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

KENNETH ROSENBLUM, Plaintiff, - v. - CRAIG TREITLER and STEVEN ROSENBLUM, Preliminary Executors of the Estate of BERNICE ROSENBLUM, Defendants.	Index No.: 654177/2015 (Crane, J.)

PLAINTIFF'S REPLY POST-HEARING MEMORANDUM OF LAW

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Plaintiff Kenneth Rosenblum respectfully submits this Reply Memorandum in further support of the valuations he presented at the hearing of April 24-26, 2023.[1]

ARGUMENT

I. THE COURT SHOULD CREDIT MR. FEENEY'S REAL ESTATE APPRAISALS

A. Mr. Feeney Correctly Based His Projected Rental Income of the Subject Properties on His Expert Analysis of the Applicable Real Estate Market

The Estate criticizes Mr. Feeney for having "ignored the properties' contract rents and instead [having] used rents that the units were not currently achieving." (Def. MOL at 11). But Mr. Feeney's **projected** rental income is higher than what the units were "currently achieving" precisely because his analysis of the market "indicated that the subject properties [were] operating below market levels." (Tr. at 26:10-12). Mr. Feeney "mirror[ed] what market participants would do" in estimating value (Tr. at 27:1-3) – projected the income that a reasonable investor could generate by renting all the apartments at the maximum legal rent that the market would bear. (Ex. 1 at 67-79; Ex. 2 at 64-76). This was entirely proper and reasonable.

Conversely, the Estate attempts to defend its expert Mr. Farrell's decision to use "the current contract rents" as his projected rental income, contending that these "contract rents" were "reflective of market rates." (Def. MOL at 10). But the record does not support this conclusion. On cross-examination, Mr. Farrell could point to nothing in his reports demonstrating that he had performed any "rental analysis from comparable buildings" (Def. MOL at 10; Tr. at 174). He admitted his reports did not present any analysis of the residential rent market rates in the neighborhood where the subject properties are located (Tr. at 182), or whether the subject

[1] The terms capitalized and not defined herein have the meanings assigned to them in Kenneth's opening Post-Hearing Memorandum of Law, filed on July 28, 2023 (the "Opening MOL"). Defendant's Post-Hearing Memorandum of Law of July 28, 2023 is cited herein as "Def. MOL".

properties' rent levels were "at market, above market or below market." (Tr. at 32:20-23). But what Mr. Farrell's reports do contain is a statement that four out of the five properties that he chose as comparables were "superior to the subject propert[ies] . . . based on the existing income levels of each property" (Ex. 3 at 92; Ex. 4 at 97) – which effectively admits that the rental income the subject properties generated was lower than that of similar properties, *i.e.* plainly **below market**. Another statistic Mr. Farrell's reports contain is the "average effective rent" of a residential unit in the "lower West Side submarket": $4,541, which is significantly higher than the average actual rent from the rent roll that Mr. Farrell used without any adjustments.

The Estate argues that "the fair market value of the property is limited to the income due under the lease." (Def. MOL at 12, quoting *Cinque v. Largo Enterprises of Suffolk Cnty.*, *Inc.*, 212 A.D.2d 608, 609 (2d Dep't 1995)). But that case involved a commercial property "subject to a below-market-value lease" that would prevent a new owner from raising the rent to market level for a long time. Here, by contrast, the residential leases had a term of less than one year as of the Valuation Date and did not preclude an owner from adjusting the rents to market level thereafter.

In any event, *Cinque* did not purport to pronounce any general rule regarding real estate appraisals, and certainly does not mean that Mr. Feeney's methodology of adjusting projected rental income to market level "is contrary to New York law," as the Estate argues. (Def. MOL at 12). The opposite is true. The Court of Appeals has long recognized that "reliance on contract rents, particularly those involving property subject to below market long-term leases, may yield distorted valuations and that an assessor, therefore, may apply compensatory measures calculated to adjust such income figures to a point at which they become reliable indicators of full value." *Merrick Holding Corp. v. Bd. of Assessors of Nassau Cnty.*, 45 N.Y.2d 538, 543 (1978); *accord Cnty. Dollar Corp. v. City of Yonkers*, 97 A.D.2d 469, 473 (2d Dep't 1983); *VGR Assocs., LLC &*

Price Chopper Operating Co. v. Assessor, Bd. of Assessment Rev. of Town of New Windsor, 13 Misc. 3d 1218(A), *3 (Sup. Ct. Orange Co. 2006). Here, Mr. Farrell admitted that "if a market analysis showed that the rents in these buildings were below market . . . you would look at the rents as a new owner would, bring them up to market, assuming that that was legally possible to do, and use the rents that the new owner could achieve to determine valuation." (Tr. at 184:8-13). That is exactly what Mr. Feeney did – and what Mr. Farrell himself failed to do.

In particular, the Estate is wrong that "Mr. Feeney could not offer a compelling justification for ignoring the 'Amt. Billed' information on the rent roll," which represented discounts on the so-called "preferential" rents. (Def. MOL at 12). The "compelling justification" is that the "preferred rent," which is "below market," "only lasts for the term of the lease" – and unregulated units "would have the opportunity to command a full market level of rent for the future." (Tr. at 129:10-11; 132:20-22). As the Court noted during the hearing, "the market sets the rate" and one "wouldn't need to have a preferential rent on a market rate apartment." (Tr. at 130:4-7).

According to the Estate, "Mr. Feeney confirmed that if he had the actual leases . . . he would have used the lower rent amounts actually billed and collected instead of the higher amounts reflected in his analysis." (Def. MOL at 14). But Mr. Feeney said the opposite: he explained that the lease could only clarify "what rent this particular unit was currently achieving in September of 2019" and what it would remain "for the duration of the lease term" – but it would still be necessary to "model for higher levels of rent for [the] period" after expiration of the lease. (Tr. at 45:11-22). Because the leases state "preferential rents" which, in unregulated units, could be raised to market level as soon as each respective lease expires, those leases are not determinative of the projected rental income and are essentially irrelevant to the valuation process.

The Estate is also wrong that the standard assumption of "competent management" in Mr. Feeney's reports required him "to assume that the amounts management actually charged and collected in rent for the units represented the market value for those units." (Def. MOL at 12). There is no authority whatsoever for this specious notion. "Competent management" means the property is well-maintained, *i.e.* kept in reasonably good condition, and that reasonable administrative steps are taken to collect the existing rent. The management company, however, does not set the amount of the rent or market the units. "Competent management" does not guarantee any correlation between the rent actually collected and market rent.

The Estate next argues that Mr. Feeney "overstated" the rent attributable to the six vacant units at 132 Thompson Street. (Def. MOL at 15). This contention is based, in particular, on the Estate's challenge to Mr. Feeney's use of 546 Broadway as one of the comparables for calculating appropriate market rents. But, again contrary to the Estate's misquoting, Mr. Feeney never stated that 546 Broadway was "not at all comparable" to 132 Thompson Street, or that the two buildings do not contain "any" comparable units. (Def. MOL at 15). Rather, Mr. Feeney explained that 546 Broadway does **not** entirely consist of 1,000 to 1,500 feet lofts, as the Estate suggested (Tr. at 90:6-8), while maintaining that "locationally" it remains "one the best comparables for Thompson Street." (Tr. at 89:20-22). In any event, Mr. Farrell's report assigned no rental income (and, thus no value) to the vacant units – he admitted that "it isn't very clearly stated" in his reports, and could not point to any place in his reports setting forth any respective calculations. (Tr. at 169-170). His testimony that his report nevertheless assigned some value to them is unsupported.

