SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

MAN CHOI CHIU and 42-52 NORTHERN BLVD., LLC, Plaintiffs, - against - WINSTON CHIU, Defendant.	Action No. 1 Index No. 21905/07
WINSTON CHIU, Counterclaim Plaintiff/ Third-Party Plaintiff, - against - MAN CHOI CHIU, Counterclaim Defendant/ Third-Party Defendant, - and- HELEN CHIU AND THERESA CHIU, Nominal Counterclaim Defendants, - and - 42-52 NORTHERN BLVD, LLC, Nominal Counterclaim Defendant.	
WINSTON CHIU, Plaintiff, - against - MAN CHOI CHIU and 42-52 NORTHERN BLVD, LLC, Defendants.	Action No. 2 Index No. 25275/07

PLAINTIFFS' POST-TRIAL BRIEF

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TREATISE

This Post-Trial Brief is respectfully submitted on behalf of Man Choi Chiu ("Man Choi"), 42-52 Northern Blvd., LLC (the "LLC"), Teresa Chiu ("Teresa") and Helen Chiu ("Helen") (collectively, the "Plaintiffs"), following a bench trial of these two (2) related actions,[1] before the Hon. Allan B. Weiss, in the Supreme Court, Queens County.

PRELIMINARY STATEMENT

There were two (2) main issues that were tried before the Court: the extent, *if any*, of Winston Chiu's ("Winston" or "Defendant") claimed membership interest in the LLC and, if the Court were to find that Winston had any interest in the LLC, the "fair value" of such interest.

As discussed below, Plaintiffs proved their case by a preponderance of the evidence and the credible testimony of witnesses, including Man Choi and his two (2) daughters (Helen and Teresa), Ronald Fishman and Fred Samuel, the two (2) attorneys who were involved in the LLC's purchase of the subject property in 1999, Paul Miller, the LLC's outside accountant, Winston's own admissions, and the expert testimony of Eric P. Haims, an MAI commercial real estate appraiser, and Joseph B. Nelson, a valuation and forensic accounting expert and CPA.

Plaintiffs proved, among other things, that on May 21, 2001 Winston withdrew *all* of his capital in the LLC, consisting of the $193,854 delivered at closing, i.e., the proceeds from his tax-free exchange under Section 1031 of the IRC. Plaintiffs also proved that Winston had a 7.84% interest (immediately before the withdrawal of his capital) that would have been worth only $4,471 from a purely accounting standpoint. In response to this nominal value of Winston's interest, Nelson employed a "practical approach" to calculate how much it would take to make Winston "whole" for any funds that he had remaining in the LLC. Nelson testified that, *at most*, Winston would be owed $184,326, representing the balance of funds that Winston had parked in the LLC.

Even if, however, the Court were to find that Winston did not withdraw all of his capital as of May 21, 2001, Plaintiffs proved that, as of February 9, 2008, the "valuation date" set by prior

Orders of the court,[2] the "net asset value" of the LLC was $10,449,739. Nelson testified that Winston had an interest of 5.74% in the LLC, the "fair value" of which (after properly applying a "lack of marketability discount" of 25%) would be $440,471.

Defendant, on the other hand, utterly failed to prove that he had an interest in the LLC of *at least* 25%, 32% or otherwise, based upon purportedly indisputable "documentary evidence," i.e., the Second Department's 2007 decision in the prior action (which both the Appellate Court and this Court recently found did not compel a finding that Winston was *at least* a 25% member), and the LLC's completely inaccurate, unaudited financial statements and filed partnership tax returns and K-1 statements for only two years (1999 and 2000). Indeed, Plaintiffs proved that these documents incorrectly recorded the total capital contributions made by the parties and reflected only their initial "*cash*" contributions toward the LLC's purchase of the property, and failed to properly credit Man Choi for the nearly $2 million contributed by him and his wholly-owned companies (1-9 Bondst Realty and the Win Depot entities) toward the purchase of, and an additional $1.23 million contributed to making capital improvements to, the property.

