Defendant-Respondent Winston Chiu submits this Brief in opposition to the consolidated appeals of Plaintiffs-Appellants Man Choi Chiu and 42-52 Northern Blvd., LLC (the "LLC") (collectively with Man Choi Chiu, the "Appellants") from two orders issued by the Supreme Court, Queens County (Dollard, J.) : (a) a March 11, 2008 Order (the "March 2008 Order")(R. 4) to the extent that such Order dismissed the Second Cause of Action which sought the expulsion of Winston Chiu from the LLC on the same grounds that were litigated and decided in a prior action (R. 12-14); and (b) a July 7, 2008 Order (the "July 2008 Order")(R. 16-18), which granted Appellants' motion for reargument and renewal of the March 2008 Order, but upon such reargument and renewal, adhered to the Court's determination to dismiss the Second Cause of Action. (A. 16-18).

The Second Cause of Action was correctly dismissed because, as an initial matter, it sought in a purported "new action" precisely the same relief that has already been foreclosed to Appellants in a Decision and Order (the "Prior Appellate Order") by this Court, in a prior case two years ago ("Action No. 1"). The instant case is now the third proceeding concerning the same parties, the same claims and the same property at issue – a building located in Long Island City owned by the Plaintiff LLC. The dispute in all three cases is also the same – who owns the LLC. The Trial Court also properly dismissed the claim for expulsion because neither the Operating Agreement nor any applicable version of the New

York Limited Liability Company Law authorize the expulsion of a member of the LLC.

Briefly, Respondent Winston Chiu and Appellant Man Choi Chiu are brothers – Winston is the eldest. The Plaintiff LLC owns a commercial building at 42-52 Northern Boulevard (the "Building"). The two brothers have been litigating over a period of years in three different proceedings over who rightfully owns an interest in the LLC.

The Second Cause of Action in the instant Complaint sought a judgment removing Winston as a member of the LLC because his interest is completely negated (in Appellants' view) by: (a) Winston's alleged withdrawal of a $193,000 contribution to the LLC; and (b) the breach of duty and the damage that Winston supposedly caused the LLC by Winston's having attempted, some years ago, to transfer the Building to his own Trust – the God Bless WMSC Trust – through a Transfer Deed (the "Deed") that he executed on his own, without the consent of Appellant Man Choi Chiu.

However, the Second Cause of Action was asserted by these very same Plaintiffs (Man Choi Chiu and the LLC) against the same Defendant (Winston Chiu) in the first litigation (Action No. 1) between these parties over who owns the LLC; and that claim was both actually litigated in a bench trial before Justice

Blackburne and then dismissed on the merits by this Court in a March 13, 2007 Decision (the "Prior Appellate Order"). (R. 64-66).

Specifically, in 2002, Man Choi and the LLC commenced an action against Winston Chiu and the trustees of his Trust in Supreme Court, Queens County under Index No. 211701/02 ("Action No. 1"). In Action No. 1 Appellants alleged that Winston's transfer of the Building to his Trust was fraudulent and sought to cancel the Deed and set aside the unlawful conveyance of the Building. (R. 59). Action No. 1 was assigned to Justice Blackburne, who conducted a bench trial. During the trial, the Appellants moved to amend their Complaint to add causes of action that, because Winston (a) had allegedly invested only $193,000 in the LLC, then shortly thereafter withdrew that money, he had no interest in the LLC and was thus not a member; and (b) had allegedly breached a duty to the LLC and damaged it through his fraudulent conveyance of the Building to his own Trust, he should be excluded from the LLC to penalize him and make the LLC whole.

This is precisely the very same claim that Appellants make against the same Defendant in the Second Cause of Action in the instant Complaint. Back in Action No. 1, Justice Blackburne granted the motion to amend. (R. 77). The parties tried both claims before her in Action No. 1. In a Trial Decision dated November 18, 2005 ("Blackburne Trial Decision") (R. 78-79, 81), Justice Blackburne held in Action No. 1 that Winston was not a member of the LLC because he invested, but

then withdrew a contribution of $193,000 (precisely the same theory advanced by Appellants in the Second Cause of Action in the instant action. Justice Blackburne also held that even if Winston was a *bona fide* member of the LLC, he should not be paid any interest on the amount that he invested as a punishment for his aborted transfer of the Building. (R. 79-80).

On appeal, Justice Blackburne's Trial Decision was reversed on the merits by the Appellate Division. This Court modified Justice Blackburne's Trial Decision and Judgment by:

> (1) deleting the provisions . . . which determined that the defendant Winston Chiu 'was never a member of the plaintiff 42-52 Northern Blvd. LLC' and that the plaintiff Man Choi Chiu is the 'sole member' thereof; (2) deleting the provisions thereof which granted the plaintiffs' application to conform the pleadings to the proof by amending paragraphs 50 and 51 of the complaint and paragraph 2 of the *ad damnum* clause; and (3) deleting the provision thereof precluding the defendants from any financial involvement, participation, management, membership, rights, privileges, interest or emoluments of membership in the plaintiff 42-52 Northern Blvd. LLC, and the premises known as 42-52 Northern Blvd.; as so modified, the order and judgment is affirmed, without costs or disbursements.

(R. 64).

This Court held that the causes of action to declare that: Winston was a "nominal' member and should be excluded; or that alternatively, he was never a member, were time-barred by laches. This Court further held that even if these

claims were not procedurally barred, the claims failed on the merits, because the evidence at trial (the tax filings of the LLC and the Operating Agreement to which Winston was a signatory) showed that Winston had at least a twenty-five percent interest in the LLC. (R. 65-66).

Thus, the very same claims that are asserted in the Complaint before the Court in the instant action were actually litigated and determined in Action No. 1, first by Justice Blackburne and then by this Court. Under the principles of *res judicata* and collateral estoppel, these claims cannot be litigated again and accordingly, the Second Cause of Action was correctly dismissed with prejudice.

When Appellants reasserted the Second Cause of Action (which is taken *verbatim* from the claims that they asserted in Action No. 1) Justice Dollard held that the Second Cause of Action was dismissible as a matter of law because neither the Operating Agreement nor the applicable LLC Law (the pre-August 1999 version) provide for expulsion. (R. 12-14). Appellants then moved for reargument and renewal of the March 2008 Decision based on their argument that *Tzolis v. Wolff,* 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008) required the Trial Court to permit a claim for expulsion to go forward on the theory that the common law may fashion a remedy with respect to an LLC that is not found in the LLC Law. Justice Dollard was correct in dismissing the Second Cause of Action in the first instance, and adhering to that Decision. Appellants' reliance on *Tzolis* is a red herring.

Nowhere in that case does the Court of Appeals even mention the authority of an LLC to expel its members and no court since then has cited *Tzolis* for that proposition. Indeed, the cases uniformly hold that absent a provision in an agreement or a statute, there is no authority for a partnership or an LLC to expel a member.

Tzolis, in fact, did not concern the operation or status of an LLC at all. Rather, it simply held that the aggrieved LLC member could bring a derivative action on behalf of the LLC against other members. Thus, what *Tzolis* is about is not the LLC statute, but New York procedural law with respect to whether claims can not only be brought individually on an LLC member's behalf, but also on behalf of the LLC itself. The case stands for nothing more than the proposition that an LLC member can sue on behalf of the LLC, as well as for the member. With respect to this case, *Tzolis* gives Appellants nothing more than they had before that Decision was issued. There was no support under the LLC law or the common law for the expulsion of an LLC member before that case was handed down by the Court of Appeals; and there is no support for that proposition now, notwithstanding Appellants' attempt to rewrite the holding of that case.

On this basis, Justice Dollard's original reasoning was correct and his initial determination should not be disturbed. Moreover, this Court has the authority to affirm on a different ground than that articulated in the Orders appealed from. As

set forth above, the claim by Appellants to expel Winston Chiu because of the brief transfer of the Building to his own Trust was first asserted and then tried before Justice Blackburne, and then considered by this Court on the appeal of the Trial Decision. Both Justice Blackburne and this Court held that Winston's behavior with respect to the transfer cannot be a basis for expulsion; and dismissed that claim on the merits in Action No. 1. Accordingly, the Second Cause of Action not only should be dismissed for lack of contractual or statutory authority, but also because of *res judicata* and collateral estoppel.

The March and June 2008 Orders should therefore be affirmed in their entirety for the reasons stated therein; or on the grounds of *res judicata* and collateral estoppel.

QUESTIONS PRESENTED

QUESTION NO. 1: Can a cause of action be asserted to expel a member of an LLC that was governed by the pre-1999 amendment to the LLC statute, where there was no Operating Agreement providing for such expulsion?

ANSWER BELOW: No.

QUESTION NO. 2: Can a cause of action be asserted for the expulsion of a member of an LLC based on the same facts and claims asserted in a prior action between the managing member and the LLC on one hand, and the same LLC member on the other, where both the Trial Court and this Court held in the

prior action that such expulsion would not be permitted, and thus the claim for expulsion was actually litigated and decided against the managing member and the LLC?