The Estate further attacks Mr. Feeney for having treated Unit 7, one of the vacant units at 132 Thompson, as a free market unit, and claims that, "[i]n reality, Unit 7 is a rent controlled apartment." (Def. MOL at 15-16). But the evidence the Estate cites in that respect relates to

months or years prior to the Valuation Date. As the Court pointed out at the hearing, the apartment could have been decontrolled since. (Tr. at 75:12-24). And Mr. Farrell admitted that he "d[id]n't understand the circumstances surrounding this unit being kept in its vacant and unrenovated state" after the rent-controlled tenant died in 2019. (Tr. at 163:8-10). Mr. Farrell also agreed it was "obvious" that "somebody who bought this building in 2019 would have renovated this apartment" and "established a new market rent" for it "going forward" and that "the projected income" should be calculated "at market rate." (Tr. at 163:23-164:9). Notably, while the Estate cites Kenneth's statement in a July 2019 affidavit that Unit 7 had not been renovated and its "previous monthly rent" was $962, it conveniently omits to mention that, in the same paragraph, Kenneth notes that, had the unit been "renovated and re-rented at market price[]," "the new monthly rent[] would have been" $6,000. (NYSCEF #414, ¶ 5). This is entirely consistent with Mr. Feeney's allocation of $5,500 to this apartment as projected monthly rent.

Finally, the Estate takes issue with Mr. Fenney's "grossing up" of projected rental income by adding 3% for 132 Thompson Street and 1.5% for Christopher Street. (Def. MOL at 16-17). As Mr. Feeney explained, the "grossing up" was a necessary element of his analysis because, (a) "[f]or capitalization purposes," the appraiser must "consider[] the upside potential" of every unit in order to arrive at "stabilized income"; (b) the rents in the subject properties were "below market" "[i]n comparison to other area buildings"; (c) "increases in market rents throughout the city and certainly the Manhattan core were up over 10 percent year after year"; (d) "the leases are expiring in a staggered fashion, maybe over ten months from the date of value" – and "[a]ll of those units would have the opportunity to command a full market level of rent for the future." (Tr. at 51:3-6; 132:3-8; 132:18-22). Indeed, "grossing up" rental income in appropriate circumstances is an acceptable technique in income capitalization analysis. *See*, *e.g.*, *Hempstead*

Country Club v. Bd. of Assessors, 112 A.D.3d 123, 141 (2d Dep't 2013); *Excelsior v. Assessor, Town of Amherst*, 51 Misc. 3d 1210(A), *6 (Sup. Ct. Erie Co. 2016).

In summary, the Estate fails in its attempt to fault Mr. Feeney's market-oriented analysis of the subject properties' rental income. In contrast, Mr. Farrell's reports proffer no such analysis at all. Instead of researching the market rents in comparable buildings in the vicinity of the subject properties, Mr. Farrell engaged in circular reasoning that "the units that would be the most comparable would be the units in the subject property itself" – and essentially assumed that "the rents in the building are market." (Def. MOL at 10-11, quoting Mr. Farrell's testimony). As discussed above and in the Opening MOL, this assumption is legally unsupported and contradicts the evidence in the record. Mr. Farrell's appraisals should therefore be rejected as unreliable, and Mr. Feeney's appraisals accepted as properly based on market analysis.

B. Mr. Feeney's Capitalization Rates Are Supported by the Evidence

1. The Estate Overstates the Effect of the 2019 Legislation on the Subject Properties

The Estate attacks Mr. Feeney for having relied on cap rate comparables that closed before the Tenant Protection Act of 2019 came into effect. (Def. MOL at 24). This criticism is misguided.

First, all of Mr. Feeney's cap rate comparable sales occurred in 2019, within a few months of the new legislation's coming into effect in June 2019. (Ex. 1 at 85; Ex. 2 at 82). As Mr. Feeney testified, "those people who were transacting in the market knew" about the impact of the legislation many months before it became effective: the "investment, sales activity had already slowed significantly," because "investment or market participants anticipated the change in the law . . . would actually hurt them." (Tr. at 137:8-25). On the other hand, as Mr. Feeney further explained, while Mr. Farrell "uses sales that post-date the law" in their closing dates, they "in all likelihood have contracts that predated the law" because "properties tend to be on the contract for

two to three months" and, "if things are selling in June, July, August, those contracts were probably agreed to prior to the change in the law." (Tr. at 137:12-17).[2]

The Estate attempts to spin Mr. Feeney's acknowledgment that, all other things being equal, the cap rates would be higher if the sale occurred after the new legislation came into effect rather than before (Def. MOL at 25). But the Estate ignores his actual point: the cap rates in Mr. Feeney's comparables already reflected the effect of the new legislation, which the purchasers knew was coming. As he testified, "the cap rate[s] would be even lower under the old legislation." (Tr. at 138:21-22). In short, "the market saw that the legislation was going to change" many months prior to the actual change (Tr. at 28:16-17), and its impact was taken into account by the buyers and sellers on all of the proffered comparables.

Second, the effect of the Tenant Protection Act is limited to **rent-stabilized** apartments, which account for a small percentage of the subject properties' rental revenue. As Mr. Feeney explained, these properties do not have a "meaningful amount of rent regulated units": in "income generated properties, an appraiser, a buyer, a seller, is focused on the amounts of revenue. . . In terms of the amounts of revenue. . . only about two to three percent of residential revenue for the Christopher Street asset is being generated by rent regulated units. So, five out of 44 units, round to 11 percent. But those 11 percent of total units results in two to three percent of every overall residential income." (Tr. at 133:15-25). Likewise, "Thompson Street has approximately 33 percent [of rent regulated units], 13 out of 39. . . . But, again, it's only about ten percent of overall residential revenue." (Tr. at 134:2-6). Notably, the "rent-regulated" units included not only rent-stabilized apartments but also rent-controlled ones, which are not affected by the Tenant Protection

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[2] As just one example, the Estate admits that the contract for 11 Carmine St., one of Mr. Farrell's comparables, was signed in May 2019. (Def. MOL at 21).

Act. The percentages of revenue derived from rent-stabilized apartments are thus even lower than those noted by Mr. Feeney, and plainly insignificant in projecting future revenue of the properties.

Third, precisely because the new legislation could have a significant effect on capitalization of rent-stabilized units, properties like Christopher St. consisting mostly of market rate apartments became much more attractive to potential investors. As Mr. Feeney explained:

> These properties, if offered for sale in the marketplace, would attract buyers that were seeking market rate housing. Market rate housing, you know, was forecast to sharply increase. It was already doing it by normal market forces. But the Tenant Protection Act will for a long time create upward pressure on market rate housing throughout the city. And that has been a provable case in markets that have rent regulation. The strongest rent regulations in the nation have been San Francisco and New York City. And those two cities as of 2019 had the highest rents in the nation for market rate units.

(Tr. at 33:20-34:5). As a result, the value of "predominantly market rate housing in the Manhattan core" only increased after June 2019, making the 3.25% to 3.50% cap rate applied by Mr. Feeney eminently reasonable, in contrast to the 4.75% cap rate used by Mr. Farrell. (Tr. at 33:5-8).

