selection of cap rate comparables, Plaintiff claims that Mr. Feeney "analyz[ed] contemporaneous transactions involving similar properties in the same and similar neighborhoods." NYSCEF 649 at 8. Plaintiff's first claim about timing is not true. And his second claim glosses over exactly what he means by "similar neighborhoods."

First, as Defendants already detailed, Mr. Feeney did not consider ***contemporaneous*** transactions. *See* NYSCEF 648 at 24–27. Instead, Mr. Feeney selected transactions that were under contract between November 2018 and April 2019, and thus did not close until dates between January and June 2019. Ex. 1 at 85; Tr. 137:11–17. This was a significant error on Mr. Feeney's part because, as he readily acknowledged, the new rent laws enacted in June 2019 were "unanimously expected to result in higher capitalization rates for assets with a meaningful amount of rent regulated units." Ex. 1 at 20; *see also* Tr. 118:23–119:17 (discussing period of "price discovery" that occurred between June and mid-September 2019); NYSCEF 648 at 24–27. Indeed, Mr. Feeney testified that the new rent regulations would have increased the cap rates for all of his

comparable transactions. *See* Tr. 117:19–118:7. He offered no plausible explanation for why that same conclusion would not also apply to the LLC properties, each of which had a similar percentage of rent regulated units as Mr. Feeney's comparables. *See* NYSCEF 648 at 25.

Plaintiff himself has already acknowledged that the new rent regulations had a negative impact on the value of the LLC properties. He made that exact point to the Court on July 9, 2019, after the rent laws were enacted and just two months before the valuation date. At that time, it suited Kenneth's interests to admit that the rent laws impacted his joint businesses with his mother because he was seeking dissolution of the LLCs as an alternative form of relief to withdrawal. In a sworn affidavit, he stated: "property owners need[ed] new strategies for operating their business" because "of the new rent regulations." NYSCEF 414 ¶ 6. Just as the parties would need to develop a new strategy for operating the LLC properties, so too would any potential investor interested in purchasing those properties. That investor would have decreased the value associated with the LLC properties to account for the risk associated with developing the new strategy. *See* Tr. 269:10–270:7; *see also* Tr. 154:7–16. Fast forward four years, Plaintiff—through Mr. Feeney—is trying to tell a different story. Now, because it suits his interest to argue that the rent laws had no impact on the LLC properties, that is Kenneth's new position. He was right the first time. Both of the LLC properties have a meaningful percentage of rent regulated units—33% (Thompson Street) and 11% (Christopher Street). *See* Ex. 3 at 61 (13 out of 39 total units); Ex. 4 at 66 (5 out of 44 total units). The suggestion that investors would not have viewed that as a negative in the immediate aftermath of the new rent laws has no basis in fact or logic. *See* Ex. 1 at 20–22 (discussing impact of new rent regulations). Plaintiff's attempt to flip-flop positions should not be credited.

Second, by arguing that Mr. Feeney used transactions in "the same and similar neighborhoods," Plaintiff glosses over what he means by "similar." NYSCEF 649 at 8. Mr.

Feeney's cap rate comparables included 303 E. Houston Street (on the Lower East Side) and 519 Second Avenue (in Kips Bay on East 29th Street). Ex. 1 at 85; Ex. 2 at 82. He therefore acknowledges that, for cap rate purposes, transactions do not need to be in the exact same neighborhood as the subject properties. Just as Mr. Feeney deemed it appropriate to use these properties in his analysis, so too did Mr. Farrell deem it appropriate to use properties in West Chelsea, on Mulberry Street, and in upper Manhattan. *See* NYSCEF 648 at 21–24 (discussing Mr. Farrell's comparables); *see also infra* at 14–15.

Moreover, Plaintiff did not even try to address the significant issues with Mr. Feeney's cap rate comparables. *See* NYSCEF 648 at 24–27. As Defendants detailed in their initial brief, Mr. Feeney's analysis is unreliable both because the comparable transactions he relied on did not capture the negative impact of the new rent regulations, *see id.* at 24–26, and because of the specific issues identified with the individual transactions, *see id.* at 26–27.

C. Plaintiff's attempts to undermine Mr. Farrell's cap rate analysis fall flat because Plaintiff ignores the actual purpose of a cap rate.