Plaintiffs also proved that the funds contributed by Man Choi and his wholly-owned companies toward the purchase, and improvement, of the property should have been properly recorded on the LLC's books and records as Man Choi's "capital" and not "debt," given the fact that (among other things) there was never any promissory note executed, no stated interest rate or repayment date and no security or collateral given for the advance of these funds.

Notably, Winston's truly bizarre testimony at trial that he is still the 100% owner of the LLC, notwithstanding that appellate and trial courts previously ruled that Winston "withdrew" as a member of the LLC (effective as of February 9, 2008), was completely contrary to the case that his own counsel promised (but ultimately failed) to prove at the beginning of the trial, i.e., that Winston had an interest of either 25% or 32%, but certainly not 100%. Winston's testimony was also

contrary to the testimony of Z. Christopher Mercer, Defendant's own valuation expert, who valued Winston's purported interest at 25%. Indeed, the Court is not required to give any credence to testimony that is inherently improbable[3] and, thus, Winston's self-serving and contradictory testimony should be disregarded in its entirety.[4]

Nor should the Court give any credence to Mercer's testimony that Winston's *assumed* 25% interest in the LLC was worth between $2.2 million to $2.6 million. Mercer never performed an independent review, or verified the accuracy, of the LLC's financial statements and tax returns. Mercer simply accepted "as is" the LLC's completely incorrect "capital structure" and followed Defendant's counsel's orders to value Winston's interest at 25%.

In addition, Mercer failed to apply any "discount for lack of marketability," as required by the Court of Appeals' decision in Matter of Friedman v. Beway Realty Corp., 87 N.Y.2d 161, 638 N.Y.S.2d 399 (1995), and other controlling New York precedent. Mercer attempted to confuse the Court by claiming that a "discount for lack of marketability" was merely a disguised "minority discount," which is not permitted under New York law and which Nelson did not apply.

Moreover, Mercer's "astronomical" valuation did not pass a "sanity check," as it would unjustly give Winston, who contributed only $193,854 of capital (that he subsequently withdrew), annual windfall returns of between 33% and 36.7%, valuing the LLC, a real estate holding company that never generated any actual income, like a hot internet company.

The Court should dismiss Defendant's purported "derivative claims," including his completely fabricated claim for so-called "foregone [sic] rent." Defendant not only failed to prove such claims, but also lacked legal standing to assert such claims in the first instance, as he was adjudged to have "withdrawn" from the LLC a full year before he asserted such purported claims. The Court should also dismiss Defendant's claim seeking to "dissolve" the LLC. Rather, the most equitable method for "liquidation" in this case would be to permit Plaintiffs to "buy out" the "fair

value" of Winston's purported interest in the LLC, especially since Winston withdrew from the LLC more than four (4) years ago.

The Court should also deny Defendants' request for attorneys' fees and disbursements. There is no express provision in the New York Limited Liability Company Law ("LLCL") for recovery of legal fees in derivative actions, and even if legal fees could be recovered, Defendant utterly failed to prove that his protracted, decade-long litigation with his younger brother—the genesis of which was Winston's fraudulent conveyance of the LLC's property in April 2001—in any way "substantially benefitted" the LLC. On the contrary, Plaintiffs proved that Winston sought to harm Man Choi, his family and the LLC, by seizing upon the death of Henry Chiu, Man Choi's only son (in May 2000), in a shameless scheme to take over Man Choi's lucrative businesses and literally steal the LLC's multi-million dollar property. In sum, Winston is not entitled to reap an unjust "windfall" for his purported "contribution" of $193,854 to the LLC, which he made only to effectuate his own 1031 exchange and which funds Winston unilaterally withdrew in May 2001.