2. Mr. Feeney Used Appropriate Cap Rate Comparables

Mr. Feeney determined the applicable cap rate range of 3.25% to 3.50% by "consider[ing] sales in the marketplace with known cap rates from area buildings in the West Village and some in the East Village." (Tr. at 27:19-21; Ex. 1 at 85-87; Ex. 2 at 82-84). As the Estate admits, "Mr. Feeney's comparable buildings had similar percentages of rent-regulated apartments" to the subject properties. (Def. MOL at 25). In short, the appropriateness of Mr. Feeney's comparables to the subject properties, both geographically and in terms of their share of rent-regulated and market units, is **undisputed**. The Estate does not truly challenge Mr. Feeney's **choice of comparables** but instead merely quibbles about his conclusions with regard to some of them.

For instance, the Estate does not question that 29 Fifth Avenue is an appropriate comparable, and it has no factual reason to doubt the 2.8% cap rate on its sale as stated in Mr.

Feeney's report. (Ex. 1 at 85). Rather, the Estate asks why anyone would enter into a real estate transaction with such a low rate of return, citing Mr. Farrell's claim that he "could get 2.8% on a bond," while Kenneth stated in an affidavit that **2.25%** was "a very poor rate of return" on an investment like the subject properties. (Def. MOL at 26). The record clearly answers the Estate's disingenuous question. As Mr. Feeney testified, "from a buyer's perspective, the cap rate would reflect what they expect [] the rate of [] return to be **in the first year post-transaction**." (Tr. at 120:13-16, emphasis added). Unlike a bond investment with a stable rate of return, an inherently riskier investment into real property is expected to bring an increased rate of return **over a long-term period**, especially in free market rentals, where renovations and improvements can justify higher rents in the future. For the purchaser, the 2.8% cap rate representing the **first-year** rate of return is not determinative of the value of his long-term investment on a highly valuable property like 29 Fifth Avenue.[3] This is fully consistent with Kenneth's statement that 2.25% is "a very poor rate of return" on such valuable properties many years after they were purchased. (Ex. G, ¶ 4).

In the same vein, Kenneth's statement that "the usual rate of return" in the real estate business" is "about 5%" (Ex. G, ¶ 5) does not mean that the 3.25% to 3.5% cap rates used by Mr. Feeney "are not credible," as the Estate argues. (Def. MOL at 27). As Mr. Feeney explained, "[c]ap rate reflects **the first return**, **cash on cash** rate of return ... **in the first year post-transaction**" (Tr. at 120:11-16, emphasis added). But the average investor takes out debt at some 75% of the value. Obtaining a 3.25% cap rate in 2019 when mortgage rates were around 2.5%, would result in a yield above 5%. Conversely, with the 4.75% cap rate used by Mr. Farrell, the

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[3] For instance, the prices at which the parties' TIC buildings were sold at auction in December 2022 (NYSCEF #634), considered in the context of those properties' contemporaneous NOI as per the management company's records, all indicate cap rates at or below 3%.

yield would jump to over 8%, which is not a rate of return to be reasonably expected from a real estate investment. Notably, Mr. Mercer, who customarily relies on real estate appraisals in his practice as a business valuator, found Mr. Farrell's appraisals unreliable for similar reasons: using Mr. Farrell's 4.75% cap rate would bring "an effective required rate of return for the investment" into an unrealistic "eight plus percent range." (Tr. at 336:3-5).

With regard to 106 West 13th Street, the Estate's critique is limited to Mr. Farrell's opinion that the 3% cap rate stated in the Co-Star report for that property was not independently verified. (Def. MOL at 26-27). Yet, Mr. Feeney explained that his team independently verified it: "The fact that the cap rate is three percent and that we report three percent means that we were able to verify that it was three percent." (Tr. at 109:16-18).

With regard to 35 Bedford Street as well, the Estate questions the 3.8% cap rate stated in Mr. Feeney's report but proffers no evidence of an alternative cap rate other than Mr. Farrell's recollection of the buyer's alleged statement appearing in a newspaper. (Def. MOL at 27).

With regard to 561 Hudson Street, which had 15 rent-regulated units out of the total of 17, the Estate points out that the purchaser's "business model was no longer viable because of the new rent laws." (Def. MOL at 27). But that is just a way of saying that this particular property is not comparable for this purpose to the subject properties, which largely consist of market rent units. Even if Hudson Street's cap rate of 3.5% is eliminated from the calculation, the average range of 3.25% to 3.50% will not get any higher.

3. Mr. Farrell's "Comparables" Are Too Dissimilar to the Subject Properties

Most of Mr. Farrell's comparables are from completely different parts of the City and are dissimilar to the subject properties in their size or number of market units. (Opening MOL at 11-13). In particular:

- 124 W 73rd St.: the building is uptown, is under 17 feet wide, and has only 8 residential units, *i.e.* is much smaller than the subject properties. (Ex. 6 at 5; Ex. 7 at 2).
- 11 Carmine Street: the building had a much higher percentage of commercial rent income than the subject properties (Ex. 9 at 3) and no known renovations since 1891, as compared to 132 Thompson renovated in 2014 (Ex. 3 at 84 and Tr. 211-212).
- 22 St. Marks: the building was last renovated in 1984 and has over 50% of rent-regulated units. (Ex. 5 at 2; Tr. at 234:3-12).
- 202 Ninth Avenue: the building is in a different neighborhood (at 23rd Street, Tr. at 237) and has only 5 total units (Ex. 10 at 2; Tr. at 240).
- 345 E 65th Street: the building is uptown.

The Estate's argument that "investors would expect the same return regardless of where in Manhattan particular properties are located" is not only inherently incredible ("location, location, location" plainly matters) but also inconsistent with the Estate's own admission on the same page that "average rents where the LLC properties are located are 20.2% higher than in the overall Manhattan market." (Def. MOL at 23). The Estate's outlandish notion that a cap rate (*i.e.*, expected rate of return) would be the same in the West Village as, for instance, in East Harlem, makes the location of comparables essentially irrelevant, and is thus at odds with generally accepted practices of appraisers just as it is at odds with common sense.

According to the Estate, Mr. Farrell's appraisals under the sales comparison approach "corroborate[]" his appraisals under the income capitalization approach. (Def. MOL at 31). But Mr. Farrell uses some of the same inapt comparables for both, and any additional comparables he uses in the sales comparison approach suffer from similar flaws: many are in neighborhoods inferior to the subject properties; many have not been renovated as recently as 132 Thompson; some are significantly smaller than the subject properties, such as 418 East 9th Street with only 13 units (Ex. 3 at 87); and there is no analysis of the comparative share of free market apartments in any of these buildings versus such share in the subject properties. As a result, Mr. Farrell's sales comparison appraisals are as intentionally skewed as his direct capitalization appraisals.

C. Mr. Farrell's Appraisals Are Inconsistent with Defendant's Earlier Appraisals

Mr. Farrell's appraisals are 21% to 34% lower than Defendant's appraisals of the same properties as of 2016 previously presented to the Court. (Opening MOL at 13-14). Mr. Farrell could not explain such a sharp decline in value within the three years in question. (Tr. at 319:20-320:25). The Estate now argues that the "market trends Mr. Feeney identified" accounts for the dramatic drop of cap rates and value presented in Defendant's respective appraisals. But, as with most of the Estate's arguments, its argument collapses on the slightest scrutiny.