A cap rate equates to an investor's expected rate of return. Tr. 112:2–4. For that reason, it is appropriate for an appraiser to consider a larger geographic area when examining cap rate comparables because investors in the same real estate asset class would expect similar rates of return regardless of where in Manhattan a particular property is located. Tr. 253:20–254:8. Plaintiff ignores this economic reality. Instead, he pushes the misguided view that real estate in the West Village has inherent value independent of market conditions because of its location. According to Plaintiff, Mr. Farrell's cap rate analysis is unreliable because an investor would accept a ***far lower rate of return*** for a property in the West Village as compared to an investor purchasing real estate in West Chelsea, the East Village, or the Upper West Side. Mr. Farrell explained why that makes no economic sense. *See id.* And, on this point, Mr. Feeney agreed with Mr. Farrell. According to

Mr. Feeney, "[i]nvestors' return requirements are a benchmark by which real estate assets are bought and sold." Ex. 1 at 84. If, in the immediate aftermath of the new rent regulations, real estate investors in West Chelsea required a rate of return of 4.76% or higher, so too would investors in the West Village. Ex. 3 at 80; *see also* Tr. 240:18–241:16; Ex. 10 at 3. Nothing in the record suggests a rational explanation for why an investor would accept a lower rate of return just to invest in the West Village as compared to other parts of Manhattan. Plaintiff's attempt to deflect from that absence of proof by repeating the mantra of "location, location, location" is no substitute for an actual analysis of market expectations as of the valuation date.

Plaintiff's other attempts to undermine Mr. Farrell's analysis fail for three reasons:

First, Plaintiff starts off his critique by misstating the record. He claims that "Mr. Farrell made ***no effort*** to select as his comparables other properties in the West Village." NYSCEF 649 at 11 (emphasis added). That is not true. One of Mr. Farrell's comparables—11 Carmine Street—is in the West Village, halfway between Thompson Street and Christopher Street. Ex. 3 at 80, 88. Plaintiff otherwise places much stock on the fact that Thompson Street was renovated in 2014, whereas Carmine Street had no reported renovations. NYSCEF 649 at 12. But the record is silent on the exact renovations at Thompson Street and, as for Christopher Street, that property had not been renovated at all since it was built in 1908. Ex. 4 at 5. Further, Plaintiff cites Exhibit 9—an offering memorandum for Carmine Street that the Court *never* admitted into evidence—to make a point about the ratio of commercial rent to residential rent. NYSCEF 649 at 12. Plaintiff's attempt to sneak Exhibit 9 into the record should be rejected. In any event, Mr. Feeney, like Mr. Farrell, did not provide the commercial-to-residential ratios for any of his comparables. Ex. 1 at 60, 85. Because Mr. Feeney did not include this information in his reports, he presumably agreed with Mr. Farrell that "[t]he ratio doesn't really enter into" a cap rate analysis. Tr. 219:4–11.

Second, Plaintiff critiques Mr. Farrell because he did not identify the number of rent regulated units at his comparable properties. *See* NYSCEF 649 at 12. He also notes that one of Mr. Farrell's comparables—22 St. Marks Place—had over 50% rent-regulated units. *Id.* Mr. Farrell testified that, across "all of [his] comps," the "average number of [rent-regulated] units as a percentage . . . was 16 percent," which was "above the 11 percent" at Christopher Street and "below the roughly 33 percent" at Thompson Street. Tr. 268:2–21. Mr. Feeney's comparables had a similar percentage of rent regulated units, ranging from 15% to 88%. NYSCEF 648 at 25, 27; Ex. 1 at 60. Plaintiff does not otherwise explain the significance of this point. And, as Mr. Farrell explained, in the aftermath of the new rent laws, "[a]ny amount of rent regulated apartments is an issue" that would negatively affect value. Tr. 269:10–270:7.

Third, Plaintiff tries to attack 124 West 73rd Street because Mr. Farrell could not recall the source of the cap rate on the stand. NYSCEF 649 at 12. Mr. Feeney had the same problem recalling critical details about the information in his reports. *See* Tr. 40:14–23, 42:21–23, 106:13–107:1. In one egregious example, Mr. Feeney could not recall whether his team relied on CoStar's unverified estimate of a cap rate for his analysis. Tr. 108:7–18; Ex. F. Even with the assistance—in the middle of his examination—from Plaintiff's counsel and other unnamed individuals, Mr. Feeney could not confirm the source of his cap rate. Tr. 110:4–6, 113:4–8. Ultimately, the Court admitted the CoStar report because CoStar's estimated, unverified cap rate matched the cap rate Mr. Feeney listed in his report. Tr. 113:9–114:5; *see also* Tr. 105:14–107:1 (Mr. Feeney was unable to confirm the source of the cap rate he used for 106 West 13th Street).

D. Plaintiff's argument about the parties' 2016 appraisals ignores his own expert's analysis of cap rate trends in Manhattan from 2016 through the September 2019 valuation date.