ARGUMENT

POINT I

PLAINTIFFS HAVE PROVEN THEIR CASE BY A PREPONDERANCE OF THE EVIDENCE AND THE CREDIBLE TESTIMONY OF WITNESSES

Plaintiffs set out to prove, and indeed, succeeded in proving, by a preponderance of the evidence and credible testimony of witnesses,[5] that Winston is seeking an unjust "windfall" for his $193,854 "contribution" to the LLC, which he made solely to complete his own tax-free exchange, and which funds Winston then unilaterally withdrew on May 21, 2001.[6]

A. *The LLC's Purchase of the Property*

Plaintiffs proved that Man Choi (who still has difficulty understanding and speaking English), acting through his son, Henry, who was his father's "right hand man" and fluent in English, desired to acquire the property known as 42-52 Northern Boulevard, Long Island City,

New York ("Property"), for the use by his various companies in the restaurant equipment and supply business.[7] Ronald Fishman, a real estate attorney, testified that he was retained by Man Choi and his son on behalf of the LLC for the purpose of acquiring the Property. Fishman testified that Winston was not involved in negotiating or drafting the contract of sale.[8] Fishman also testified that he formed the LLC on or about May 13, 1999,[9] after the execution of the contract of sale.

B. *Winston's Limited Participation in the LLC's Purchase of the Property Was Solely to Effectuate His Own 1031 Tax-Free Exchange*

Winston's entire "contribution" toward the LLC's purchase of the Property (for a purchase price of $5.45 million) was a mere $193,854 (or 3.5%).[10] As a favor to his older brother, Man Choi agreed to permit Winston to "invest" the sum of $193,854 (the proceeds from the sale of his separate property in San Lorenzo, California) toward the LLC's purchase of the Property. Winston sought to save himself approximately $20,000 in deferred capital gains taxes by performing a 1031 exchange, using the LLC as his "conduit."[11]

Man Choi testified that he did not need Winston's funds (i.e., $193,854) to purchase the Property.[12] Man Choi and his family arrived in this country from China in 1980 and worked hard to purchase several restaurant supply businesses and commercial properties, including a commercial building at 318 Lafayette Street, and commercial condominium units located at 1-9 Bond Street, both located in Manhattan.

Contrary to Winston's self-serving and plainly false testimony that he was the only "member" of the LLC who contributed any money at closing, in fact nearly all of the funds used to acquire the Property (totaling $5,693,618, with closing costs), except for the $3.5 million mortgage from Eastbank, N.A., came from Man Choi or his wholly-owned entities.[13] Thus, Man Choi contributed a total of $1,999,763 toward the purchase, which consisted of: (i) $1,272,566 paid at the closing by 1-9 Bondst Realty (including $1,149,920 from the refinancing of its mortgage)[14] and Win Restaurant Supply; (ii) Man Choi's $535,000 deposit ($527,262 of which was funded by 1-9

Bondst Realty[15]); (iii) $145,145 in closing costs funded by Win Restaurant Supplies, Inc.; and (iv) $47,052 in building costs funded by Win Restaurant Supply and Win Restaurant Equipment and Supply Corp. (see Ex. P-32).

The LLC obtained a $3.5 million mortgage from Eastbank, N.A. based upon the credit of Man Choi and his companies, including a $500,000 collateral mortgage and an assignment of leases for advertising space (billboards) at 318 Lafayette Street. In addition, Man Choi's wife, Betty, separately deposited $150,000 into a cash collateral account at Eastbank as further security for the LLC's mortgage loan.[16] By contrast, Winston gave Eastbank a mere one-page "Personal Financial Statement," listing his supposed "net worth" as $1,767,690, which included $600,000 in alleged "promissory notes" as an "asset."[17] Contrary to Winston's disingenuous attempt to falsely portray himself not only as the "sole owner" of the LLC, but also the sole guarantor on the mortgage, two (2) of Man Choi's entities, Win Restaurant Equipment and Supply Corp. and Win Restaurant Supplies Inc., and his late son, Henry Chiu, also guaranteed the LLC's mortgage.[18] Fishman testified that the bank requested that Winston execute a guaranty only because he was executing loan documents on behalf of the LLC.[19] Moreover, Eastbank never sought to enforce Winston's paper guaranty, as the LLC timely paid all of the mortgage payments.[20]