In making it, the Estate cites Mr. Feeney's statement that, in the two years preceding the Valuation Date, "cap rates have stabilized." (Def. MOL at 28, quoting Ex. 1 at 25). The Estate contends that "there actually was a slight uptick in cap rates" in that period, traceable in Mr. Feeney's graph on the same page of his report. (*Id.*). But the "dark blue line" in the graph on which the Estate seizes represents "Manhattan **elevator** buildings" – **not** walkup buildings like the subject properties. (*Id.*, emphasis added). Moreover, even taking the graph at face value as "increasing towards 4%" by the end of 2018 (Def. MOL at 28), Mr. Feeney's report gives no indication that the same trend would continue; to the contrary, it states that "cap rates ha[d] flattened." (Ex. 1 at 25). Nor can the Estate rely on the notion that "cap rates would have risen further" "after the rent laws were enacted" (Def. MOL at 29): as discussed in Point B.1 above, the cap rates Mr. Feeney applied already reflect the effects of the 2019 legislation. Thus, nothing in Mr. Feeney's report or testimony supports the Estate's argument that the applicable cap rate "should be much closer to Mr. Farrell's 4.75%." (Def. MOL at 29).

The Court should reject Mr. Farrell's artificially low appraisals, inconsistent even with the Estate's own prior appraisals, and accept Mr. Feeney's appraisals as supported by the evidence.

II. THE COURT SHOULD CREDIT MR. MERCER'S BUSINESS VALUATION

As our Opening MOL demonstrates and as the Estate does not dispute, Mr. Mercer's valuation accurately reflects the LLC Entities' accounting records. In particular, the Estate does not challenge Mr. Mercer's determination, based on the companies' books and confirmed by their CPA, of the amount of cash that each of the LLC Entities had as of the Valuation Date: to wit, \$503,690 for 132 Realty and \$874,018 for Village Realty. (Ex. 11 at 105, 108; Tr. at 332:1-14). More specifically, the Estate makes no attempt to defend Mr. Klein's purported downward "adjustments" for each company's cash amounts based on withdrawals subsequent to the Valuation Date pursuant to this Court's Summary Judgment Order. (Opening MOL at 20-21, citing evidence). By failing to address this issue, the Estate has waived it. The Court should thus credit the companies' balance sheets as contained in Mr. Mercer's report. (Ex. 11 at 105, 108).

The Estate still disputes Mr. Mercer's conclusions on (a) the treatment of loans receivable; and (b) the lack of a marketability discount. The Estate is wrong on both counts.

A. All Intercompany Loans Must Be Treated the Same Way

There is no dispute that the LLC Entities' business records show loans owed to the LLC Entities by the Partnership in the total amount of about \$4.7 million, as well as significant loans payable by the LLC Entities to Standard Inc. and Restoration, the two corporations that the parties jointly own. (Ex. 11 at 105, 108; Ex. 12 Ex. 3; Ex. 13 Ex. 3). Mr. Mercer's valuation took account of all these Intercompany Loans at their book value, but Mr. Klein eliminated the loans owed to the LLC Entities while preserving the loans payable by them. As set forth in the Opening MOL, such disparate treatment of the Intercompany Loans is baseless and unfairly prejudicial to Kenneth.

As Mr. Mercer explained, even if the Partnership were "insolvent" as the Estate argues, the loans are still fully collectible "[l]ooking through to the partners." (Def. MOL at 33, quoting Tr. at 416-17). Indeed, as a matter of law partners in a general partnership (in contrast to shareholders

of a corporation or members of an LLC) are personally liable for the debts of the Partnership. The Estate does not argue otherwise. It follows that, as a matter of law, any loan the Partnership may be unable to pay would be collectible half from Kenneth and half from the Estate. Neither Kenneth nor the Estate are alleged (let alone proven) to be insolvent; again, the Estate does not argue otherwise. That means that there is no legal or factual basis to deem these $4.7 million loans "uncollectible" and simply discard them, as Mr. Klein has done.

The Estate complains that Mr. Mercer "offered no testimony or explanation about exactly how Kenneth and Bernice would work out" these loans. (Def. MOL at 33). That is a red herring: Mr. Mercer had no obligation or need to tell the parties how to collect these loans from themselves (not that the parties' lawyers needed him to do so). As a business valuator, Mr. Mercer properly treated both the loans payable and the loans receivable in the same way. In contrast, Mr. Klein baselessly wrote off the $4.7 million in loans receivable by the LLCs while keeping the loans payable by the LLCs, all to the corporations owned by the parties in the same proportion — in an obvious effort to justify a low valuation. (Opening MOL at 17-19, citing evidence).

In any event, the Estate's rhetorical question "how" the loans would be "worked out" between the parties has a simple answer: the same way as all other loans among the parties and their jointly owned companies have historically been "worked out" – by way of the parties' accounting. The Court will recall abundant evidence in this case of numerous intercompany loans and personal loans taken by Kenneth and Bernice from the entities they co-owned, none of which was supported by any notes or instruments, and all of which were eventually resolved in the parties' accounting. The personal loans taken by Kenneth and resolved by the parties' 2013 settlement is one example. The loans by the jointly owned corporations that still remain payable to the LLC Entities is another: even though the precise origin and timing of these loans are unclear,

and they are documented only by a notation on the entities' books, both Mr. Mercer and Mr. Klein deemed them valid and collectible, and neither party has questioned that these loans would be eventually resolved. The same is true of the loans payable by the LLCs to the Partnership, as the Estate insisted in its prior written submissions to the Court. (NYSCEF #566 at 10; #579 at 5-6).

The Estate further relies on Kenneth's prior refusal to acknowledge that he is "personally liable for the loans" taken by the Partnership. (Def. MOL at 33). This is another red herring. Kenneth never disputed the legal principle that partners are personally liable for the debts of an insolvent Partnership. But the Partnership was never found insolvent, and the Estate's demand to Kenneth in connection with the loans was not based on any allegation of the Partnership's insolvency. Moreover, Kenneth's primary objection was that the Estate was attempting to collect loans on behalf of the LLC Entities without having paid Kenneth a penny towards the fair value of his interest therein. That is precisely why the Court, having previously considered the Estate's demands to Kenneth in the context of the parties' accounting, "tabled" the issue of the loans receivable by the LLC Entities. (NYSCEF #587 at 2; #586 at 29-30). None of this makes the Partnership loans "uncollectible" or requires the Court to disregard them.

The bottom line is that all loans among the entities owned by the same parties in the same proportion must be treated the same way, as Mr. Mercer did by considering "both loans receivable and loans payable just as they existed on the valuation date." (Tr. at 333:4-7). Having taken the loans payable at face value, the Estate offers no good faith basis to disregard the loans receivable.

B. The Marketability Discount in This Case Should Be Zero

As set forth in the Opening MOL and Mr. Mercer's valuation, no marketability discount is appropriate in this case because Kenneth's 50% interest in a pre-1999 LLC, whose assets consist of freely marketable real estate and cash, is a **liquid** interest. Perhaps not surprisingly, the Estate does not even attempt to defend Mr. Klein's misguided methodology of assessing a marketability

discount based on the *Mandelbaum* factors or restricted stock studies. Instead, the Estate purports to defend Mr. Klein's conclusion based on its erroneous interpretations of New York's case law, none of which is analyzed in Mr. Klein's report. This attempt fails for the following reasons.