Plaintiff's arguments about the parties' 2016 appraisals ignores his own expert's analysis of cap rate trends in Manhattan. *See* NYSCEF 649 at 13–15. As Defendants explained in their

opening brief, Mr. Feeney confirmed that cap rates in Manhattan were steadily rising towards 4.0% between 2016 and 2018. NYSCEF 648 at 28; *see also* Ex. 1 at 25. And, as Mr. Feeney also admitted, those cap rates rose further in June 2019 after the new rent regulations were enacted. *See* Tr. 117:19–118:7, 127:5–11. Accordingly, Mr. Feeney's conclusion that the cap rate for Thompson Street actually ***decreased*** from December 2016 to September 2019 is contradicted by his own analysis of the market. *See* NYSCEF 648 at 28–30. The same is true for Mr. Feeney's claim that the cap rate for Christopher Street remained the same during those two periods. *See id.* By comparison, Mr. Feeney's assessment of the market is consistent with Defendants' appraisals from 2016 and 2019 because those appraisals reflect increasing cap rates for both LLC properties.

Considered in the context of Mr. Feeney's market analysis, Plaintiff's emphasis on Defendants' assessment of the LLC properties' decline in value from 2016 to 2019 makes little sense. NYSCEF 649 at 13–14. Mr. Feeney explained one basis for the decline—rising cap rates. NYSCEF 648 at 28–30. Mr. Farrell agreed. He testified that "the passage of the Housing Stability and Tenant Protection Act in mid-2019 would certainly have downward pressure on value." Tr. 322:13–22. And the Court identified yet another reason why the value declined—the decline associated with "intractable litigation that more or less dates back to 2016," approximately three years ***before*** the valuation date. Tr. 322:23–323:7; *see also* Tr. 323:14–18 (noting the possibility "that this intractable litigation has depressed value across the board[] because that does happen").

Plaintiff previously agreed with Defendants and the Court. He admitted there was a significant decline in value from the end of 2015 through March 2019, just six months before the September 2019 valuation date. Kenneth swore "that during the pendency of this litigation the value of the buildings has ***decreased by about 20%***." Ex. G n.1 (emphasis added). Kenneth's March 2019 assessment of the value of Thompson Street and Christopher Street is ***consistent with***

Defendants' appraisals and ***inconsistent with*** his own appraisals. Kenneth's affidavit attesting to a 20% decline in value was part of the public record ***before*** September 2019. No reasonable investor would just ignore Kenneth's own assessment of the properties' ***decline in value***.

E. Plaintiff's constant flip-flopping undermines his credibility.

On four different occasions, Plaintiff has switched positions in this current phase of litigation as compared to the positions he took on the same issues in early 2019. Notably, Plaintiff's 2019 positions were taken: (a) when he was seeking to dissolve the LLCs, and (b) before the Court rejected his claim that he withdrew in December 2016 and instead found that his withdrawal date was in September 2019. Specifically, Kenneth's position has changed on the following four issues:

Kenneth's 2019 Position	Kenneth's 2023 Position
Thompson Street and Christopher Street ***declined*** in value by about 20% from the end of 2015 through March 2019. Ex. G n.1.	Thompson Street ***increased*** in value over that same time period. *See* NYSCEF 649 at 14.
Investors would expect a 5% rate of return on properties like Thompson Street and Christopher Street. Ex. G ¶ 4.	Investors would accept a 3.25 to 3.50% rate of return for Thompson Street and Christopher Street. *See* Ex. 1 at 87; Ex. 2 at 84.
The new rent laws had a negative impact on Thompson Street and Christopher Street that required new business strategies for managing those properties. *See* NYSCEF 414 ¶ 6.	The new rent laws had minimal impact on the value of the properties because the properties did not have a meaningful amount of rent regulated units. *See* Tr. 133:14–16.
Unit 7 at Thompson Street is rent controlled, needed renovations and could only rent for $962 per month. *See* NYSCEF 414 ¶ 5.	Unit 7 was a free-market apartment that could rent for $5,500 per month within one month of September 2019. *See* Tr. 70:3–71:18.

In each of these four instances, Plaintiff first acknowledged the negative conditions facing the LLC properties in 2019 because he wanted to dissolve the LLCs, and because he thought his statements would not impact his alternative claim for withdrawal as of December 2016. But, after losing on his claim for dissolution and being limited to a withdrawal claim based on a September 2019 valuation date, Plaintiff switched tactics. Now, he is downplaying those same economic

conditions in a transparent attempt to drive up the value of the properties and his "fair value" claim. His persistent flip-flopping undermines the credibility of his analysis and should not be rewarded.

II. The Court should rely on Mr. Klein's business valuations in determining the value of the LLCs and in assessing the appropriate marketability discount.

In determining the value of the LLCs, the Court should (a) ascribe no value to the loans due to the LLCs by Standard Realty and reduce the amount of cash in the LLCs' bank accounts by the amount Kenneth was entitled to withdraw on his equalization claim; and (b) apply a conservative 15% marketability discount. Plaintiff's arguments against these straightforward and reasonable positions should be rejected.

A. Plaintiff's arguments about the treatment of the Standard Realty loans and the cash he withdrew from the LLCs ignore the fact that "fair value" is determined from the perspective of a hypothetical third-party purchaser.