ANSWER BELOW: The Trial Court in the instant action did not reach this issue as it dismissed the claim for expulsion on the absence of contractual or statutory authorization, but this Court can affirm the dismissal and reargument orders on the additional grounds that the cause of action for expulsion is barred by *res judicata* and collateral estoppel.

STATEMENT OF FACTS

The conflict between the two brothers arose after the unexpected death of Henry Chiu, the son of Man Choi – a young man who was apparently able to keep the Chiu brothers together.

The issue in dispute in Action No. 1, the case tried before Justice Blackburne, was whether the elder brother – Defendant Winston Chiu – held an interest in the LLC which owned the property, and if so, in what amount. At the trial before Justice Blackburne, each brother provided testimony which contradicted the other. Objective evidence, such as the LLC's tax returns and financial statements which were prepared by the younger brother – Plaintiff Man Choi – established that Winston had at least a twenty-five percent interest. The Appellate Division held that Justice Blackburne erred in ignoring this

incontrovertible documentary evidence – written admissions by the younger brother – and, instead, in accepting the younger brother's subjective, uncorroborated testimony which was in fact contradicted by his own documents.

A. The Chiu Family

Winston Chiu emigrated to the United States decades ago. In 1980, he sponsored the emigration of his younger brother, Plaintiff Man Choi Chiu. Soon after arriving here, and with funding from Winston, Man Choi Chiu started what ultimately became a multi-million dollar restaurant supply business. Man Choi Chiu operated the business in New York with the assistance of his only son Henry, and his daughters. At least through the 1990s, Man Choi, who spoke little to no English, principally relied on his son Henry to manage the day-to-day affairs of the business for him.

By 1999, Winston, who had also been very successful, retired in California, and Man Choi Chiu and his immediate family had acquired various buildings, primarily as locations to operate their restaurant supply ventures or as investment properties. In the summer of 1999, Henry contacted Winston and queried whether he would be interested in helping him acquire a building at 42-52 Northern Boulevard in Long Island City. Although there is a dispute as to whether Henry actually told his father this, he evidently informed Winston that he was tired of

operating under his father and wanted to strike out on his own, and that this real estate venture would be the first such business. (R. 26-27).

B. The Premises and the LLC

Henry had located a property at 42-52 Northern Boulevard in Long Island City and had proposed to form an LLC to purchase it. The LLC was formed May 13, 1999. Winston was to provide investment funds. He was also to provide the most important asset – the ability to obtain a $3.5 million mortgage from the EastBank – inasmuch as the purchase price of the building would exceed $5 million. (R. 27-28).

It is undisputed that Man Choi and the members of his immediate family were financially over extended by their borrowing against another property located at 1-9 Bond Street, and could not obtain an additional loan from the EastBank, which would be needed to purchase the building for over $5 million. Because of the inability of Man Choi to obtain further credit, Winston was needed for the deal. (R. 28).

Winston traveled to New York, viewed the property, and with Henry negotiated with bank officials at EastBank. Winston then opened an account in EastBank for the LLC and deposited $60,000 for loan fees and other transaction expenses. (R. 28).

Winston then negotiated the final contract price with the seller at the offices of the seller's counsel, Shearman & Sterling. (R. 28).

All of the documents submitted by the LLC to the bank in order to obtain the loan identified Winston as a member of the LLC and as the one who was seeking the loan on behalf of the LLC. In fact, some of the documents identified him as the only member of the LLC. Winston also provided personal guarantees to EastBank for the entire $3.5 million dollar mortgage. Winston's guarantee is still outstanding. (R. 28).

As part of the closing binder that was submitted to the bank, Winston and Henry submitted an agreement that they had both signed in May 1999, stating that Winston had the right to purchase twenty five percent of the shares of the LLC for $25 and Henry had the right to purchase seventy five percent of the LLC for $75 and that Henry would be operating the LLC. (R. 28, 128-29) The agreement further provided that Winston had the right of first refusal to purchase Henry's entire interest in the LLC. (*Id.*) This contract supports Winston's testimony that Henry wanted to have a venture apart from his father and with his beloved uncle, Winston. (R. 28-29).

After the May 1999 agreement, Winston was also given a chart in Chinese (later translated by a certified translator) by Man Choi which confirmed that Winston was sole owner of the LLC. (R. 29).

Significantly, Ronald Fishman, the attorney who regularly represented Man Choi and Henry in their real estate ventures, and who had never represented Winston, and who prepared the LLC and loan documents, testified that he understood Winston to be a member of the LLC. He was only told otherwise by Man Choi after Henry died at a time when Man Choi and Winston were fighting over the ownership of the entity. (R. 29).

Mr. Fishman also prepared articles of organization which listed Winston as the agent for service of process of the LLC. (R. 29).

At the closing, Winston provided $193,854.51. The source of this money was the proceeds of a sale of a house Winston owned in California, which he wanted to be tax deferred as a like-kind exchange under Section 1031 of the Internal Revenue Code. Accordingly, at the closing, the money was delivered by an escrow agent, Fred Samuels. Winston also had previously provided $60,000 for the bank fees and other expenses, and then ultimately invested another $193,000. (R. 29).

On September 8, 1999, the LLC purchased the Premises from Weeks Office Products, Inc. for $5,450,000. As reflected in the Closing Statement, Winston attended the Closing as a "Buyer." The other "Buyer" identified in the Closing Statement was Henry Chiu. (R. 29).

The $4,966,420.81 due the Seller at Closing (after adjustments), was paid:

(a) $193,854.51 by Winston through Fred Samuel as "Like Kind Exchange Agent."

(b) $3,500,000.00 from EastBank, N.A., representing a mortgage loan to the LLC.

(c) $1,272,566.30 by certified check from the LLC, part of which represented proceeds obtained from the refinancing of 1-9 Bond Street. (R. 29-30).

C. The Death Of Henry And The Falling Out Between The Brothers

Soon after the closing, Henry became ill and he died on May 6, 2000. (R. 20).

Man Choi renounced his own and his son's agreements with Winston and attempted to misappropriate the property for himself. Despite this attempt, documents that Man Choi created established Winston's ownership interest and validate the agreement with Henry. (R. 30).

As held by the Appellate Division Order, the 1999 and 2000 tax returns, which were prepared by Man Choi after Henry's death, contained Schedule K-1s which showed that Man Choi has a seventy-five percent interest and Winston has a twenty-five percent interest in the LLC. (R. 30, 64-66, 133-157).

The Appellate Division further held that the tax returns can be reconciled with the May 1999 agreement between Winston and Henry. (R. 66, 128-29) Under that agreement, Henry was to have a seventy five percent interest, which Man Choi claims to have "inherited" after his son died. Under the agreement, however, Winston had a right to purchase the remaining shares, which would have

made him the sole owner of the LLC. Man Choi unlawfully deprived him of those shares.

Worse, Man Choi sought to deprive Winston of any role or ownership interest in the LLC at all. He refused to allow Winston to participate in the affairs of the LLC and refused his requests for information. (R. 30).

Still, worse was to occur. In 2001, Winston learned from EastBank that either Man Choi or his daughters had submitted forged documents containing a falsified signature by Winston in an attempt to deprive Winston of access to or information about the LLC bank accounts. (R. 30).

Winston understandably panicked. Based upon his agreement with Henry, which gave him the right to all of Henry's shares after his death, the prior understanding that he had with Man Choi, and the documents that were submitted to the bank stating that he was a member, including his personal guarantee of $3.5 million, he also had a good faith belief that he was the sole owner of the property. One can particularly understand his anxiety about not only the property being stolen from him, but of his still being responsible for the $3.5 million personal guarantee. In order to protect his property and his ability to pay the $3.5 million guarantee, Winston prepared a deed transferring the Premises to his personal trust, the God Bless WMSC Trust, until the dispute could be resolved. (R. 31).

Although Winston's desperate attempt at self help may have been an overreaction, it was understandable and caused no actual harm to the LLC – certainly not harm enough to deprive him of his twenty-five percent interest in a building now worth over $15 million, when he is still responsible under his $3.5 million personal guarantee to the bank. Indeed, the LLC never enumerated any monetary damages and certainly continued to collect all of its rent. It should also be noted that, in connection with the appeal from the Trial Order, the Appellate Division issued a restraining order preventing the LLC from disposing, encumbering or otherwise transferring or burdening the property, which is what Winston, a lay person, was attempting to accomplish in the first instance. (R. 31).

D. <u>The Litigation In Action No. 1</u>

By Summons and Complaint dated August 7, 2002, Man Choi Chiu and the LLC commenced Action No.1 against Winston, the Trust and the trustees, claiming that Winston fraudulently represented himself as the "sole member" of the LLC and secretly transferred the property to the God Bless WMSC Trust, Winston's own living Trust. (R. 31, 158-66).

On October 2, 2002, the Defendants answered and asserted counterclaims that after Henry's death Man Choi misappropriated the LLC's bank account by submitting forged documents. (R. 32, 177-84).