1. The Estate Ignores the Specific Nature of Ownership at Issue Here

Because both LLC Entities are governed by the pre-1999 LLCL, Kenneth had the absolute right to withdraw from them on 6 months' notice. For that reason, this Court granted Kenneth summary judgment on his withdrawal claim. (NYSCEF #423 at 3; Opening MOL at 22-23). Because he was legally entitled to receive "fair value" upon withdrawal, in terms of liquidity, Kenneth's 50% interest in the LLC Entities is similar to his 50% interest in the TIC Properties which were successfully liquidated at the recent public auction.

Conversely, this liquid interest in the LLC Entities stands in sharp contrast to the illiquid ownership interest of a corporate shareholder, who does not have a statutory right to dissolve the corporation or to demand "fair value" from the other shareholders for his stock. Again, this very case shows that distinction: this Court denied Kenneth's claim for dissolution of the corporations he owned jointly with Bernice, and he lacks a statutory right to demand "fair value" for his 50% shareholding interest in those corporations. The Estate ignores this obvious distinction and relies on irrelevant cases applying marketability discounts to illiquid corporate shareholding interests.

The Estate begins with *Friedman v. Beway Realty Corp.,* 87 N.Y.2d 161, 164 (1995), where the petitioners were "minority stockholders in nine family owned close corporations." As the Estate acknowledges, the marketability discount ultimately applied by the Court of Appeals in *Beway* was applied "because of the illiquidity of the shares, 'i.e. that a potential investor would pay less for shares in a close corporation because they could not be readily liquidated for cash.'" (Def. MOL at 35, quoting *Beway* at 165). But there is no such illiquidity here: unlike the minority

stockholders in *Beway*, Kenneth was free to withdraw from the LLC Entities, thereby liquidating his interest – and any "potential investor" would know it could do the same.

Likewise *Giaimo v. Vitale*, 101 A.D.3d 523, 524 (1st Dep't 2012), concerned a corporation, and a marketability discount was applied because of "increased costs and risks associated with corporate ownership of the real estate" which "would not be present if the real estate was owned outright" and which "have a negative impact on how quickly and with what degree of certainty the corporations can be liquidated." Here, by contrast, there is no "corporate ownership" and no associated "costs and risks": the real estate can be liquidated as if it were "owned outright" – as the above comparison with the TIC-owned properties in this very case amply demonstrates.

In the same vein, the other cases the Estate cites involving illiquid corporate stock are irrelevant here.[4] Yet, the Estate ignores the directly applicable holding in *Man Choi Chiu v. Chiu*, 125 A.D.3d 824, 825 (2d Dep't 2015) – the only appellate case dealing with withdrawal from a pre-1999 LLC under §606 of the former LLCL, which affirmed the trial court's refusal to apply any "discount for lack of marketability" in the same context as presented here.

The Estate also cites partnership cases – but there as well, it chooses to rely on dissimilar factual and legal patterns, conveniently ignoring the differences from the instant situation. For instance, in relying on *Congel v. Malfitano*, 31 N.Y.3d 272 (2018), the Estate omits to mention that (a) it was decided under a statute that "relates to wrongful dissolution, rather than a statutory right to withdraw, and [] makes no mention of 'fair value'"; and (b) "the application of the

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[4] *See Murphy v. U.S. Dredging Corp.*, 74 A.D.3d 815, 818 (2d Dep't 2010) (justifying marketability discount by the "risk associated with illiquidity of the [corporate] shares"); *Ferolito v. Arizona Beverages USA LLC*, 2014 WL 5834862, at *7 (Sup. Ct. Nassau Co. Oct. 14, 2014) (the marketability discount "recognizes that a potential investor would pay less for shares in a close corporation because they could not readily be liquidated for cash") (citing *Beway*).

marketability discount [wa]s not properly before" the Court, because the challenge to it had not been preserved. *Id.* at 294, 298.[5] The Estate also cites *Levine v. Seven Pines Assocs. Ltd. P'ship*, 156 A.D.3d 524 (1st Dep't 2017), disingenuously referring to the entity there as a "partnership" (Def. MOL at 36), but omitting to note that the discount was applied to a dissenting **limited** partner's interest. In contrast, the Estate brushes off the First Department's holding in *Vick v. Albert*, 47 A.D.3d 482 (1st Dep't 2008), a case involving a real estate general partnership from which any partner could withdraw at will – and thus presenting facts much closer to this case with its withdrawal as of right and "fair value" payable upon withdrawal. The First Department rejected any marketability discount, explaining: "The unavailability of the discounts is particularly apt here, where the business consists of nothing more than ownership of real estate." *Id.* at 484. Same here.

In short, the Estate consistently disregards the fact that Kenneth's absolute right to withdraw and receive fair value for his interest in the LLCs rendered his interest **liquid** for discount purposes, all in sharp contrast to the corporate or other ownership structures featured in the Estate's selected case law. Because he had an absolute statutory right to demand fair value, the authorities make clear that the interest is deemed liquid in nature and is not subject to any marketability discount. *See Vick, supra*; *Chiu; supra*.

2. The Estate Ignores the *Beway* Principle of Considering Marketability Only at Entity Level, *not* at any Fractional Ownership Level

In *Beway*, the Court of Appeals directed that the marketability inquiry for the purposes of "fixing fair value" should consist of determining "what a willing purchaser, in an arm's length transaction, would offer" for "the corporation **as a whole** . . . as an operating business" – and then

[5] Indeed, the "wrongful dissolution" situation of *Congel* was so dramatically different from the statutory withdrawal situation requiring a "fair value" assessment that the court in *Congel*, in addition to the marketability discount, also affirmed the application of a minority discount, distinguishing *Beway* which prohibits it in "fair value" assessments.

applying it to the "proportionate interest" at issue. 87 N.Y.2d at 168 (emphasis added).[6] While the Estate quotes this *Beway* language and admits that the law "mandates" this approach (Def. MOL at 41), the Estate persistently applies inconsistent methodology in its argument.

In particular, the Estate attempts to defend Mr. Klein's view that "a marketability discount was appropriate" because "the interest being transferred is **a stake in** the LLCs," for which there is "no readily-available market" – and because "any purchaser of **Kenneth's interest in the LLC** would be going into business with a nearly 100 year old business partner" without an operating agreement and with risks of further litigation. (Def. MOL at 36-37, emphasis added). This entire line of reasoning is grounded in the fundamental error of considering marketability at the level of fractional ownership instead of the entity as a whole, as *Beway* mandates. The hypothetical purchaser, for the purposes of any marketability considerations, would not be buying "Kenneth's interest in the LLC" – it would be buying **the entire LLC** "as an operating business." *Beway*, *supra*. And as a purchaser of the entire LLC, this hypothetical buyer would **not** be going into business with Bernice or her heirs, and therefore would not need to be concerned about the absence of an operating agreement or other "governing documents addressing capital calls, distributions or withdrawals." (Def. MOL at 37, n.11). As Mr. Mercer explained, "[t]he absence of an operating

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[6] Delaware law is similar: "fair value" is viewed as the shareholder's "proportionate interest in a going concern," and that "proportionate interest is determined only after the company as an entity has been valued"; a discount may be "applied to the net asset value of the company in order to arrive at the true or intrinsic value of that particular company's stock" – but "no discounts" are to be applied "at the shareholder level," because that would be "contrary to the requirement that the company be viewed as a 'going concern'" – and "to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders. . ." *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144-45 (Del. 1989); *accord Prescott Grp. Small Cap, L.P. v. Coleman Co.*, 2004 WL 2059515, at *32 (Del. Ch. Sept. 8, 2004) ("marketability discounts at the shareholder level are impermissible under Delaware appraisal law"); *accord Deane v. Maginn*, 2022 WL 16557974, at *27 (Del. Ch. Nov. 1, 2022) (refusing to apply a marketability discount as "disfavored . . . in the appraisal context").

agreement has really no bearing if we're selling **the entire company** . . . because the buyer couldn't care less about what operating agreement exists at a point in time." (Tr. at 361:4-10).