Kenneth's arguments about the Standard Realty loans and the cash he withdrew from the LLCs boil down to nothing more than his misguided claim that Mr. Klein's treatment of those liabilities is inappropriate because it somehow harms Kenneth to Bernice's benefit. *See* NYSCEF 649 at 17–21. Kenneth is wrong. If his arguments are adopted, ***Bernice***, not Kenneth, would be harmed. Bernice would be harmed, first, because she did ***not*** receive the benefits of the assets Kenneth withdrew and, second, because Kenneth is now arguing that Bernice's estate should pay him those assets a second time. But, more to the point, Kenneth's arguments ignore the fact that the "fair value" determination asks "what a hypothetical willing purchaser, with a reasonable knowledge of the underlying facts," would pay for his interests in the LLCs. *Giaimo v. Vitale*, 101 A.D.3d 523, 525 (1st Dep't 2012); *see also* Tr. 414:2–11 (Mr. Mercer admitting that the hypothetical purchaser is an "independent party"). From this perspective, it is clear that both the Standard Realty loans due to the LLCs and the cash in the LLCs' accounts that Kenneth was entitled to withdraw had no value as of the September 20, 2019 valuation date. The hypothetical

third-party purchaser would therefore reduce the amount they would be willing to pay for the LLCs accordingly.

First, on the Standard Realty loans due to the LLCs, there is no dispute that Standard Realty was insolvent as of the valuation date because it had no assets. *See* NYSCEF 526 at 3. For that reason, Mr. Klein determined that a hypothetical buyer would not treat the loans payable as assets of the LLCs and, thus, would not pay value for them. *See* Tr. 430:16–431:16. Any other conclusion assumes that a hypothetical buyer would pay value for loans due to the LLCs from an insolvent entity. There is nothing in the record to support such an illogical conclusion. Mr. Mercer simply speculated that the parties "would work all of that out" without offering any details on how, when, or why that would occur. Tr. 414:12–16. The hypothetical purchaser would not take on the risk of potentially receiving payment at some future date from some other solvent entity or person following litigation. As Mr. Klein explained, relying on his decades of experience, the hypothetical purchaser would discount the loans to zero. *See* Ex. 12 at 20–21; Ex. 13 at 21; Tr. 430:16–431:16.

Second, a similar analysis applies to the monies Kenneth withdrew from the LLCs. As of the valuation date, the Court ruled that Kenneth had a right to withdraw more than $9 million from the parties' joint entities—$329,736 of which was owed from 132 Realty LLC and $840,097 of which was owed from Village Realty LLC. *See* NYSCEF 423 at 2; NYSCEF 561 at 9 (showing Kenneth's withdrawals); Ex. 12 at Ex. 3, item "a"; Ex. 13 at Ex. 3, item "a." As Mr. Klein concluded, the hypothetical purchaser of Kenneth's interest would have discounted the amount of cash on the LLC's books to account for the known fact that Kenneth was going to withdraw those monies. *See* Tr. 462:6–8; Ex. 12 at 21; Ex. 13 at 21; *see also Ferolito v. Arizona Bev. USA LLC*, 2014 WL 5834862, at *8 (Sup. Ct. N.Y. Cnty. Oct. 14, 2014) ("The Court may consider . . . future events that are "known or susceptible of proof" as of the valuation date.") (citation omitted). Any

other conclusion assumes that the hypothetical purchaser would pay value for cash that was about to be withdrawn by Kenneth. The record does not support such a counterintuitive finding.

Plaintiff's other arguments should be given short shrift because they are also based on his misunderstanding of the proper perspective of his "fair value" claim—the hypothetical purchaser. *First*, the loan amounts the LLCs ***owed to*** other entities do not need to be treated the same as the Standard Realty loans ***owed to*** the LLCs, NYSCEF 649 at 17–19, because unlike Standard Realty, the LLCs were solvent as of the valuation date, Tr. 455:25–456:3. *Second*, Mr. Klein explained that the Standard Realty loans were uncollectible regardless of whether there were notes for the loans because of Standard Realty's insolvency. *See* Ex. 12 at 20–21; Ex. 13 at 21; Tr. 430:16–431:16. And, even if the hypothetical purchaser could try to collect from Kenneth and Bernice personally, there is nothing in the record to suggest that the purchaser would take on that risk. The most reasonable course of action for the hypothetical purchaser would be to discount the loans to zero. *Third*, the fact that the Court previously indicated the parties should address the loans in the context of the "fair value" claims, *see* NYSCEF 649 at 18–19, says nothing of ***how*** the loans should be treated. The law requires that the loans be valued from the perspective of a "hypothetical willing purchaser, with a reasonable knowledge of the underlying facts." *See Giaimo*, 101 A.D.3d at 525. That buyer would consider the loans worthless. And, *finally*, Bernice is not "double-dipping" by arguing that a hypothetical purchaser would not pay value for funds Kenneth was entitled to withdraw as of the valuation date. *See* NYSCEF 649 at 21. In reality, it is Kenneth who is trying to double-dip. He withdrew the funds in satisfaction of his equalization claim and now wants to be paid those same funds a second time on his "fair value" claim. *See* Tr. 462:6–12.