Indeed, Winston's participation in the LLC's purchase of the Property was solely to complete his own 1031 tax-free exchange.[21] Fishman and Miller (the LLC's outside accountant) testified that Winston had to be given some indicia of ownership of the Property in order to effectuate his 1031 exchange.[22] Winston himself admitted that this was necessary, and it is for this very reason that title to the Property was temporarily conveyed to Winston (and his wife) and the very same day (September 8, 1999), title to the Property was rightfully re-conveyed to the LLC.[23]

Man Choi and his son specifically retained Fred Samuel, a real estate attorney, in order to "facilitate" Winston's 1031 exchange.[24] At the closing, Samuel delivered an attorneys' check, in

the amount of $193.854.51, representing the proceeds from the sale of Winston's property in San Lorenzo, California. The notation on the check read, "Winston Chiu 1031 Exchange."[25]

Paul Miller testified that he understood that Winston was going to "roll in" the funds from his 1031 exchange into the LLC's purchase of the Property, and then "roll out" his funds (i.e., the $193,854) when Winston found another property to purchase. It was never the intention or agreement of the parties that Winston would become Man Choi's partner, or that he would be given any actual ownership interest in the LLC.[26] In fact, Fishman testified that none of the purported "agreements" that were placed in the closing binder (Ex. D-D, at Tab "13"), merely because Henry had asked him to keep these documents in the same file, played any role in the LLC's purchase of the Property,[27] and there was no evidence that any of those agreements were ever implemented.

Moreover, Winston never had any management responsibility for the Property, nor paid any of its operating expenses (except for a few token payments made to bolster his claims in the prior action). Notwithstanding the foregoing, on Winston's joint personal income tax returns with his wife, filed between 1999 to the 2009, Winston fraudulently took, as a deduction, 100% of the LLC's operating expenses, as though he were the 100% owner of the LLC.[28] Thus, for a mere "contribution" of $193,854, Winston acted as though he were the owner of the LLC owning a multi-million dollar property, with all of the tax benefits, and none of the risks or liabilities, of ownership.

Plaintiffs also proved that the $60,000 that Winston used (in May 1999) to open an account at Eastbank,[29] in the name of 1-9 Bondst Realty, was properly not recorded as Winston's capital contribution on the LLC's books and records, as it was not a direct contribution to the LLC.[30] Notably, 1-9 Bondst Realty (and not Winston) advanced these funds to pay some of the closing costs in connection with the LLC's purchase of the Property, and the remaining funds were subsequently deposited into an LLC bank account at Eastbank. Indeed, $40,382 of the $60,000, advanced by 1-9 Bondst Realty, was properly recorded as part of Man Choi's *initial* capital

contribution, totaling $581,563. See Ex. D-A.

Plaintiffs also proved that Winston seized upon the death of Henry, Man Choi's only son, to literally steal the Property from Man Choi and his family. Winston (who had no involvement or say in any of Man Choi's businesses) did not want Man Choi's wife and three daughters to have anything to do with the LLC or any of Man Choi's other businesses.[31] Thus, after the death of Man Choi's son, Henry, in May 2000, Winston set out to prey upon his younger brother and his family, first by stealing the LLC's Property, then by unilaterally withdrawing his purported "investment" in the LLC, and most recently by claiming that he owned all or some interest in the LLC. Regrettably, this was not the first time that Winston had attempted to defraud his own relatives.[32]

As adjudicated in the prior action, by deed, dated April 26, 2001,[33] Winston fraudulently conveyed title to the Property from the LLC to his so-called "Godbless WMSC Living Trust." It is no mere coincidence that Winston established the Trust (making his family its beneficiaries) on the same day—April 26, 2001—that he stole the LLC's Property.[34] Winston admitted (in the prior action, as well as here) that he relied upon a single piece of paper, a so-called "Certificate of Authority" erroneously drafted by Eastbank in connection with the closing and listing Winston as the purported "sole member" of the LLC, in order to "justify" his wrongful conduct.[35]