The matter was tried before Justice Blackburne on July 26, 27, 28, 29, August 8 and 9, 2005. (R. 32).

The only relief sought by the Complaint in Action No. 1 was setting aside the transfer by canceling the Deed and obtaining an award of attorneys' fees. (R. 32, 164) However, at the end of the non-jury trial before Justice Blackburne, the Plaintiffs requested that Justice Blackburne go further and conform the pleadings to the proof so as to: (a) declare that Winston was at best a nominal member of the LLC, with a total interest of at the most 4%; (b) exclude Winston from the LLC because of the aborted transfer; and (c) allow Plaintiffs to buy out Winston's interest for the value set by the Court, less any damages awarded Plaintiffs for the negative financial consequences allegedly suffered as a result of Winston's transfer. (R. 32, 77-78).

Justice Blackburne granted the motion to amend. (R. 77-78).

At trial, Man Choi claimed that he allowed Winston to contribute $193,854.41 towards the purchase price, as a favor so that Winston could qualify for deferred tax treatment under Internal Revenue Code § 1031 on the unrelated sale of California property. Man Choi alleged that those funds were returned to Winston after the Closing and that Winston had nothing else to do with the LLC, which was owned by Man Choi alone. (R. 32).

Contrary to Man Choi's position, however, and as explained by the Appellate Division, the evidence adduced at trial established that: (a) Winston played a significant role in the purchase of the building and was a member of the LLC at the time of the purchase of the building; (b) in fact, the LLC represented to the bank and the IRS through loan documents and tax returns that Winston was at least a twenty-five percent owner of the LLC; (c) Winston made a substantial capital contribution to the LLC, which included arranging for the $3.5 million mortgage used for the purchase; and (d) Winston personally guaranteed the $3.5 million loan – a personal guarantee for which he is still liable today. (R. 32).

E. <u>Justice Blackburne's Decision and Order in Action No. 1</u>

In her Trial Decision dated November 18, 2005, Justice Blackburne granted the motion to conform the pleading to the proof. Justice Blackburne also found that any monies that Winston had contributed toward the purchase of the Premises had been returned to him and that he had no ownership in the Premises and "was never a member of 42-52 Northern Blvd. LLC." (R. 77-79).

In reaching the determination that Winston "provided no funds toward the purchase, renovation, maintenance or real estate taxes of the property," Justice Blackburne found that his $193,854.51 contribution was merely "washed" through the LLC so that Winston could gain a tax advantage; that his initial $60,000 advance was used only to establish a local credit reference, was never recorded as

an investment or contribution to the LLC and was withdrawn shortly after it was deposited; and that the additional $290,652.72 put up by Winston was only cycled through the LLC to gain a tax advantage for Winston. (R. 78-79).

Justice Blackburne also stated:

> To the extent that $193,854.51 may be termed a 'loan' 'investment' or 'contribution' towards the purchase of the [Premises] such that the $193,854.51 could theoretically represent it [sic] a capital account of Winston Chiu upon which interest may have been entered thereon and accrued to his benefit, Winston Chiu forfeited such benefit. For the Court concludes that by his fraudulent acts and self-dealing, which resulted in subsequent economic harm caused the Plaintiff Man Choi Chiu and the LLC, Winston Chiu is not entitled to be paid interest on the $193,854.51 from the date it was tendered by check of attorney Fred Samuels to the date '[t]he LLC paid me back'. In addition, the Court concludes that the rightful owner of the Premises is 42-52 Northern Blvd., LLC of which Man Choi Chiu is the sole member.

(R. 79.)

Justice Blackburne further stated that:

> Since all monies of Defendant Winston Chiu connected in any way to the LLC in the purchase of the Northern Blvd. premises were fully recovered by him prior to the commencement of this action and this Court had ruled that he is not entitled to any interest on those monies for the time prior to his recovering the same, Plaintiffs are not charged with returning any monies to Defendant Winston Chiu and *the sums attributable to any economic harm suffered by Plaintiffs as deemed recovered by Plaintiffs by this Court's disallowance of interest payments to Winston Chiu.*

(R. 80; emphasis added.)

Based on these findings, Justice Blackburne: (a) declared the Deed transferring the Premises to the God Bless WMSC Trust null and void; (b) directed Winston to deliver all books, records and documents in his control relating to the premises and LLC to Plaintiffs; (c) precluded Winston from any financial involvement, participation, management, membership, rights, privileges or emoluments in the LLC or premises; and (d) found that the Plaintiffs were entitled to recover the reasonable costs and attorney's fees incurred in successfully prosecuting this action, and ordered that a hearing be held to determine the amount of same. (R. 80-81).

F. The Prior Appellate Order

On March 13, 2007, the Appellate Division, Second Department issued an Order holding that Justice Blackburne erred in granting the motion to amend the Complaint in Action No. 1 to add causes of action to declare Winston as never being a member of the LLC or that he was a nominal member and, to exclude him for taking back his $193,000 contribution and his aborted transfer of the building. The Appellate Division held that the proposed amended claims failed for two reasons:

First, the Appellate Division held that the claims were barred by laches. (R. 65).

Second, the Appellate Division also determined that the proposed amended claims failed on substantive grounds, because under the law an LLC's tax returns are incontestable admissions by the LLC. In this case, the tax filings for 1999 and 2000 showed Winston had a twenty-five percent interest. The Appellate Division held that based on that evidence alone, Justice Blackburne erred as a matter of law and fact in holding that Winston was not a member or was merely a "nominal" member of the LLC. (R. 65).

On this point, the Appellate Division stated:

> The Trial Court lacked a factual and legal basis to grant the Plaintiffs' application, after the close of the evidence, to amend the Complaint to include a new cause of action for a Declaration that Winston Chiu as merely a 'nominal member' of the LLC, who could be expelled there from upon payment to him by the LLC of the value of the 4% of the capital account ... The Court's determination as to the membership of the LLC should have been based primarily on the LLC's own records, which, by law, must include 'a current list of the full name set froth in alphabetical order and last known mailing address of each member together with the contribution and the share of profits and losses of each member or information from which such share can be readily derived'(LLC Law § 1102(a)(2)). The only documentary evidence that arguably satisfied this requirement consisted of the LLC's tax returns for the years 1999 and 2000, both of which listed the Defendant Winston Chiu as a member having a twenty-five percent ownership of capital, profit sharing and loss sharing and the Plaintiff Man Choi Chiu as the other member having the seventy-five percent ownership of capital, profit sharing and loss sharing. Thus, the proposed amendment was unwarranted by the evidence. *For the same reason, the Trial Court's finding*

> *that Man Choi Chiu was the 'sole member' of the LLC is similarly unsupported by the record evidence.*

(*Id.* at 2).

Third, The Appellate Division held that "the trial court's determination that the defendant Winston Chiu 'was never a member of the [LLC]' was against the weight of the documentary and testimonial evidence relating to the original purchase and financing of the [Building]" because the LLC's counsel "provided an opinion letter representing, in relevant part, that certain loan documents executed by Winston Chiu, as a member of the LLC, were 'duly authorized, validly and duly executed and delivered by the [LLC] . . . and constitute the valid, legal, binding and enforceable obligation of the [LLC].'" (R. 65, emphasis added).

Fourth, this Court also held that Justice Blackburne erred in excluding the contract between Henry and Winston Chiu. (R. 66, referring to R. 128-29).

> Additionally, the Trial Court erred in refusing to receive as evidence offered by the Defendants an Operating Agreement purportedly entered into before the organization of the LLC between Winston Chiu and Man Choi Chiu's late son, Henry Chiu. As correctly noted by the Defendants in their brief, the very same Agreement, which *inter alia* granted Winston Chiu the right to acquire up to twenty-five percent of the ownership interest in the LLC and Henry Chiu the right to acquire the remaining seventy-five percent interest, was included as part of the closing statement prepared by Wander and Golden, which has previously been admitted into evidence on the consent of the parties.

(*Id.*)

Indeed, if this document were to be considered, then Winston Chiu is the sole owner of the LLC. Thus, the Appellate Division modified Justice Blackburne's Trial Decision as follows:

> (1) deleting the provisions . . . which determined that the defendant Winston Chiu 'was never a member of the plaintiff 42-52 Northern Blvd. LLC' and that the plaintiff Man Choi Chiu is the 'sole member' thereof; (2) deleting the provisions thereof which granted the plaintiffs' application to conform the pleadings to the proof by amending paragraphs 50 and 51 of the complaint and paragraph 2 of the *ad damnum* clause, and (3) deleting the provision thereof precluding the defendants from any financial involvement, participation, management, membership, rights, privileges, interest or emoluments of membership in the plaintiff 42-52 Northern Blvd. LLC, and the premises known as 42-52 Northern Blvd.; as so modified, the order and judgment is affirmed, without costs or disbursements.

(R. 66).