Likewise, considering marketability at the entity level makes it crystal clear why "the current protracted litigation" between Kenneth and Bernice's Estate (Def. MOL at 42) is completely irrelevant to valuation of the LLC Entities as of September 2019. Because the "prospective purchaser" as of the Valuation Date would **not** be buying "Plaintiff's interest in the LLCs" but would instead be buying the LLC Entities **as a whole**, it would not need to be concerned about potentially being "mired in litigation" down the road. (Def. MOL at 42). Simply put, the hypothetical buyer would no longer be dealing with any parties to this litigation or their ongoing disputes; instead, it would have complete control of the LLC Entities.

Under *Beway*, Mr. Mercer is correct that the marketability discount is "baked in at the property level" – in other words, exposure to the market is already embedded in the underlying real estate appraisals. (Tr. at 364:16-22).[7] Contrary to the Estate's argument, the prospective purchaser's "due diligence" will **not** include any factors regarding "how the companies are run, whether and on what basis distributions are paid, and how capital calls are handled." (Def. MOL at 42). None of that would interest the prospective buyer, who will be in complete control of the LLC Entities as a result of the purchase and would be able to establish its own rules of "how the

[7] *See*, *e.g.*, *Cinque*, 212 A.D.2d at 610 (affirming refusal to apply marketability discount where "the value of the corporation [wa]s attributable solely to real property and cash"); *Kassab v. Kasab*, 56 Misc. 3d 1213(A), at *8-9 (Sup. Ct. Queens Co. 2017) (crediting Mr. Mercer's valuation which "did not apply any marketability discount, since the companies were real-estate holding companies, whose valuation already relies upon market exposure"), *aff'd as modified*, 195 A.D.3d 832 (2d Dep't 2021). The Estate pretends that the *Kassab* holding does not count because Mr. Mercer's conclusions there were not controverted by a competing valuation. (Def. MOL at 39, n.12). But, as per the authorities in both parties' opening MOLs, no party bears the burden of proof in valuation proceedings, and courts do not make default findings in such proceedings. Thus, the holding in *Kassab* is *the court's* holding and constitutes persuasive authority as such.

companies are run." Instead, the prospective purchaser's due diligence would focus on the market value of the underlying real estate, which constitutes the core of its business investment. The only thing about the LLC "wrappers" that will interest the purchaser is the companies' monetary assets and liabilities – which may be directly addressed by adjusting the purchase price and do not require any assessment of uncertain future risks related to the market.

For the same reason, Mr. Mercer is correct by premising his valuation on "[a] cash equivalent transaction" occurring on the Valuation Date, in which cash from the sale could be distributed to the members of the LLC Entities. (Def. MOL at 41, quoting Tr. at 348-49). Again, *Beway* requires a determination of "what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business." 87 N.Y. 2d at 168. That is precisely what Mr. Mercer's valuation does. The Estate's attack that Mr. Mercer "assumes a liquidation event in contravention of *Beway*" (Def. MOL at 40) is thus incomprehensible. Mr. Klein also "assumes a liquidation event" – only instead of assuming a sale of the whole entity, as *Beway* mandates, he assumes a sale of Kenneth's interest. This approach must be rejected as inconsistent with *Beway*. As the First Department succinctly summarized, "application of the discounts sought by defendant[] would deprive plaintiff[] of the value of [his] proportionate interest in a going concern, since [he] would not receive what [he] would have received had the entire entity been sold on the open market unaffected by a diminution in value as a result of a forced sale." *Vick*, *supra*.

3. There Is No Basis in the Record for the 15% Discount Applied by Mr. Klein

Mr. Klein based his conclusions regarding the 15% marketability discount on a purported analysis of the *Mandelbaum* factors and restricted stock studies. (Ex. 12 at 23-25; Ex. 13 at 23-26). Our Opening MOL discussed in detail why that analysis makes no sense, and why the *Mandelbaum* factors and restricted stock studies are irrelevant, because Kenneth's interest in the

LLC Entities is liquid in nature. (Opening MOL at 22-24). The Estate does not even attempt to defend Mr. Klein's application of the *Mandelbaum* factors or restricted stock studies, tacitly admitting the fatal flaws of such methods in the instant context. Once the inapplicable *Mandelbaum* factors and restricted stock studies are out of the picture, there is nothing in the record to support Mr. Klein's conclusion of 15% as the appropriate marketability discount – even assuming that such a discount should be applied at all.

While insisting on the supposed "reasonableness of the 15% marketability discount applied by Mr. Klein," the Estate proffers absolutely no basis for that number, saying only that it is "readily justified by the range of marketability discounts applied in other cases." (Def. MOL at 36-37). For the latter statement, the Estate cites nothing but Mr. Klein's reports, which in turn contain no analysis of any "range of marketability discounts applied in other cases." In contrast, Mr. Mercer's report collects and summarizes decades of caselaw in each of the Appellate Departments, showing that, in cases concerning valuation of interest in real estate holding companies, the **mean**, **median**, and **mode** marketability discount are **all zero**. (Ex. 11 at 84, 141-42; Tr. at 342:19-343:24). Thus, if the "range of marketability discounts applied in other cases" is to be given any weight, it counsels in favor of applying a zero discount in this case.

The same result is strongly warranted by equity. The inequity is especially obvious when the Estate cites "protracted litigation" as one of the grounds for the discount – the litigation arising from Bernice's failure to pay Kenneth "within a reasonable time" after withdrawal, as she was required to do under LLCL §509, and otherwise holding up the division of the parties' joint business. In other words, the Estate is trying to get a premium in value for Bernice's litigation tactics. As Mr. Mercer put it, "to discount for the litigation would be effectively to transfer value from Mr. Rosenblum to Bernice Rosenblum." (Tr. at 341:10-15). Rewarding bad faith conduct

would be not only fundamentally unfair, but also wrong from the public policy perspective. This is yet another reason why the only appropriate marketability discount in this case is zero.