B. Mr. Klein's application of a 15% discount for lack of marketability was reasonable and appropriate in this case.

1. Contrary to Mr. Mercer's contentions, the property appraisals do not "bake in" a marketability discount with respect to the LLCs.

Plaintiff asserts that a marketability discount is "baked in" at the property level because "fair value" assumes a sale of the underlying properties owned by the LLCs that addresses exposure to the market. *See* NYSCEF 649 at 16; Tr. 364:16–22. This simplistic take ignores the legal requirements of a fair value determination. The "sale" of the properties is a hypothetical fiction used to determine the market value of the properties. *See 936 Second Ave. L.P. v. Second Corp. Dev. Co.*, 10 N.Y.3d 628, 632 (2008) ("[T]he market value of real property is the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell".) (citation omitted). Once market value of the properties is determined, the law dispenses with the construct that assumes a hypothetical sale of the assets, and instead requires fair value to be determined as if the company is operated as a "going concern." *Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 168 (1995); *see also Blake v. Blake Agency, Inc.*, 107 A.D.2d 139, 146 (2d Dep't 1985) ("The value of the corporation should be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business, ***rather than as a business in the process of liquidation***.") (emphasis added). In determining fair value, the Court must assume that, after the sale to a third-party, the LLCs continue to own and operate the subject properties and thus are still faced with all the same marketability issues discussed by Mr. Klein. *See* Tr. 428:22–429:5.

Under binding caselaw, New York's marketability discount deals with the marketability of the company itself, not its assets. Accordingly, all of the cases upholding the application of a marketability discount to real estate holding companies did so because the company lacked marketability, regardless of how attractive the underlying real estate may appear to a hypothetical

buyer. *See Beway*, 87 N.Y.2d at 168–69 (applying a marketability discount on corporation's shares despite no discount applied to valuation of underlying real estate holdings); *Levine v. Seven Pines Assocs. L.P.*, 156 A.D.3d 524, 525 (1st Dep't 2017) ("[i]n the past, we have applied discounts for lack of marketability . . . to real estate holding companies"); *Congel v. Malfitano*, 141 A.D.3d 64, 69 (2d Dep't 2016), *aff'd as modified*, 31 N.Y.3d 272 (2018); *Giaimo*, 101 A.D.3d at 524; *Murphy v. U.S. Dredging Corp.*, 74 A.D.3d 815, 818 (2d Dep't 2010) (only applying marketability discount to corporate shares due to the risk associated with their illiquidity).

More to the point, even if the LLC properties were to be liquidated in a hypothetical sale, Mr. Klein explained why a marketability discount would still be necessary. Tr. 436:23–438:15, 442:2–442:10. If, contrary to *Beway*'s "going concern" requirement, one were to assume the LLCs simply held cash as of the valuation date, the reasons for a marketability discount would remain. There would still be ongoing litigation surrounding the LLCs, there is no operating agreement, no distribution policy, no capital call policy, no withdrawal procedure, and no liquidation plan. These are serious risks, and there is no way to conveniently and efficiently liquidate in the event of disagreement between members short of another "fair value" proceeding. *See* Tr. 485:11–486:6. Thus, while Plaintiff's argument that the LLCs are merely "wrappers" for the real estate is inaccurate, it is also irrelevant to the application of a marketability discount.[3]

2. Plaintiff has a fundamental misunderstanding between the legal ability to sell a company and the factual desirability of buying a company.

Plaintiff next argues that the fact that any prospective purchaser could bring the same LLCL § 509 claim for withdrawal means Kenneth's ownership shares are "liquid." NYSCEF 649

[3] Plaintiff's claim that a discount would transfer value from Kenneth to the Estate, *see* NYSCEF 649 at 27–28, is not an argument against the appropriateness of a marketability discount in this case, but rather one against the concept of marketability discounts. New York law is clear that marketability discounts should be considered, and, each case that applied one effected the same type of "transfer," which merely reflects the economic reality of the circumstances of withdrawal.

at 23. The legal right to withdrawal does not equate to liquidity. This litigation showcases to any prospective purchaser that withdrawal will likely lead to protracted and expensive litigation. The Court repeatedly explained this point to Plaintiff during the hearing, but he has refused to abandon his argument. *See, e.g.*, Tr. 400:5–12 ("Let's just take litigation being a detracting factor, right? So, it's not over the actual real estate itself, . . . it's on the entity level. So why wouldn't you take a marketability discount for a factor like that or the lack of an operating agreement? It's not that the building is lacking the operating agreement, it's the LLC level."); Tr. 451:9–452:11.