G. Winston's Commencement Of Action No. 2

By dismissing the claims regarding the ownership in the LLC, the Appellate Division resolved Action No. 1 in its entirety. However, the Appellate Division Order, by holding that Winston was a member, created new issues, such as how much more than twenty-five percent did he own and how would the LLC be governed?

On October 10, 2007, Winston commenced Action No. 2 in the Supreme Court, Queens County, seeking a determination as to how much more of an interest above twenty-five percent did he have in the LLC and also to either dissolve the

LLC or withdraw from it with his interest being paid out to him in cash. Winston could not seek this relief in Action No. 1, because after the Appellate Division Order all of the claims in the case had been resolved and the action had been concluded. (R. 36-37).

H. The Instant Complaint in Action No. 3

The Summons and Complaint served by Man Choi and the LLC on Winston on October 25, 2007 is now the third action to concern the issue of who owns the LLC. The allegations in the Summons and Complaint are the same as those made by Man Choi in Action No. 1.

Paragraphs 7-17 of the instant Complaint allege that Man Choi invested virtually all of the money in the LLC, leaving aside the $3.5 million loan obtained from EastBank and $193,000 invested by Winston Chiu. (R. 56-57, ¶¶ 7-17). This is exactly what was alleged in Action No. 1. (R. 206 (Plaintiffs' Answering Brief on Appeal In Action No. 1 at 16 ("Man Choi Chiu was providing the necessary funds for all of the payments at closing (except for the $193,000 in proceeds from Winston Chiu's 'like kind' exchange) . . . with the exception of Winston Chiu's $193,000 'like kind' exchange (from the sale of a residential California property), Plaintiffs paid the balance of the $5.45 million contract price.")).

Paragraphs 19-22 of the instant Complaint allege that Winston, in fact, never did actually invest $193,000 because he was merely placing the money temporarily

in the LLC for a "Section 31 like kind exchange," and that he soon withdrew the money after contributing it to the LLC. (R. 57-58, ¶¶ 19-22). Again, this is exactly what was alleged in Action No. 1. (R.250 (Plaintiff's Post-Trial Brief at 3 ("At, most Winston Chiu . . . was only a nominal member of the LLC based upon his minimal $193,000 'investment' at the closing [and] in fact, Winston Chiu himself (and as the evidence confirmed) later took back the $193,000, the only funds that he allegedly 'invested' in the purchase of the Property.")).

Paragraphs 26-28 of the instant Complaint allege that Winston fraudulently and unlawfully transferred title to the building from the LLC to God Bless WMSC Living Trust without the knowledge of Man Choi and that this transfer caused the LLC harm. (R. 58-59, ¶¶ 26-28). Again, this is exactly what was alleged in Action No. 1. (R. 199 (Plaintiffs' Answering Brief on Appeal In Action No. 1 at 9) ("In April 2001, Winston Chiu falsely holding himself out to be the 'sole member' of the LLC, fraudulently and unlawfully transferred title [of the building] from the LLC to the Trust."); (R. 257 – Plaintiffs' Post-Trial Brief at 10) ("Not only did the unlawful 'transfer' result in the freezing of the LLC's bank accounts at Eastbank, but the 'transfer' created a cloud on the LLC's title and (as of the discovery of the unlawful 'transfer') has prevented the refinancing of the mortgage at far more favorable prevailing rate."))

Based on these factual allegations, the instant Complaint asserts two causes of action. First it asserts a claim for declaratory judgment that "Winston Chiu has, at best, a nominal financial interest or ownership interest in and to the LLC" because he withdrew his $193,000 contribution. (R. 61 at ¶ 40). The second cause of action seeks to exclude Winston because he breached a fiduciary duty to the LLC and caused it damage by his fraudulent transfer of the building to his Trust. (*Id.* at ¶ 44).

Again, this is exactly the same relief that these same Plaintiffs sought against this same Defendant in Action No. 1. As Justice Blackburne noted in the Trial Decision:

> Plaintiff [Man Choi Chiu] seeks [on behalf of himself and plaintiff LLC] [1] a judgment setting aside the deed from 42-52 Northern Blvd., LLC to GodBless WMSC Living Trust; [2] damages in compensation for the negative financial consequences he suffered as a result of the fraudulent transfer; *[3] a declaration that defendant is only at best a 'nominal member' of the LLC; and [4] an order precluding defendant's future participation in the LLC.*

(R. 68; emphasis added).

In their post trial brief submitted to Justice Blackburne in Action No. 1, Plaintiffs repeated the same mantra as to the claims they were making and the relief they were seeking:

> In view of plaintiffs' motion, at the close of their case-in-chief, to conform the pleadings to the proof, the Court should not simply set aside and cancel the deed to the [GBWC] Trust and restore title to the LLC. *Rather, the Court should go further, based upon the evidence submitted by both sides, and declare that Winston Chiu, at best is only a 'nominal' (perhaps at most a 4%) member of the LLC in view of his limited 'investment' (that he later admittedly rescinded).*
>
> Based upon plaintiffs' testimony and evidence, the Court [in Action No. 1] should likewise award damages against defendants (on plaintiffs' second cause of action). Not only did the unlawful 'transfer' result in the freezing of the LLC's bank accounts at Eastbank, but the 'transfer' created a cloud on the LLC's title and (as of the discovery of the unlawful 'transfer') has prevented the refinancing of the mortgage at far more favorable prevailing rates.
>
> *As both sides left no doubt that they are seeking a final 'divorce' from each other, the Court should also set a value on Winston Chiu's 'interest' in the LLC (based upon his, at most $193,000 'investment' in September 1999, with an appropriate rate of interest on his 'investment') to be 'repaid" to Winston Chiu (less any damages awarded to Plaintiffs [caused to them from the aborted transfer by the Deed to the GBWC Trust] as and for his purported 'interest' in the LLC, thereby ending the parties' 'business relationship.*

(R. 257-58; emphasis added).

In the instant action, part of the relief Plaintiffs seek is to penalize Winston by excluding him from the LLC because his attempt to transfer the building via the Deed allegedly "breached a duty" that he owed the LLC. (R. 61 ¶ 44). Quite similarly, on the appeal in Action No. 1, the Plaintiffs argued that Justice

Blackburne was authorized to exclude Winston from the LLC as punishment for the attempted transfer of the building:

> [T]he trial court justifiably concluded, from the trial record, that the transfer by Winston Chiu was fraudulent and made for his own benefit and to harm Plaintiffs. In making such a finding [and then excluding Winston as a member of the LLC], the [Trial] Court properly exercised its authority in fashioning an appropriate remedy to achieve two (2) purposes: (1) to reverse Winston Chiu's unauthorized transfer of the premises to the Trust; and (2) to preserve the LLC and permit it to function without further interference by Winston Chiu. Winston Chiu, in whatever 'capacity' he was acting when he unlawfully transferred the Premises to the Trust, breached his 'duty' to the LLC, and its members, by intending to do harm to the LLC and Man Choi Chiu and benefit solely himself. The Trial Court [by excluding Winston from the LLC for breaching this duty] properly fashioned a remedy to permit the LLC to resume ownership of the Premises and move forward without any unlawful interference by Winston Chiu.

(R. 235-36 (Plaintiffs' Answering Brief On Appeal In Action No.1 at 45-46)).

I. The March 2008 Dismissal Order

In the March 2008 Order, Justice Dollard dismissed the First Cause of Action, which sought a judgment declaring that "Winston Chiu has, at best, a nominal financial interest or ownership in and to the LLC." Justice Dollard held that the claim was dismissible on the grounds of *res judicata* and collateral estoppel based on the prior Appellate Division Order. (R. 8-9).

Justice Dollard dismissed the Second Cause of Action on the following basis:

> That branch of the motion which is for an Order pursuant to CPLR 3211(a)(7) dismissing the Second Cause of Action as insufficiently stated is granted. The Second Cause of Action seeks the expulsion of WC as a member of the company by reason of his fraudulent transfer of the property and/or his removal as an officer. It is true that Limited Liability Company Law § 701 provides in relevant part: "Unless otherwise provided in the Operating Agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member, or the occurrence of any other event that terminates the continued membership of any member shall not cause the Limited Liability Company to be dissolved ...." (The Court's conclusions are not altered even if the version of Limited Liability Company Law § 701 in effect prior to the statutory amendment in 1999, is regarded as applicable). However, the mere reference to the expulsion of a member in a statute pertaining to the continuing existence of a Limited Liability Company does not amount to a statutory grant of power to the court to order the expulsion of a member. While the Limited Liability Company Law contains a provision for the withdrawal of a member (Section 606) and a provision for the judicial dissolution of a Limited Liability Company (Section 702), the Plaintiff did not correctly cite any statute or case authorizing the judicial expulsion of a member. The expulsion of a member can be provided for in the company's Operating Agreement (*See* LLCL § 417), but the Plaintiff has not shown that the parties entered into such an Operating Agreement with such a clause. The Plaintiff did not establish that he has an enforceable contractual basis for seeking the Defendant's ouster. Finally, the Complaint does not adequately allege that WC is an officer of the LLC, and in the absence of an Operating Agreement, this statute

(Section 412) places the management of the LLC in the hands of its members.