III. KENNETH IS ENTITLED TO STATUTORY PREJUDGMENT INTEREST AT THE RATE OF 9% PER ANNUM SINCE THE DATE OF HIS WITHDRAWAL

A. The First Department Held That This Court Has Discretion to Award Interest

As the Estate's counsel recognized at the hearing, the Court in this case had "never" previously "heard" or decided the issue of "prejudgment interest on the LLC fair value claim." (Tr. at 5:11-18). In a striking contradiction to its own statement on the record, the Estate now argues that the First Department has "already resolved" the issue, and that such "resolution" is "law of the case." (Def. MOL at 42-43). As is apparent on the face of the Appellate Division's decision, it contains no "resolution" of the prejudgment interest issue. All the Appellate Division stated on this point is that this Court "did not improvidently exercise its discretion in declining to award prejudgment interest on plaintiff's withdrawal distribution." *Rosenblum v. Rosenblum*, 214 A.D.3d 440, 440-41 (1st Dep't 2023). As this Court knows, it did not "exercise its discretion" either by awarding or "declining to award" prejudgment interest on Kenneth's withdrawal value, given that that value itself has not yet been determined. Rather, as the Estate's counsel admitted, this Court had never addressed the issue. Accordingly, the only guidance that the Appellate Division's holding provides on the issue of "prejudgment interest on plaintiff's withdrawal distribution" is that this Court has "discretion" to "exercise" in this matter.

This conclusion is fully supported by the authorities the Appellate Division cited as a basis for its only statement concerning prejudgment interest: CPLR 5001(a), which provides for judicial discretion to award prejudgment interest "in an action of an equitable nature," and two Second Department cases, both of which did award such interest: *PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 839 (2d Dep't 2020), and *Chiu*, 125 A.D.3d at 826. All three of these authorities stand for

the principle that prejudgment interest on a withdrawal or buyout value is awardable at the trial court's discretion; none of them stands for a proposition that such interest should not be awarded. Thus, the Appellate Division's citation to these authorities emphasizes that it did not resolve the prejudgment interest one way or the other, and instead left it to this Court's discretion.

B. CPLR 5001(a) Constitutes Express Statutory Authority for an Award of Prejudgment Interest on the "Fair Value" of Kenneth's Membership Interest

As the Estate admits, CPLR 5001(a) "permits . . . a discretionary award of interest on claims that are 'equitable in nature.'" (Def. MOL at 45). The Estate's only argument is that Kenneth's "fair value claim" is not "equitable in nature." (*Id*. at 46).[8] The conclusive authority on the issue is the Court of Appeals' holding in *Loengard v. Santa Fe Indus., Inc.*, 70 N.Y.2d 262, 266 (1987): "[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." Accordingly, there can be no question that LLC dissolution, withdrawal, and buyout cases are "equitable in nature," and that CPLR §5001(a) grants the court discretion to award prejudgment interest in these cases – as numerous judicial holdings granting such interest confirm. *See Chiu*, *supra* (affirming award of prejudgment interest from the date of petitioner's withdrawal from LLC); *PFT Tech., supra* (imposing buyout as an "equitable remedy" in LLC dissolution proceeding, and affirming award of prejudgment interest on membership value); *Mizrahi v. Cohen*, 104 A.D.3d 917, 920 (2d Dep't 2013) (imposing buyout as "an appropriate equitable remedy upon the dissolution of an LLC" and remanding to determine

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[8] In support of that preposterous proposition, the Estate has nothing better to cite than *Ansonia Assocs. v. Ansonia Residents' Ass'n*, 78 A.D.2d 211, 214 (1st Dep't 1980), a case that had nothing to do with withdrawal from an LLC, or a "fair value claim," or determination whether any such claim is "equitable in nature" within the meaning of CPLR 5001(a). Instead, in the context of an appeal about a preliminary injunction, the Court merely noted that "[i]f adequate relief can be obtained by a money judgment there is no need for equitable relief." *Id.* Needless to say, the latter statement and *Ansonia* in general are irrelevant to this case and do not support the Estate's views.

membership value); *In re Superior Vending, LLC*, 71 A.D.3d 1153, 1154 (2d Dep't 2010) (imposing buyout as "the most equitable method of liquidation" in LLC dissolution proceeding, and awarding prejudgment interest).

As all these cases make clear, the statutory origin of dissolution or withdrawal claims under the LLCL does not detract from their equitable nature. The Estate's argument that there is no statutory basis for an award of interest in a case governed by the LLCL necessarily implies that *Chiu*, *PFT Tech*, *In re Superior Vending*, and similar cases were all wrongly decided. But the First Department has already rejected that position by upholding this court's "discretion to award prejudgment interest" based on *Chiu* and *PFT Tech,* as well as CPLR §5001(a). *Rosenblum*, *supra*. It is grossly ironic that the Estate, while arguing that the Appellate Division's "resolution" is "law of the case" (Def. MOL at 42-43), at the same time refuses to recognize the only point that the Appellate Division has truly "resolved" on the prejudgment interest issue: that this Court has discretion under CPLR 5001(a) whether to award such interest.

C. <u>Equity Requires an Award of Interest at the Statutory Rate of 9%</u>

The Estate next argues that this Court should exercise its discretion to decline an award of prejudgment interest or to apply a lower rate. These arguments fail, as unsupported by any authority and contrary to the principles of equity that guide the Court's discretion in this matter.

First, the Estate argues that the Appellate Division's holding on the prior appeal "already confirmed the reasonableness of a no-interest award on these facts." (Def. MOL at 46). As discussed above, the First Department did not decide the merits of the prejudgment interest issue and could not "confirm the reasonableness" of a decision that this Court had not made. At best for the Estate, the First Department's holding affirmed this Court's discretion to award prejudgment interest – but nothing in that holding serves as substantive support for a no-interest award.

Second, the Estate argues that Kenneth is "responsible for the delay" because he "insisted that he withdrew in 2016, not September 2019" and later "appealed the determination [of the 2019 withdrawal date] to the First Department." (Def. MOL at 46-47).[9] Prior to the first trial, both parties submitted 2016 valuations because that was the Court's direction at the time, which only changed when the Court issued its post-trial decision requiring 2019 valuations. And any "delay" in these proceedings has nothing to do with prejudgment interest, which is "a cost imposed for having the use of another party's money over a period of time." *Giaimo*, 101 A.D.3d at 526 (affirming award of interest on fair value). Under LLCL §509, Kenneth is entitled to receive his "fair value" "within a reasonable time after withdrawal" – but Bernice failed to pay him that value, or even any value that she viewed as fair, whether in 2016 or in 2019. Thus, Bernice, and later her Estate, has had the use of Kenneth's money – tens of millions of dollars even under the Estate's own valuations, for years. Where, as here, a fiduciary "enjoyed the benefit of plaintiff's money" for years, an award of prejudgment interest is "virtually mandated" by equity. *Aurnou v. Greenspan*, 161 A.D.2d 438, 439-440 (1st Dep't 1990) (holding that failure to award prejudgment interest in a partner withdrawal case "constituted an abuse of discretion under CPLR 5001").

Third, the Estate relies on this Court's prior finding that Kenneth "remained actively involved in the LLCs" after noticing his withdrawal in 2016. (Def. MOL at 47). Whatever relevance that had to fixing the date of Kenneth's withdrawal, it has none at all here and does not "militate[s] against any award of interest." (*Id*). Accepting the 2019 withdrawal date, LLCL §509 indisputably requires that Kenneth be paid his "fair value" within a reasonable time after that date

[9] Needless to say, the Estate cites no authority for the spurious notion that Kenneth should be penalized for the exercise of his legal rights by making reasonable arguments to this Court or the Appellate Division. If the Estate were correct, then the Estate should also be penalized for Bernice's assertion of frivolous counterclaims, unsupported by any evidence, in this very action.

– and again, Bernice and later the Estate never paid him anything. No amount of pre-withdrawal "involvement" can justify the Estate's **post-withdrawal** use of Kenneth's funds, or dispense with prejudgment interest that equity now requires.