Moreover, the fact that it is *legal* to sell one's shares via LLCL § 509 is not what makes them liquid. Binding New York appellate cases that applied marketability discounts to real estate holding companies did not do so because of a lack of legal avenues to force a sale. *See Beway*, 87 N.Y.2d at 167; *Levine*, 156 A.D.3d 524; *Congel*, 141 A.D.3d 64; *Giaimo*, 101 A.D.3d 523; *Murphy*, 74 A.D.3d 815. In obvious point of fact, each and every one of these cases necessarily involved a scenario in which the departing owners had a legal right to leave the company and to have a court determine the value of their shares. That fact did not prevent the courts from rightfully determining that the companies in those cases still were illiquid in the sense that there should be a discount for lack of marketability. The issue boils down to whether there is a ready market for Kenneth's shares and whether a third-party buyer would pay 100 cents on the dollar for them. *See Hall v. King*, 177 Misc. 2d 126, 131–32 (Sup. Ct. N.Y. Cnty. 1998). As Mr. Klein explained, there is not a ready market and no reasonable buyer would pay 100 cents on the dollar.

3. Plaintiff misconstrues Mr. Klein's reliance on *Mandelbaum*.

Plaintiff also makes much of the fact that Mr. Klein's report cited *Mandelbaum*, a New Jersey tax case. NYSCEF 649 at 22–24; *Mandelbaum v. Comm'r*, 69 T.C.M. (CCH) 2852 (T.C. 1995), *aff'd*, 91 F.3d 124 (3d Cir. 1996). As he explained on the stand, Mr. Klein discussed *Mandelbaum* because it provides a helpful collection of relevant business factors to consider when

determining marketability—not because he claims it to be binding precedent. Tr. 432:15–434:5; *see also Ferolito*, 2014 WL 5834862, at *19 (citing *Mandelbaum* in applying a 25% discount).

Plaintiff next criticizes Mr. Klein because his analysis of the *Mandelbaum* factors was qualitative, not quantitative. That Mr. Klein did not apply false precision to his analysis supports the reasonableness and credibility of his approach; it is not a basis to ignore it. Relying on his decades of experience, Mr. Klein approached the issue the same way sophisticated, hypothetical third-party purchasers would. Ex. 12 at 23; Ex. 13 at 23–24; Tr. 432:15–435:4. *Mandelbaum* does not provide a cut and dry mathematic equation to be applied, and Mr. Klein has never claimed that it does. Tr. 472:11–17.

Plaintiff's independent efforts to apply the *Mandelbaum* factors in his brief further highlights that he misunderstands the "fair value" inquiry. For example, he argues that because this is a mandatory private sale to Bernice, no discount is necessary. NYSCEF 649 at 23. But binding caselaw dictates that the valuation of the LLCs is viewed from the perspective of a third-party and must mirror what "a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business." *Beway*, 87 N.Y.2d at 168. For valuation purposes, there is no forced sale. *Beway* and the other cases that consider "fair value" under a statutory right to "force" a sale dictate that the discount should be considered from the willing purchaser's perspective. *See* Tr. 469:24–470:25. The remainder of Plaintiff's critiques of the *Mandelbaum* factors are likewise irrelevant. The factors are the sorts of considerations that sophisticated purchasers use in the real world, and no reasonable buyer would be persuaded to ignore them.

4. Despite Mr. Mercer's repeated attempts to argue that marketability discounts should not be applied to real estate holding companies, binding precedent routinely holds that such discounts are appropriate.

Although Plaintiff claims that the "vast majority" of real estate holding company cases apply no discount, even a cursory glance at Mr. Mercer's own report shows that roughly half of

the notable real estate holding company valuation cases have in fact applied a range of discounts for lack of marketability. *See, e.g.*, *Levine*, 156 A.D.3d 524 (applying a 25% DLOM); *Giaimo*, 101 A.D.3d at 523 (applying a 16% DLOM); *Burntisland II LLC v. Falkland, LLC*, 2017 WL 5725493 (Sup. Ct. N.Y. Cnty. Nov. 20, 2017) (applying a 16% DLOM); *In re Williamson*, 2001 WL 36406098 (Sup. Ct. N.Y. Cnty. Mar. 26, 2001) (applying a 25% DLOM); *Hall v. King*, 177 Misc. 2d 126 (applying a 25% DLOM). In fact, in the case that Plaintiff's expert cites as the seminal case on the matter—*Beway*—the Court of Appeals affirmed the application of at least a 20% discount for lack of marketability to a real estate holding company. *Beway*, 87 N.Y.2d at 171. Mr. Mercer's steadfast refusal to recognize these inescapable facts strikes at the core of his credibility.