Following the LLC's purchase of the Property, in early 2000 Winston attempted to effectuate a second 1031 tax-free exchange, as the first one (involving his San Lorenzo property) evidently failed. Although Winston netted only $290,000 in proceeds from the sale of his rental property in Pleasanton, California, in order to match the purchase price of the subject Property ($5.45 million) to effectuate his 1031 exchange, Winston fraudulently reported to the IRS, on Form 8824 filed along with his 2000 income tax return, that the "adjusted basis" of the "like-kind property" that he gave up (his Pleasanton property) was $5,458,037.[36]

Plaintiffs proved that none of the $290,000 was ever used in connection with the LLC's

purchase of the Property.[37] Moreover, contrary to Winston's blatantly false testimony, none of the $290,000 was ever given by Winston to Henry (who was sick and died in early May 2000) to use to pay down the LLC's mortgage. Nor could Henry have lawfully acted as a "qualified intermediary" for Winston's 1031 exchange, notwithstanding Winston's fabricated testimony to the contrary.[38]

Rather, on March 7, 2000 Winston himself deposited $290,623 into a time deposit bank account, nominally in the name of the LLC, at Eastbank. With interest, the $290,623 grew to $302,856. On March 7, 2001, without Man Choi's or the LLC's knowledge of this account or their consent, Winston closed that account, and transferred $302,855.70 of proceeds to an account at Charles Schwab that Winston also established nominally in the name of the LLC, but which he completely controlled.[39] Then, in May 2001, Winston unilaterally repaid himself his $193,854 from his failed San Lorenzo 1031 exchange and $60,000, matching the amount that he had advanced to 1-9 Bondst Realty.[40] Thus, on May 21, 2001, Winston wrote a check, in the amount of $193,854.41,[41] which was just 10 cents shy of his $193,854.51 "investment" in the LLC, and deposited that check into his and his wife's personal account at Charles Schwab (Account No. 3115-0742). On May 30, 2001, Winston withdrew $60,000 from the LLC's account (see Ex. D-M), and deposited the funds into his own personal account at Charles Schwab. That Winston withdrew almost exactly the same amount as he had "contributed" to the LLC (i.e., the proceeds of his 1031 exchange), and exactly the $60,000 that he had advanced to 1-9 Bondst Realty, was no mere "coincidence."[42] Indeed, Winston himself testified, and admitted under oath, at his deposition and at trial, that he withdrew these funds in order to decrease his "investment" in the LLC.[43]

At trial, using the "Follow the Money Trail" chart (see Ex. P-33), Nelson explained how Winston repaid himself his $193,854 "investment" in the LLC, and the $60,000 loaned to 1-9 Bondst Realty, utilizing the $290,000 from his second (failed) 1031 exchange. The chart illustrated that a total of $484,478 ($193,855 + $290,623) flowed into the LLC and that Winston withdrew a

total of $300,152 (including his $193,854 and $60,000), leaving a balance of $184,326 in funds (which was not "capital," as Winston had reduced his interest in the LLC to zero). See Ex. P-33.

After May 2001, Winston used the remaining funds in the LLC's Schwab account to pay, among other things, some of his personal attorneys' fees incurred in the original fraudulent conveyance action, as well as his personal expenses.[44]

C. *Determining and Valuing Winston's Interest in the LLC*

The determination of the extent, and the "fair value," of Winston's purported interest in the LLC was performed by Joseph Nelson, a valuation expert at the accounting firm of Berdon LLP and a CPA (unlike Mercer). Nelson testified that, in accordance with LLCL § 509,[45] he used the "net asset value" approach to value a 100% interest in the LLC.[46] Nelson testified that such approach was the appropriate method for valuing a real estate holding company such as the LLC.[47] The value of the LLC's real estate, as determined by Eric Haims, a commercial real estate appraiser with the highest MAI designation from the Appraisal Institute,[48] and a Senior Vice President of Jerome Haims Realty, Inc., was just one of the components (i.e., a "fixed asset") in a complex calculation.