Further, the Court has already determined the exact undisputed amount of distributions that Kenneth received from the LLCs after the withdrawal date (to wit, $348,132.02), and deemed it "a credit to be taken into account when plaintiff is paid for withdrawal." (NYSCEF #587 at 2; *see also* NYSCEF #579 at 3-4 (the Estate confirming the $348,132.02 number); NYSCEF #581, ¶4 (the Estate's accountant Belsky confirming $348,132.02 as the total distribution Kenneth received from the LLCs between September 20, 2019 and February 2022)). The Estate's statement that distributions to Kenneth from the LLCs are "continuing to the present" (Def. MOL at 48) is a blatant misrepresentation to the Court: as Mr. Belsky attested under oath, only the Estate (and not Kenneth) received the $614,964 distribution from the LLCs in April 2022 (NYSCEF 581, ¶ 5); nor is there evidence of any further distributions to Kenneth from the LLCs at any time thereafter. Moreover, regardless of any distributions, Kenneth **still** has not received the "fair value" of his interest, which makes the Estate's assertion that Kenneth "had the use of the funds he was entitled to receive as a member at all relevant times" (Def. MOL at 47) another blatant misrepresentation.

Fourth, while the Estate attempts to brush off the numerous judicial holdings consistently awarding prejudgment interest in dissolution and buyout cases, whether under the BCL or the LLCL (Def. MOL at 47), it is unable to cite a single authority declining to award prejudgment interest in any case of this nature. According to the Estate, *Giamo* and *Blake v. Blake Agency, Inc.,* 107 A.D.2d 139 (2d Dep't 1985) should be disregarded because they are corporate dissolution cases decided under the BCL, while *PFT Tech* and *In re Superior Vending* should be disregarded because they "involve LLC dissolution, not statutory withdrawal." (Def. MOL at 47). As for

Chiu, also awarding prejudgment interest in precisely the same legal framework as the instant case, *i.e.* a member's withdrawal from a pre-1999 LLC, the Estate refers to it as "[t]he lone LLC withdrawal case relied on by Plaintiff" (*id.*), apparently missing the irony that the Estate itself is unable to rely even on a single LLC withdrawal case. The Estate also attempts to distinguish *Chiu*, where "the withdrawing party was effectively frozen-out and forced from the company," arguing that here, by contrast, Kenneth "elected to bring suit" with a withdrawal claim. (Def. MOL at 47). But regardless of how the withdrawal originated, the crucial similarity of both cases is the remaining member's bad faith refusal to timely pay the "fair value" to the withdrawing member, keeping the withdrawing member's entire investment in the company hostage for years. It is for that reason that "justice requires that . . . interest be paid" on that withheld value. *Blake, supra*.

Fifth, the Estate argues, again without any authority, that "interest should only run from January 31, 2020, since the Court initially gave Defendants until that date to buy-out Plaintiff's interest." (Def. MOL at 47-48, citing NYSCEF #423). But under LLCL §509, the "fair value" must be paid "within a reasonable time" after withdrawal, making the withdrawal date the date from which prejudgment interest runs. *See Chiu*, *supra*; *see also In re Superior Vending, supra* (in an LLC dissolution proceeding resulting in an equitable buyout, interest awarded from the date the "membership interest" was "terminated").[10] The Estate is thus conceptually misguided in its implied suggestion that its hypothetical exercise of the Court-given option to buy out Kenneth's membership interest at "fair value" by January 31, 2020 would not have had to include interest on that value between the withdrawal date and the date of payment. *See*, *e.g.*, *Kassab*, 56 Misc. 3d 1213(A) at *16 (giving majority shareholder an option to buy out minority shareholder's interest

[10] This is similar to the rule in corporate dissolution proceedings that prejudgment interest runs "from the date the petition is filed." BCL § 1118(b). *See*, *e.g.*, *Cinque*, 212 A.D.2d at 610.

within 90 days at a determined value as of May 7, 2013, but noting that the minority shareholder "is entitled to pre-judgment interest, from the date of May 7, 2013 at the statutory rate of 9% percent, until the date of payment."). Moreover, since the Estate did **not** buy Kenneth out by January 31, 2020, that option has long been waived, and that date is now irrelevant.

Finally, the Estate argues that "the rate of interest should be far lower than the 9% statutory rate" – and suggests that instead the Court should apply Federal Funds Effective Rates. (Def. MOL at 48). Once again, the Estate cites **no legal authority whatsoever** for this spurious notion. CPLR § 5004 is clear: "Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute." Although CPLR 5001(a) gives the Court discretion to adjust that rate in matters "of an equitable nature," in practice the courts have consistently awarded interest at the statutory rate of 9% in dissolution, buyout, and withdrawal cases.[11] Contrary to the Estate's argument, the statutory 9% rate in the circumstances of this case is neither "punitive" nor would represent "a windfall" for Kenneth. (Def. MOL at 48). Rather, in the Estate's own words, it "simply reflect[s] the fact that, prior to the Court's determination of fair value, Plaintiff has not had the use of those funds to invest elsewhere." (*Id.*). Yes, indeed.[12]

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[11] *See*, *e.g.*, *Chiu, supra* (affirming award of interest "at the statutory rate of 9%" from the withdrawal date); *In re Superior Vending, supra* (awarding interest at 9% on LLC buyout); *Blake, supra* (reversing trial court and awarding interest at 9% per annum); *Murphy*, 74 A.D.3d at 820 (generally affirming the trial court's award of the "statutory rate of 9%"). And in the very few cases where courts departed from the statutory 9% rate, the rate they used instead was at least 5%. *See*, *e.g.*, *PFT Tech.*, *supra* (affirming award of interest at 5%); *Murphy*, *supra* (as to a specific period of a few months for which the trial court had awarded interest at 5%, holding that on remand the trial court has discretion to apply "a different rate" – presumably referring to the statutory 9%); *In re Jamaica Acquisition, Inc.*, 25 Misc. 3d 1212(A) (Sup. Ct. Nassau Co. 2009) (awarding 6.59% on buyout value under BCL § 623(h)(6) in connection with a corporate merger).

[12] Ironically, the Estate cites Kenneth's March 2019 affidavit stating that, at the time, the parties were receiving a return of about 2.25% in their joint business (Def. MOL at 48, citing Ex. G, ¶4) – but omits to mention that, in the same sentence, Kenneth calls it "a very poor rate of return . . .

Notably, the Estate has consistently insisted on the statutory rate of 9% in this action, and the Court has awarded it. As a matter of equity, what is good for the goose is good for the gander. In short, regardless of the Estate's endless excuses and unsupported theories, equity and judicial precedent require an award of interest at the statutory rate of 9% on the principal amount of the "fair value" of Kenneth's interest in the LLC Entities from the date of withdrawal.

CONCLUSION

For the reasons set forth above and in the Opening MOL, the Court should grant judgment in Kenneth's favor for the fair value of his interest in the LLC Entities in the total principal amount of $33,910,000, with interest from September 20, 2019 until the date of payment at the statutory rate of 9% per annum; together with such other and further relief to Kenneth, including an award of interest and costs, as the Court may deem just and equitable.

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especially for this kind of business," thereby clearly implying that, had his funds not been held hostage by Bernice, he would have invested them elsewhere with a much better rate of return.