(R. 12-13).

J. The July 2008 Reargument Order

Appellants moved for reargument and renewal of the March 2008 Order to the extent it dismissed the Second Cause of Action, arguing that the decision in *Tzolis* (which was issued before the March 2008 Order was issued in this case) created new law for supporting the expulsion of a member of an LLC. Appellants also argued that even without *Tzolis,* Justice Dollard had overlooked or misapprehended the law by holding that the pre-August 1999 version of the LLC statute did not provide for expulsion.

In the July 2008 Order, Justice Dollard granted the motion for reargument and renewal, but upon such reargument and renewal adhered to his original determination. In that regard, he held with respect to the argument that the statute authorized expulsion, "The mere reference to the expulsion of a member in Limited Liability Company Law § 701 pertaining to the continuing existence of a Limited Liability Company does not necessarily mean that there is an implicit statutory basis for the judicial expulsion of a member; a member can be expelled pursuant to the terms of an Operating Agreement which can contain 'any provisions not inconsistent with the law or [the company's] articles of organization.'" (R. 18) (citing to LLCL § 417[a]).

With respect to *Tzolis* supposedly permitting expulsion even if it is not authorized in the statute, Justice Dollard held as follows:

> Plaintiff MCC argues that *Tzolis v. Wolff,* 10 N.Y.3d 100, decided by the Court of Appeals on February 14, 2008, shortly before this Court had decided the previous motion, requires a different result. The Court of Appeals stated: "We hold that members of a limited liability company (LLC) may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the Limited Liability Company Law. (*Tzolis v. Wolff, supra,* 102)." Plaintiff MCC argues that *Tzolis v. Wolff,* (*supra*) authorizes this Court to devise a remedy such as expulsion even in the absence of expressed statutory provision for the remedy. However, the Court of Appeals relied on the long common law history of derivative actions in deciding *Tzolis v. Wolff* (*supra*), but, the case at bar, Plaintiff MCC did not show that there is a common law basis for the expulsion of a member of a Limited Liability Company or even for the expulsion of a partner. On the contrary, '[p]artners have no common law or statutory right to expel or dismiss another partner from the partnership. They may, however, provide in their partnership agreement for expulsion under prescribed conditions which must be strictly applied." (*Millet v. Slocum,* 4 A.D.2d 528, 532, *aff'd* 5 N.Y.2d 734; *See Gelder Medical Group v. Webber,* 41 N.Y.2d 680).

(R. 18).

In opposing the motion for renewal and reargument, Respondent Winston Chiu also moved for reargument and renewal of the March 2008 Order to the extent that it did not specifically dismiss the Second Cause of Action on the grounds of *res judicata* and collateral estoppel. Justice Dollard held in the July

2008 Order that it was not necessary for him to dismiss on the grounds of *res judicata* and collateral estoppel because he was dismissing on the grounds on lack of contractual or statutory authorization: "In regards to Defendant WC's cross motion, the Court notes that it is not necessary to dismiss a cause of action on more than one ground." (R. 18).

ARGUMENT

I. THERE IS NO AUTHORITY TO "OUST" A MEMBER OF AN LLC

In their opposition to the motion to dismiss, Appellants argued that the passing reference in Section 701 of the Amended LLC Law to expulsion as one of the reasons an LLC might be maintained authorized a cause of action for a judicial expulsion. In their motion for reargument and renewal, the Appellants argued that the Trial Court overlooked the meaning and significance of this reference to expulsion in Section 701, and that *Tzolis* provided justification for the Court relying on the common law to create a remedy for expulsion even if the statute did not authorize such a remedy. As set forth below, the Trial Court correctly held that both of these arguments were meritless.

A. The Trial Court Correctly Held That The Expulsion Of A Member Is Not Authorized By Section 701 Of The LLC Law

The LLC was created in and operates from New York. Thus, it is exclusively governed by the LLC Law. *See Artigas v. Renewal Arts Realty Corp.*, 22 A.D.3d 327, 327, 803 N.Y.S.2d 12, 13 (1st Dep't 2005). It is undisputed that

the Operating Agreement does not address expulsion. Thus, the LLC Law governs the status and operation of the LLC here. *Spires v. Casterline,* 4 Misc.3d 428, 436, 778 N.Y.S.2d 259, 266 (Sup. Ct. Monroe Cty. 2004). The LLC in this case was created in May, 1999 and the LLC Law was amended effective August 31, 1999. Under the pre-August 31, 1999 version of the LLC Law, the only provision that addresses the withdrawal or removal of an LLC member is LLCL § 606. *See Out of the Box Promotions LLC v. Koschitzki,* 15 Misc.3d 1134 (A), 2007 WL 1374501 at *6 (Sup. Ct. Kings Co. May 10, 2007). Section 606 specifically provides the terms under which a member may be removed from an LLC:

> A member may withdraw as a member of a limited liability company at the time or upon the happening of any of the events specified in the operating agreement and in accordance with the operating agreement or unless otherwise provided in the operating agreement, with the vote or written consent of at least two-thirds in interest of the members, other than the member who proposes to withdraw as a member of the limited liability company. If such consent is not given, and if the operating agreement does not specify the time or the events upon the happening of which a member may withdraw, a member may, unless prohibited by the operating agreement, withdraw upon not less than six months' prior written notice to the limited liability company. . . .

(N.Y. L.L.C. L § 606).[1]

Because there are no terms provided otherwise by an operating agreement N.Y.L.L.C.L § 606 governs the removal of a member of the LLC.

[1] This provision of the LLC Law was amended in August 1999. The above referenced section is the language that was in place at the time that 42-52 Northern Blvd LLC was created, and which applies to it, pursuant to § 606(b).

Inasmuch as Section 606 does not authorize removal, the LLC cannot remove a member without such authorization from an operating agreement.

Appellants' attempt to obscure this reality by arguing that Section 701 of the prior version of the LLC Law implicitly authorizes expulsion because it refers to "expulsion" in passing by providing that an LLC is dissolved and its affairs shall be wound upon the first to occur of the following: ... (d) the bankruptcy, death, dissolution, *expulsion* in capacity in capacity or withdrawal of any member ... *unless* within 180 days after such even the LLC is continued either: (1) by the vote or written consent of the percentage in interest of the members or class or classes, or group or groups of members in the operating agreement; or (2) if no such percentage is specified in the operating agreement by a vote or written consent of a majority in interest of all of the remaining members ...." (Emphasis added).

In the March 2008 Order, the Court states "It is true that Limited Liability Company Law § 701 [refers to 'expulsion' but] the Court's conclusions are not altered" even when considering this provision. (R.13). As the Trial Court so rightly stated, "the mere reference to the expulsion of a member and the statute pertaining to a continued existence of a Limited Liability Company does not amount to a statutory grant of power to the court to order the expulsion of a member." (*Id.*)

The reference to "expulsion" in Section 701 simply means that in the event an *operating agreement* provides for such expulsion, certain events might thereafter occur if a member is actually expelled pursuant to the agreement. The reference certainly is not tantamount to a statutory authorization for expulsion in the absence of an operating agreement. The best proof of that is that despite having three opportunities to do so -- their dismissal motion, their reargument motion and in this appeal Appellants have not cited a single case that specifically empowers a court to expel a member from an LLC.

B. <u>The Tzolis Decision Is Not A Basis For Renewal</u>

The Appellants' sole reason for seeking renewal was their contention that the Court of Appeals Decision in *Tzolis* "holds that courts have broad discretion to devise a remedy for wrongs committed by members of a Limited Liability Company, even in the absence of a statutory provision for such relief, provided that the remedy is not expressly barred by the LLC itself," and thus this Court has the authority to expel Winston Chiu from the LLC, even though the statute does not authorize such expulsion. (Pl. Renewal Motion Br. at 6-7).

In fact, Appellants misread *Tzolis* and that case does not provide any basis for expulsion.

Tzolis concerned Pennington Property Co., LLC, the owner of a Manhattan apartment building. The Appellants owned 25% of the membership interest in the

LLC. They asserted an action on their own behalf and on behalf of the LLC, claiming that those who control the LLC arranged first to lease then to sell the LLC's principal asset for sums below the market value; that the lease was unlawfully signed; and that company fiduciaries benefited personally from the sale. (2008 WL 382345 at *7).

The Supreme Court dismissed the causes of action holding that the individual claims could not be brought by Appellants individually, because they were to address wrongs suffered by the corporation and that New York law does not permit members to bring derivative actions on behalf of a limited liability company. (*Id.*) The Appellate Division reversed, concluding that derivative suits on behalf of LLCs are permitted.