Regardless, the other cases involving real estate holding companies applying no marketability discount are either no longer good law or easily distinguishable on the facts. In *Vick v. Albert*, 47 A.D.3d 482 (1st Dep't 2008), for example, although the First Department declined to apply a marketability discount to the real estate holding company, it subsequently called that determination into doubt in *Giaimo*. In *Giaimo*, the First Department held "that the method of valuing a closely held corporation should include any risk associated with the illiquidity of the shares," and that *Vick* did ***not*** stand for the proposition that marketability discounts should not be applied to "real estate holding companies." 101 A.D.3d at 524.

Another case that Mr. Mercer relies on to bolster his claim for no marketability discount is *Kassab v. Kasab*, 56 Misc. 3d 1213(A) (Sup. Ct. Queens Cnty. 2017), *aff'd as modified*, 195 A.D.3d 832 (2d Dep't 2021). The Court in *Kassab* did not apply a marketability discount because "the respondent did not proffer any competing valuation to controvert that of Mr. Mercer." *Id.* at *9. Here, to the contrary, Defendants have put forth a reasonable valuation of the business interests

at issue, and Defendants' expert has proposed a conservative marketability discount directly in line with those found reasonable in the relevant New York caselaw.

Another business valuation case that Plaintiff and Mr. Mercer lean on heavily is *Zelouf Int'l Corp. v. Zelouf*, 47 Misc. 3d 346 (Sup. Ct. N.Y. Cnty. 2014), in which the court did not apply a marketability discount. The court's stated reasoning in *Zelouf* for not applying a marketability discount hinged on the fact that the majority shareholders had frozen the minority shareholder out of the business. The court reasoned that, because the sale was being forced due to a minority status, any marketability discount applicable to her interest would be a *de facto* minority discount, which is impermissible under New York law. *Id.* at 350–51. The court also issued a subsequent decision on rehearing making clear that its holding was based on "the unique set of facts" at issue in the case, which led the court to conclude that "applying a DLOM is unfair." *Id.* at 353. By contrast, Kenneth is not a minority shareholder, has not been frozen out of the LLCs, and voluntarily chose to withdraw. NYSCEF 526 at 4. The unique facts from *Zelouf* are not present here. Thus, even assuming the *Zelouf* court properly concluded that a marketability discount in that case was equivalent to a minority discount—a holding at odds with *Beway*, which distinguishes between the two—that conclusion does not support Plaintiff's no-discount argument.

Plaintiff also criticizes Mr. Klein for citing to relevant New York caselaw but not "analyzing" it. *See* NYSCEF 649 at 24–25. The analysis of caselaw is the province of the Court, not a business valuation expert. And, as discussed in Defendants' opening brief, the relevant caselaw is entirely in line with Mr. Klein's analysis and conclusions regarding a discount. *See* NYSCEF 648 at 33–43. And, although Plaintiff clearly disagrees with the holdings of the three cases mentioned in Mr. Klein's report—*Beway*, *Giaimo*, and *Levine*—his own expert not only cites all three as guiding precedent, but declares that *Beway* is the "leading" case on this issue. Ex. 11

at 32, 46. All three cases ruled that discounts were appropriate in cases involving real estate holding companies. *See Beway*, 87 N.Y.2d at 169; *Giaimo*, 101 A.D.3d at 523; *Levine*, 156 A.D.3d 524.

Plaintiff also argues that these cases are irrelevant because they involved either corporations or a partnership, yet he relies on them extensively throughout his own expert's report and testimony. *See* Ex. 11 at 143; Tr. 374:18–375:23; *see also* NYSCEF 649 at 25 nn.11, 12. The cases do not draw any significance from the specific corporate form of the at-issue real estate holding company. The holdings from *Beway*, *Giaimo*, and *Levine* apply equally to the LLCs.

III. Plaintiff is not entitled to prejudgment interest.

Plaintiff has no legal right to prejudgment interest because (a) the First Department already rejected his claim; (b) he has no statutory right to mandatory prejudgment interest; and (c) his claim for discretionary prejudgment interest is barred by the First Department's decision and, in any event, is based on a misreading of a decision from the Court of Appeals. For these and other reasons, Plaintiff should not be awarded prejudgment interest. *See also* NYSCEF 648 at 43–46.

Having already lost his claim for prejudgment interest on appeal, Plaintiff takes the untenable position that the First Department was wrong to determine that "[t]he trial court also did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." NYSCEF 649 at 28 (quoting *Rosenblum v. Rosenblum*, 214 A.D.3d 440, 440–41 (1st Dep't 2023)). It is of no moment that this Court did not previously consider the claim. Plaintiff argued that the First Department should decide the issue in the first instance, and the First Department decided it. As Defendants' explained in their opening brief, the First Department's decision is law of the case and cannot be revisited now. *See* NYSCEF 648 at 43.