In order to calculate the "net asset value" of the LLC, Nelson started with the LLC's raw data, including (among other things) its general ledger, financial statements, filed tax returns for only two years (1999 and 2000), bank statements and workpapers prepared by Paul Miller's accounting firm. As Nelson testified, because the LLC's books and records were incorrect, inaccurate and incomplete, Nelson (and the staff at Berdon under his supervision) performed the arduous task of analyzing, verifying and reconstructing the LLC's books and records in order to accurately reflect activity in the LLC's accounts.[49] In addition, Nelson testified that, because there was limited activity recorded in the LLC's general ledger after 2001, he had to "roll forward" the LLC's financial statements (trial balance sheets, balance sheets and profit and loss statements) in order to calculate the "net asset" value as of February 9, 2008.[50]

Nelson testified that he also had to adjust the members' capital accounts, because they were improperly established in the first instance by Paul Miller's firm. Nelson testified that the purported 75%-25% "split" in interest between the parties (as reflected in the LLC's tax returns and financial statements) was "absolutely" inaccurate, because it only reflected the relative "cash" contributions of the parties toward the LLC's purchase of the Property. As such, Nelson gave no "credence" to the LLC's filed tax returns.[51] Nelson testified that it appeared that Paul Miller's firm had "backed into" or "reverse engineered" the 75%-25% split by allocating only $581,562 as Man Choi's capital contribution (which only reflected a small portion of his total contributions toward the LLC's purchase of the Property of nearly $2 million), and $193,854 to Winston (the proceeds from his 1031 exchange).[52] In order to arrive at this seemingly arbitrary 75%-25% split in interest, Nelson testified that, among other things, the amount of $6,180 (taken from the $1.14 million refinancing of 1-9 Bondst Realty's mortgage) was "plugged" into the equation.[53]

Indeed, it was not necessary for Winston to have a 25% interest in the LLC in order to complete his 1031 exchange. As Nelson testified, the interest allocated to Winston should have been much less, given the parties' total relative contributions. Thus, Nelson testified that nearly $2 million out of the $5,693,618 in total closing costs for the LLC's purchase of the Property was funded by Man Choi and his wholly-owned entities, including $1,149,920 from the refinancing of the mortgage by 1-9 Bondst Realty. Winston's total contribution was only $193,854.[54]

Nelson also testified that Man Choi's contributions toward the purchase of the Property (as with Winston's $193,854), should have been properly classified as "equity" and not "debt," especially given that, among other things, there was no promissory note, no stated interest rate, no repayment schedule and no security or collateral given for the advance of such funds. Nelson's conclusion was based upon Generally Accepted Accounting Principles (GAAP), Statement of Position 78.9 (Accounting for Investment in Real Estate Ventures), published by the American

Institute of CPA's, IRS statutes and case law, including United States Tax Court cases and Roth Steel Tube Co. v. Commissioner of Internal Revenue, 800 F.2d 625 (6th Cir. 1986).[55] In Roth Steel, the U.S. Court of Appeals set forth eleven (11) factors that courts should consider in making this determination, including whether a debt instrument was ever executed, which is itself a strong indication of whether the advances should be classified as "debt" or "equity."