The Court of Appeals affirmed the Appellate Division's holding that derivative suits are permitted. The Court of Appeals' holding in this regard was very narrow, however. The Court of Appeals stated that "we base our holding on the long recognized importance of derivative suit in corporate law, and on the absence of evidence that the Legislature decided to abolish this remedy when it passed the Limited Liability Company Law in 1994." (*Id.*). The decision in *Tzolis* contains a long recitation as to how "the derivative suits have been part of the general corporate laws of this State at least since 1832. It was not created by statute, but by case law." (*Id.*) The Court noted that prior courts had held that

derivative suits could be permitted on behalf of partnerships because there was no clear mandate against limited partners' capacity to bring a derivative action.

The Court of Appeals then explained that given the long history of the availability of a derivative action, it would make no sense for members of an LLC not to have that same remedy. Indeed, the Court of Appeals referred to a derivative suit as being "an old fashioned" remedy.

In their brief, Appellants argue that because the LLC Law does not specifically address expulsion, fiduciaries then have a license to steal, and under *Tzolis*, this Court is required to imply that under the LLC Law, they may be expelled. This is absurd. The Court in *Tzolis* merely stated that given the well established history of derivative suits, that particular remedy should be available to LLC members. It never stated that *a fortiori* other remedies that are not provided for in the LLC Act should be available.

Indeed, there is no well established history of permitting corporations to expel shareholders or partnership's to expel partners without provisions in the entity's operating documents providing for such remedies. And, of course, Appellants cite to no such authority. On the contrary, Appellants specifically admit that (a) *Tzolis* relied on the well-established history of the common law remedy of the derivative suits; and (b) "courts, in the past, have" only "permitted

expulsion of partners where the partnership agreement so provides [.]." (App. Br. at 31).

Thus, by Appellants' own admission the logic of *Tzolis* (to the extent it could ever be applied beyond permitting the particular remedy of a derivative suit) does not apply here.

Leaving aside this fatal concession by Appellants and with regard to the narrow scope of the *Tzolis* holding, the Appellants fail to grasp that the Court of Appeals emphasized a need for permitting a derivative action in *Tzolis* because in that case the plaintiff members could not assert claims on their own behalf inasmuch as the harm was done to the LLC itself, not the individual members, and the Court of Appeals did not reverse the holdings by the trial court and Appellate Division that the Appellants could not assert individual claims. Therefore if the Court of Appeals did not permit a derivative suit then there would have been no remedy for the LLC.

All of the cases under the pre-1999 version of the law, hold that there is no right to expel a member of an LLC. *Spires v. Casterline*, 4 Misc.3d 428, 437, 778 N.Y.S.2d 259 (Sup.Ct.Mo.Cty. 2004) (interpreting current version of § 606(a) and holding that, in absence of operating agreement otherwise stating, under the default statutory provisions, "[LLC] must be dissolved and the business wound up prior to the withdrawal or removal of any of its members"); N.Y. Limit. Liab. Co. Law §

417(a) ("Subject to the provisions of this chapter, the members of a limited liability company shall adopt a written operating agreement that contains any provisions not inconsistent with law or its articles of organization relating to … (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents"); *see also Willoughby Rehabilitation and Health Care Center, LLC v. Webster*, 13 Misc.3d 1230(A), 831 N.Y.S.2d 357, at *4 (Table) (Sup. Ct. Nassau Cty. 2006)(noting that a "limited liability company is hybrid business entity having attributes of both a corporation and a partnership" and, by analogy to partnership, imposing fiduciary duty on member of LLC).

Appellants' reliance on *Drucker v. Mige Associates, II,* 225 A.D.2d 427, 639 N.Y.S.2d 365 (1st Dep't 1996), is misplaced. Appellants do not purport to claim that in *Drucker* the expulsion was based solely on some purported "common law" power of the court to remove a partner. In fact, that case is distinguishable. *First,* because a general partnership is not governed by statutory authority, such as an LLC, but by common law. *Second,* the decision does not make clear whether the partnership was governed by a partnership agreement which would provide some basis for removal of a partner. *Finally,* and perhaps most importantly, under New York law, the partners in a general partnership are both owners and mangers of the partnership, and the removal of a partner dissolves a partnership. In contrast, a New York LLC is like a corporation instead of a partnership, because ownership is

vested in the members while management is vested in the Manager. Thus, in *Drucker*, the court was not merely removing the partner from both management and ownership but was dissolving the partnership because the only way to remove the partner from managing the partnership was to divest him of ownership and dissolve the partnership: "the continuation of the partnership of this partnership as currently constituted is untenable." *Drucker*, 639 N.Y.S.2d at 367. In contrast, a faithless LLC member who is also a manager of the LLC could be removed as a Manager without having to remove him as a member and without triggering dissolution of the LLC. Indeed, section 701 of the LLC Law, the provision so heavily relied upon by Appellants, specifically provides for such a result. Yet, Appellants in this case argue that they want expulsion precisely to avoid the termination of the LLC, which would require the sale of the building.

Appellants' citation to *Homburger v. Levitin*, 130 A.D.2d 715, 515 N.Y.S.2d 825 (2d Dep't 1987) is also irrelevant inasmuch as that case also fails to discuss whether the partnership agreement provided for the explusion of a partner. Moreover, in that a case, there was no expulsion in the true sense of the word. Rather, there was a two-man partnership, whereby one man was the managing partner. The court removed that individual (the defendant) as managing partner for his refusal to provide information to the other partner and other types of mismanagement, but did not expel him from the partnership itself.

And to the extent that *Drucker* and *Homburger* could possibly be read to stand for the proposition that a court may remove a partner absent a provision so authorizing in a partnership agreement, they are contrary to the prevailing law (as well as Appellants' concession that courts have required specific statutory or contractual authorization to expel partners) and should be ignored. *See* 15A N.Y. JUR.2D *BUSINESS RELATIONSHIPS* § 1503 ("Generally, partners have no common-law or statutory rights to expel or dismiss another partner from the partnership."); *See also Dawson v. White & Case*, 88 N.Y.2d 666, 667, 672 N.E.2d 589 (1996) ("Absent [a termination provision in a partnership agreement], however, the removal of a partner can be accomplished only through dissolution of the firm, defined as a 'change in the relation of the partners caused by any partner ceasing to be associated in the carrying on * * * of the business'") (quoting Partnership Law § 60); *Altebrando v. Gozdziewski*, 13 Misc.3d 1241(A), 831 N.Y.S.2d 351 (Table), at *3 (Sup.Ct.N.Y.Co. 2006) ("there is no common-law or statutory right to expel a member of a partnership…") (quoting *Gelder Medical Group v. Webber*, 41 N.Y.2d 680, 683 (1977)), appeal dismissed, 47 A.D.3d 520, 849 N.Y.S.2d 550 (1st Dep't 2008); *Ehrlich v. Howe*, 848 F. Supp. 482, (S.D.N.Y. 1994) (same and accordingly granting plaintiff summary judgment on claim of breach of partnership agreement and breach of fiduciary duty because defendant excluded partner from meetings at which they voted to expel him although

partnership agreement required he be present); *Millet v. Slocum*, 4 A.D.2d 528, 532, 167 N.Y.S.2d 136 (4th Dep't 1957) (expulsion of partner that was not carried out in strict conformity with terms of expulsion provisions in partnership agreement constituted breach of partnership agreement), *aff'd*, 5 N.Y.2d 734, 177 N.Y.S.2d 716, 152 N.E.2d 672 (1958); *see also Framson, Inc. v. Queens Inner Unity Cable Sys.*, 168 A.D.2d 419, 562 N.Y.S.2d 545, 546 (2d Dep't 1990) (failure to comply strictly with specific expulsion provisions in joint venture agreement resulted in no expulsion of joint venturer); *Clark v. Gunn*, 134 N.Y.S.2d 206, 206 (Sup. Ct. Westchester Co. 1954) (where partnership agreement provided for dissolution only by mutual consent, or by death or withdrawal of a partner, plaintiffs could not oust defendant by purporting to dissolve the partnership for breach of the partnership agreement, and by taking over the partnership name).

II. ALTERNATIVELY, THIS COURT SHOULD AFFIRM THE ORDERS BELOW ON THE GROUNDS THAT *RES JUDICATA* AND COLLATERAL ESTOPPEL BAR RE-LITIGATION OF THE EXPULSION CLAIM

Respondent's original motion to dismiss sought dismissal of the Second Cause of Action on two separate grounds: (i) that there was no authority for the Trial Court to permit expulsion; and (ii) that the prior decisions by Justice Blackburne and the Appellate Division not to permit expulsion in Action No. 1 precluded the reassertion of that cause of action in the instant case, on the grounds of *res judicata* and collateral estoppel. The March 2008 Order granted the motion

on the first ground, but did not address the second ground. In the July 2008 Order, Justice Dollard confirmed that the reason he did not do so was because he thought it unnecessary to reach the *res judicata* and collateral estoppel issue inasmuch as the cause of action was already being dismissed for lack of authorization, and he was adhering to that reason for dismissal. (R. 18)("It is not necessary to dismiss a cause of action on more than one ground.").