Additionally, Plaintiff is incorrect in arguing that the First Department's citation to CPLR § 5001(a) renders his claim either one (a) "for recovery of interest in an action based on 'an

act or omission depriving or otherwise interfering with title to, or possession or enjoyment of property,'" or (b) "of an equitable nature." NYSCEF 649 at 30.

Plaintiff's claim cannot be for interference with possession or enjoyment of property. If that were so, then interest under CLPR § 5001(a) would be mandatory. By affirming a no-interest award, the First Department rejected Plaintiff's claim for mandatory interest. *Rosenblum*, 214 A.D.3d at 440–41. To award Plaintiff mandatory interest now would overrule the First Department.

Plaintiff is also incorrect in arguing that his claim is "of an equitable nature." CPLR § 5001(a). New York law is clear that claims are not of an "equitable nature . . . where there is an adequate remedy at law." *Boyle v. Kelley*, 42 N.Y.2d 88, 91 (1977). Plaintiff is exercising a statutory right. There is nothing "of an equitable nature" to Plaintiff's claim. Upon the Court's determination of "fair value," Kenneth will receive an adequate legal remedy: a money judgment.

In arguing otherwise, Kenneth incorrectly states: "The Court of Appeals has definitively held that 'a determination of the fair value of [plaintiff's] shares and an order directing defendants to pay that value for them . . . is equitable in nature.'" NYSCEF 649 at 30-31 (quoting *Loengard v. Santa Fe Indus., Inc.*, 70 N.Y.2d 262, 267 (1987)). *Loengard* only serves to demonstrate that Kenneth's statutory claim is ***not*** equitable in nature. That case involved minority stockholders frozen out of a merger by the majority who were being forced to accept ***less*** than fair value for their shares under their statutory appraisal rights. Unwilling to accept their diminished statutory appraisal rights, the minority sued for breach of fiduciary duty requesting alternative, non-statutory forms of relief. 70 N.Y.2d at 267. The Court of Appeals held that, "[i]n the exceptional case, where upon a showing of fraud, misrepresentation or self-dealing the appraisal remedy is held not to be adequate," a resulting breach of fiduciary duty claim "is equitable in nature." *Id.* at 266–67. In stark contrast to *Loengard*, Kenneth has never argued that the statutory claim for "fair value" he

is pursuing is inadequate, nor has he alleged an equitable claim for breach of fiduciary duty. *Loengard* thus supports Defendants' position. Unlike the *Loengard* plaintiffs, the relief Kenneth is pursuing under LLCL § 509 is an adequate legal remedy. His claim is ***not*** of an equitable nature. And a discretionary award of interest under CPLR § 5001(a) is unavailable.

If, however, the Court determines it has discretion to award prejudgment interest, it should still decline to award it or, a most, apply a 2.5% rate. *See* NYSCEF 648 at 46–48. First, the equities do ***not*** favor Kenneth. His initial argument that he withdrew in December 2016 was factually disingenuous for a host of reasons, including, as this Court already found, because he "continued to manage the LLCs," "continued to receive 50% of the LLC income distributions," and "represent[ed] to the IRS that he was still a 50% owner and member of the LLCs." NYSCEF 526 at 4. After losing on this issue before this Court, Kenneth caused needless delay and additional expense by pursuing a baseless appeal challenging the same indisputable issues.

Second, a discretionary award of 9% would reward Kenneth for those delay tactics by giving him a financial windfall. From 2020 through June 2022, interest rates were at historic lows and have just recently started to rise. *See* NYSCEF 648 at 47-48 & n.13. And, as Kenneth admitted, during the time he was managing the LLCs, the properties were returning 2.5%. Ex. G ¶ 4. Accordingly, any discretionary interest award should not exceed 2.5%, which far exceeds the interest rates in effect from 2020 through 2022.

CONCLUSION

For the reasons set forth above and in Defendants' initial post-hearing brief, *see* NYSCEF 648, the Court should award Plaintiff no more than $14,835,000 in full satisfaction of his "fair value" claim, such amount to be reduced by (a) the amount of distributions he has received from the LLCs from September 20, 2019, the date of his withdrawal, until the date of entry of the award, and (b) the other reductions already ordered by the Court.

Dated: New York, New York
September 1, 2023

Respectfully Submitted,

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WORD COUNT CERTIFICATION

I hereby certify that this reply post-hearing brief complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, as modified by the Stipulation and Order entered in this action on May 23, 2023, which provided that the parties' reply brief shall not exceed 30 pages. *See* NYSCEF 646. The total number of words in this document, exclusive of the caption, table of contents, table of authorities, and signature block, is 10,754. For the word count, I relied on the word-processing system used to prepare the document. This reply post-hearing brief does not exceed 30 pages.

Dated: New York, New York
September 1, 2023

/s/ *Patrick N. Petrocelli*