Based on his analysis of these factors, Nelson concluded that advances made for the purchase, and improvement, of the Property (by either party) should be properly classified as "equity" and not "debt."[56] Nelson noted that it was particularly significant that Man Choi had invested money in the LLC to improve the Property at a time when the Property was undergoing major renovations and could not have generated any income, and when the LLC could not have obtained any further financing from Eastbank, because the "loan-to-debt" ratio was at 65%.[57]

Thus, Nelson testified that had the LLC's capital accounts been properly established as of "Day 1" (i.e., immediately after the LLC's acquisition of the Property), the correct "split" in ownership should have been 91% for Man Choi, and 9% for Winston.[58]

i. ***Valuation of Winston's Interest as of May 21, 2001 ("Scenario 1")***

Nelson testified that he determined, and valued, Winston's interest as of May 21, 2001 (and also as of February 9, 2008). The May 21, 2001 valuation (referred to as "Scenario 1") was based upon testimony, including Winston's own admissions, that Winston withdrew *all* of his capital from the LLC as of that date.[59]

Haims testified that based upon his appraisal of the Property, as of May 2001 the Property was worth $4.2 million. Haims testified that the value of the Property had decreased from the date of purchase due to a decline in the real estate market as a result of a recession.[60]

From the starting point of a 91%-9% split in interest between the parties, Nelson further adjusted the parties' capital accounts based upon testimony and documentary evidence that, as of

May 21, 2001, Man Choi had contributed a total of $357,686 toward capital improvements to the Property.[61] Helen and Teresa testified that these improvements (fully completed by June 2002, but partially funded as of May 2001) included, among other things, constructing a new second floor mezzanine level that increased the square footage of the building by 20,000 square feet, installing two (2) new escalators, upgrading all building systems (including HVAC, electrical and plumbing), repairing the roof and installing new flooring.[62] Haims testified that these capital improvements undoubtedly increased the value of the Property, and not merely by the cost of these improvements.

Giving Man Choi credit for the cost of the improvements made to the Property as of May 21, 2001, Nelson calculated that Winston's interest decreased slightly from 9% to 7.84% (Winston's interest had not been unilaterally "diluted" from 25%, which was wrong in the first instance).[63] Nelson calculated that, from a purely accounting standpoint, Winston's 7.84% interest would be worth $14,000, with a "fair value" of $4,471 (after making adjustments for Winston's prior withdrawal of funds).[64] However, so as not to penalize Winston for the decrease in the value of the Property (due to the recession), Nelson testified that he employed a "practical approach" to calculate how much it would take to make Winston "whole" for any funds that he had remaining in the LLC. Thus, Nelson calculated that Winston had contributed $193,854 toward the purchase of the Property and he had deposited $290,623 (from his second, failed 1031 exchange) into a separate account nominally in the name of the LLC. Nelson calculated that Winston withdrew a total of $300,152, leaving a balance of $184,326.[65]

Thus, Nelson concluded that, *at best*, Winston is owed the return of his $184,326 in funds (not "capital") remaining in the LLC, which (not coincidently) is the same amount shown in the "Follow the Money Trail" chart (see Ex. P-33).[66]

ii. ***Valuation of Winston's Interest as of February 9, 2008 ("Scenario 2")***

Nelson testified that there was "compelling evidence" for his valuation as of May 21, 2001

(Scenario 1), which scenario most accurately reflected the "fair value" of Winston's interest.[67] However, in order for his valuation analysis to be complete, Nelson was also asked to perform an "alternative" valuation of Winston's interest (referred to as "Scenario 2"), *assuming* that Winston had not withdrawn all of his capital on May 21, 2001, but retained same in the LLC through and including February 9, 2008.[68]

Nelson used the same "net asset value approach" to perform the valuation of Winston's interest as of February 9, 2008. Specifically, Nelson "rolled forward" the LLC's financial statements (trial balance sheets, balance sheets and profit and loss statements) to February 9, 2008.[69] For both Man Choi and Winston, Nelson recorded funds advanced for capital improvements to the Property (totaling $1.23 million) as "capital" or "equity," and for the operating expenses of the Property as "loans." From June 2002 (after the renovations were completed) through the end of 2005, Nelson calculated the "rent" as being equal to the total operating expenses of the Property (mortgage, real estate taxes, insurance, etc.). From 2006 through February 9, 2008, Nelson calculated the "fair market rent" that could have been obtained for the Property as the difference between the "fair market rent" for the Property (based upon Haims' testimony and appraisal report) and the total operating expenses paid by Man Choi and his entities.[70] The difference was recorded as a "receivable" due from Man Choi, which was factored into the "net asset value" of the LLC.[71]