Notably in the March 2008 Justice Dollard did dismiss the first cause of action on the grounds of *res judicata* and collateral estoppel. To the extent that the Court actually believes that there could possibly be any judicial authority for the expulsion of Winston Chiu from the LLC, Respondent respectfully requests that the Court affirm the dismissal of the Second Cause of Action on the grounds of *res judicata* and judicial estoppel. *ImClone Systems Inc. v. Waksal.* 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005) (agreeing with conclusion of motion court, but for different reasons); *Gryphon Domestic VI, LLC v. APP Intern. Finance Co., B.V.*, 18 A.D.3d 286, 286, 795 N.Y.S.2d 43 (1st Dep't 2005) (argument made before motion court was properly preserved as a ground for affirming the judgment); *American Dental Cooperative, Inc. v. Attorney Gen. of New York*, 127 A.D. 2d 274, 279, 514 N.Y.S.2d 228, 232, n.3 (1st Dep't 1987) ("[a]n appellate court need not rely on the rationale articulated in the court of original jurisdiction to affirm a decision"); *Mandel v. Liebman*, 278 A.D. 637, 102 N.Y.S.2d 563, 565

(1st Dep't 1951) ("any sufficient ground may be raised on appeal to sustain a judgment or order which could have been addressed to the lower court."), rev'd on other grounds, 303 N.Y. 88 (1951).

A. Standards In Applying *Res Judicata* And Collateral Estoppel Doctrines

The principle of *res judicata* prevents a plaintiff from re-litigating in a subsequent action against the same defendant, the same claim that was actually, or could have been, litigated in a prior action between the parties. *Licini v. Graceland Florist, Inc.*, 32 A.D.3d 825, 826, 821 N.Y.S.2d 234, 236 (2d Dep't 2006) ("The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding."); *Citizens Bank of Appleton City, Missouri v. C.L.R. Brooklyn Realty Corp.*, 5 A.D.3d 528, 772 N.Y.S.2d 870 (2d Dep't 2004). Collateral estoppel is a similar doctrine which "precludes a party from re-litigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588 (1985); *Laramie Springtree Corp. v. Equity Residential Properties Trust*, 38 A.D.3d 850, 832 N.Y.S.2d 672 (2d Dep't 2007).

The fact that a plaintiff actually prevailed on a claim or an issue in the initial action, but only received a portion of the damages needed to make that plaintiff whole does not permit that plaintiff to seek additional damages by asserting the same or similar claims against the same defendant in a subsequent action. *See Landau, P.C. v. LaRossa, Mitchell & Ross*, 41 A.D.3d 371, 375, 838 N.Y.S.2d 773, 776 (1st Dep't 2007) ("As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."); *Fitzgerald v. Hudson Nat. Golf Club*, 35 A.D.3d 533, 533, 826 N.Y.S.2d 399, 400 (2d Dep't 2006) (same).

In analyzing whether *res judicata* or collateral estoppel precludes a claim or issue from being re-litigated, the courts look beyond the "labels" that parties attach to the claims, to the true issues and injuries in dispute. *See Melnitzky v. HSBC Bank USA*, 33 A.D.3d 482, 823 N.Y.S.2d 128 (1st Dep't 2006).

In this case, Justice Blackburne granted a motion by Plaintiffs in Action No. 1 to amend their Complaint – by conforming the pleadings to the proof – to add causes of action to declare that Winston was never a member of the LLC or that he was a nominal member and should be excluded because he had: (a) removed his contribution and (b) harmed the LLC through his aborted transfer of the building. (R. 77-78).

This Court reversed Justice Blackburne, holding that the proposed amendments were barred on procedural grounds – because of laches (R. 65) – and on substantive grounds. (*Id.*)

Whereas here, a motion to amend a pleading is denied (or the grant of a motion to amend is reversed) because an equitable claim is barred by laches, (R. 65-66) and because the plaintiff has failed to prove that there is any factual or legal merit to the proposed claim, (*id.*) the decision denying the motion to amend (or reversing the motion to permit the amendment) is a resolution on the merits. *Morgan v. Prospect Park Associates Holdings, L.P.*, 251 A.D.2d 306, 674 N.Y.S.2d 62 (2d Dep't 1998) ("In determining whether to grant leave, a court must examine the underlying merit of the proposed claims."). Thus, such a denial of a motion to amend (or reversal of a grant of a motion to amend) is barred by *res judicata* and collateral estoppel, as there was a determination that "the Trial Court lacked a factual and legal basis to grant the Plaintiffs' application" (R. 65). *C.f., Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 259 A.D.2d 273, 686 N.Y.S.2d 5 (1st Dep't 1999) *rev'd on other grounds*, 94 N.Y.2d 726, 709 N.Y.S.2d 865 (2000); *Feigen v. Advance Capital Management Corp.*, 146 A.D.2d 556, 536 N.Y.S.2d 786 (1st Dep't 1989); *New York State Dam Ltd. Partnership v. Niagara Mohawk Power Corp.*, 222 A.D.2d 792, 634 N.Y.S.2d 830 (3d Dep't 1995) (collateral estoppel applies to decision on appeal reversing trial court order);

Brennan v. Regan, 145 Misc.2d 889, 548 N.Y.S.2d 848 (Sup. Ct. Albany Cty 1989) (same).

The Court of Appeals has held that an application to amend the pleadings to the proof to conform them to the evidence should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to C.P.L.R. § 3025(b). *Murray v. New York,* 43 N.Y.2d 400, 401 N.Y.S. 2d 773, 372 (1977). As stated above, because there was a determination that "the Trial Court lacked a factual and legal basis to grant the Plaintiffs' application on the motion to amend the pleadings (R.65-66) the issues raised therein are barred by *res judicata* and collateral estoppel. *C.f., Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 259 A.D.2d 273, 686 N.Y.S.2d 5 (1st Dep't 1999) *rev'd on other grounds*, 94 N.Y.2d 726, 709 N.Y.S.2d 865 (2000); *Feigen v. Advance Capital Management Corp.*, 146 A.D.2d 556, 536 N.Y.S.2d 786 (1st Dep't 1989). The determination that the proposed amendment was time barred is a determination on the merits that precludes the assertion of that claim in a subsequent action. *See Lake Anne Realty Corp. v. Planning Bd., Town of Blooming Grove*, 262 A.D.2d 413, 691 N.Y.S.2d 173 (2d Dep't 1999) (where a claim is denied as time barred, this decision is *res judicata*).

Where a court makes a determination on the facts and the law of a proposed amendment, this is a determination of the merits. *Hill v. 2016 Realty Associates*,

42 A.D.3d 432, 839 N.Y.S.2d 801 (2d Dep't 2007) ("the court should examine the sufficiency of the merits of the proposed amendment, and, where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied."); *Morton v. Brookhaven Memorial Hosp.*, 32 A.D.3d 381, 820 N.Y.S.2d 294 (2d Dep't 2006) (same); *Thomas Crimmins Contracting Co., Inc. v. City of New York*, 138 A.D.2d 138, 530 N.Y.S.2d 779 (1st Dep't 1988); *Brennan v. City of New York*, 99 A.D.2d 445, 470 N.Y.S.2d 621 (1st Dep't 1984) ("Leave to amend may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required procedure to permit the court to pass upon the merits of the leave for amendment.").

Here the Appellate Division determined that the proposed amended claims failed as a matter of proof, which is obviously a determination on the merits.

This is distinct from whether the amendment was procedurally proper or timely. Thus, the claims that Plaintiffs seek to litigate in the instant Complaint were actually and conclusively litigated at both the trial and appellate level in Action No. 1 and cannot be re-litigated now. Indeed, the Second Department found against them by, among other things, deleting the provisions from the Judgment expelling Winston from the LLC. (R. 65).

B. Appellants Asserted And Litigated The Expulsion Claim in Action No. 1

As outlined in the original motion to dismiss, and as never disputed by the Appellants, the claims and issues in Action No.1 and the instant action are precisely the same and in particular, the Second Cause of Action in the instant Complaint was actually litigated and decided in Action No. 1.

Specifically, at the end of the non-jury trial before Justice Blackburne, the Appellants requested that Justice Blackburne conform the Pleadings to the proof so as to (a) declare that Winston was at best a nominal member of the LLC, with a total interest of at the most 4%; (b) exclude Winston from the LLC on the grounds of his *either* being a nominal member (for having withdrawn his contribution) or as a punishment for his attempted transfer of the building; and (c) alternatively, allow Appellants to buy out Winston's interest for the value set by the Court, lessening damages awarded Appellants for the negative financial consequences allegedly suffered as a result of Winston's transfer.

Justice Blackburne granted the motion to amend.

Paragraphs 26-28 of the instant Complaint allege that Winston fraudulently and unlawfully transferred title to the building from the LLC to Gob Bless WMSC Living Trust, without the knowledge of Man Choi and that this transfer caused the LLC harm. Again, this is exactly what was alleged in Action No. 1. ("In April 2001, Winston Chiu falsely holding himself out to be the 'sole member' of the

LLC, fraudulently and unlawfully transferred title [of the building] from the LLC to the trust."); "not only did the unlawful transfer result in the freezing of the LLC's bank accounts at EastBank, but the transfer created a cloud on the LLC's title and (as of the discovery of the unlawful transfer) has prevented the refinancing of the mortgage at a far more favorable prevailing rate.") (R. 257).

The second cause of action in the instant complaint seeks to exclude Winston because he breached a fiduciary duty to the LLC and caused damage by his fraudulent transfer of the building to his trust. Again, this is exactly the same relief that these same Appellants sought against the same defendant in Action No. 1.

As Justice Blackburne noted in the trial decision:

> Plaintiff [Man Choi Chiu] seeks [on behalf of himself and Plaintiff LLC] [1] a judgment setting aside the deed from 42-52 Northern Boulevard LLC to God Bless WMSC Living Trust; [2] damages and compensation for the negative financial consequences he suffered as a result of the fraudulent transfer; [3] a declaration that Defendant is only at best a nominal member of the LLC; and [4] an Order precluding Defendant's future participation in the LLC.

Thus, the post trial brief submitted to Justice Blackburn in Action No. 1, Appellants repeated the same mantra as to the claims they were making and the relief they were seeking:

> Based upon Appellants' testimony and evidence, the Court [in Action No. 1] should likewise award damages

> against defendants (on Appellants' second cause of action). Not only did the unlawful 'transfer' result in the freezing of the LLC's bank accounts at Eastbank, but the 'transfer' created a cloud on the LLC's title and (as of the discovery of the unlawful 'transfer') has prevented the refinancing of the mortgage at far more favorable prevailing rates.

(R. 257).

In that regard, Appellants requested expulsion of Winston from the LLC. (*Id.*)

This is precisely the very same arguments for expulsion that Appellants have made in the instant Complaint and in this motion for reargument and renewal.

The below chart illustrates that what was actually litigated in Action No. 1 and the instant suit are the same.

ACTION NO. 3 COMPLAINT	**ACTION NO. 1 APPEAL BRIEF BY APPELLANTS**
Complaint ¶¶ 6 – 17, that Man Choi arranged for $5,307,566.30 of the total $5,450,000 purchase price of the building.	Appellants' Answering Brief at 16 – 17, "Appellants paid the balance of the $5.45 million contract price" totaling $5,307,566.30.
Complaint ¶¶ 18 – 24, that Appellants permitted Winston Chiu to "contribute" a total amount of $193,854.51 toward the LLC's purchase price of the building and that soon thereafter Winston withdrew the money.	Appellants' Answering Brief at 19 – 20, Winston contributed "a mere $193,854.51 . . . the proceeds from Winston Chiu's IRC § 1031 "like kind" exchange done strictly for his own personal tax benefit," which contribution Winston "took back . . . from the LLC . . . ."
Complaint ¶¶ 25 – 28, Appellants were harmed by Winston's unilateral transfer of the building to his Trust through a	Appellants' Answering Brief at 15, "as a result of the fraudulent transfer by Winston Chiu, Appellants established at

Deed that he prepared and executed without Appellants' knowledge.	trial that they suffered substantial economic harm."
Complaint's First Cause of Action is for declaratory judgment that Winston is at best a nominal member because he only contributed $193,000 and then withdrew it.	Appellants' Answering Brief at 42 – 43, Winston Chiu's "contributions (most of which, as he admitted, he later unilaterally took back)" made him "at best, only a nominal member of the LLC, having an 'interest' of (at most) four (4%) percent for his initial $193,000 (temporary) 'investment'."
Complaint's Second Cause of Action is for expulsion of Winston Chiu because of damage caused by attempted transfer of property to his Trust.	Appellants' Answering Brief at 40, Point II, discussing the trial court's "appropriate remedy of excluding Winston Chiu from the LLC for his unauthorized, fraudulent and clandestine transfer of the premises."

C. Justice Dollard Dismissed The Claim For Expulsion Based On Winston Having A Nominal Interest As Barred By Res Judicata And Collateral Estoppel

Appellants ignore that their First Cause of Action, which sought a declaratory judgment that Winston was not a member of the LLC, because he allegedly withdrew his "capital" contribution (R. 58, 60) is identical to that aspect of the Second Cause of Action (R. 62 (at paragraph 48)) of the instant complaint which seeks to expel Winston on the basis that his capital contribution was "refunded" to him by the LLC.

Yet, Justice Dollard has already dismissed that aspect of the First Cause of Action as barred by *res judicata* or collateral estoppel. (R. 8). Appellants never appealed from that portion of the March 2008 Order. Indeed, their brief goes out

of its way to say that "[t]his appeal is limited to the dismissal of plaintiffs' second cause of action seeking Winston 'ouster' as a purported member of the company." (App. Br. at 3).

Because the portion of the First Cause Action that was dismissed (seeking a declaration that Winston has no interest in the LLC because he withdrew his contribution) and the portion of the Second Cause of Action (seeking the ouster of Winston because he obtained a "refund" of his contribution) are identical, the non-appealed dismissal of the First cause of Action dooms the appeal as to that aspect of the Second Cause of Action.

D. Justice Blackburne Adjudicated The Claim For Relief With Respect To Winston's Aborted Transfer Of The Building

The claim for damages and expulsion with respect to Winston's aborted transfer of the building was not only actually litigated before Justice Blackburne but was decided on the merits by her. Indeed, Justice Blackburne awarded damages because of the aborted transfer but refused to grant expulsion on that basis, and that claim cannot be re-litigated.

In her Trial Decision, Justice Blackburne held, with respect to damages to be awarded against Winston because of the aborted transfer of the building as follows:

> Since all monies of Defendant Winston Chui connected in any way to the LLC and the purchase of the Northern Boulevard premises were fully recovered by him prior to he commencement of this action, and this Court has ruled that he is not entitled to any interest on those monies for the time prior to his recovering the same, Appellants are not charged with returning any monies to Defendant Winston Chiu and *the sums attributable to any economic harm suffered by Appellants is deemed recovered by Appellants by this Court's disallowance of interest payments to Winston Chiu.*

(R. 80; emphasis added).

Thus, Justice Blackburne was clear as could be in her Trial Decision that she was awarding as damages to Appellants for the injury caused to them by the aborted transfer, the forbearance of the interest on the $193,000 that Winston contributed to the LLC. Appellants never appealed from this Decision. Thus, Appellants cannot seek compensation for the same injury under a cause of action with a different label. *Horowitz v. Aetna Life Ins.*, 148 A.D.2d 584, 585-86, 539 N.Y.S.2d 50, 52 (2d Dep't 1989) ("attempts to recover for [the same] injuries under ... slightly different labels" must be dismissed).

E. The Claim For Relief With Respect To Winston's Aborted Transfer Of The Building Was Litigated Before And Decided By The Second Department

As shown above, Appellants actually litigated before the Second Department the issue of whether Winston could be expelled because of the aborted transfer. Specifically, they argued to the Second Department that Justice Blackburne's expulsion of Winston because of his supposedly being only a nominal member

could also be supported on the grounds of his having breached a fiduciary duty to the Appellants by attempting to transfer the building. This argument was rejected by the Second Department when it deleted from the Judgment issued by Justice Blackburne, the provision expelling Winston from the LLC.

In opposing the motion to dismiss the instant Complaint, Appellants acknowledged that the only damages that Justice Blackburne awarded to Appellants for Winston's aborted transfer of the building was disallowing the interest payments to Winston on his $193,000 contribution. Appellants then went on to argue that because Justice Blackburne's order was reversed, they are now allowed to seek new damages. This is ludicrous. It is well established then when a plaintiff attempts to seek damages, such damages awarded by the Trial Court, and then the damage claim is reversed by the Appellate Division for lack of evidence, that the claim is extinguished on the merits and cannot be re-litigated in a different subsequent litigation against the same defendant. *See Biggs v. O'Neill,* 41 A.D.3d 1067, 838 N.Y.S.2d 703 (3d Dep't 2007).

Appellants also fruitlessly argue that the Prior Appellate Order was not on the merits. This is wrong for two reasons. *First,* as discussed extensively above, this Court considered the merits of the claim to expel Winston and held that there was insufficient evidence to support the claims. (R. 65). *Second,* when Justice Dollard dismissed the First Cause of Action on *res judicata* and collateral estoppel

grounds, he rejected that very same argument. (R. 357; *see also* R. 358 ("What the Defendant completely ignores, or feigns not to understand, is that the modification of the trial court's Decision and Order by the Second Department –based upon purely evidentiary and procedural grounds – was not a ruling on the 'merits' or 'substantive grounds,' such that it would preclude Plaintiffs' present cause of action for a declaratory judgment.)). Appellants did not challenge that rejection of their argument on appeal, and thus this argument should be disregarded now.

CONCLUSION

For the reasons set forth above, the Orders appealed from should be affirmed in their entirety on the grounds stated therein, or alternatively, on the grounds of *res judicata* and collateral estoppel.

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Respectfully submitted,
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