Nelson testified that although Winston's interest in the LLC had decreased from 7.84% to 5.74% due to Man Choi's capital contributions (see Ex. P-34), Winston's interest, however, was worth substantially more because the value of the Property had increased.[72] Haims testified that as of February 9, 2008, the Property (in its renovated condition) was worth $13.7 million.[73]

Nelson testified that the "net asset value" of the LLC, as of February 9, 2008, was $10,449,739. Nelson then properly applied a 25% "discount for lack of marketability,"[74] because (as he testified) an interest in a privately-owned LLC is illiquid and there is no readily available

market for it.[75] Nelson's testimony was consist with, and supported by, well established law in New York that the valuation of non-publicly traded shares must "include consideration of any risk associated with the illiquidity of the shares" in "recognition of the fact that shareholders in closely held corporations, as contrasted with shareholders in public companies, are unlikely to find prospective buyers for their shares." Matter of Seagroatt Floral Co., Inc., 78 N.Y.2d 439, 445-46, 576 N.Y.S.2d 831, 834 (1991). As the Court of Appeals made abundantly clear in Seagroatt, "lack of a public market for the shares of a closely held corporation should certainly be considered in determining what a willing purchaser would pay for such shares."[76]

Rather than merely directing that unmarketability be considered (as Mercer claimed he did), the Court of Appeals' decision in Beway Realty, compels valuation experts to calculate the value of the shares with due regard for their unmarketability, by applying a percentage discount or otherwise fixing a lower share price. Indeed, the Court of Appeals held that a court's failure to apply a marketability discount (by mischaracterizing the diminution in value as a "minority discount") constitutes reversible error.[77] Thus, in Beway Realty, the Court of Appeals, holding that a lack of marketability discount should be applied, remanded the case to the trial court for further proceedings and, upon, remand (as was subsequently reported in a different case[78]) the trial found that a 26% lack of marketability was appropriate. Indeed, courts in New York, and particularly in the Second Department, have consistently applied a lack of marketability discount, ranging from 15% to 26%, with most courts holding that a 25% discount (as found by Nelson[79]) is appropriate.

Moreover, consistent with Matter of Murphy v. United States Dredging Corp., 74 A.D.23 815, 903 N.Y.S.2d 434 (2d Dep't 2010) and Beway Realty, Nelson did not apply a so-called "minority discount."[80] Notwithstanding Mercer's attempts to confuse the lack of marketability discount with a minority discount, the Court of Appeals in Beway Realty could not have been any clearer that the former must be applied, while the latter is not permitted under New York law.

Nelson testified that, after applying a 25% discount to the LLC's "net asset value" of $10,449,739, the "fair value" of a 100% membership interest in the LLC was worth $7,837,304, and that Winston's 5.74% interest was worth $450,000.[81] After adjusting for $9,529 "due from" Winston (as he had withdrawn more funds from the LLC than he had put in), Nelson testified that, as of February 9, 2008, the "fair value" of Winston's interest in the LLC was $440,471.[82]

POINT II

DEFENDANT DID NOT COME CLOSE TO PROVING HIS ALLEGED INTEREST IN THE LLC OF *AT LEAST* 25%, 32% OR OTHERWISE

In contrast to the evidence and credible testimony presented by Plaintiffs, Winston's case was full of empty promises (made in counsel's opening statement) of what Defendant would prove, but ultimately failed to prove at trial. Instead, Defendant attempted to obfuscate the truth and mislead the Court with mostly false and irrelevant testimony and evidence, and an empty multimedia presentation by Mercer, Defendant's valuation expert, whose expertise on New York statutory "fair value" valuation proceedings fell far short of his credentials.

A. *Defendant Failed to Prove the Extent of His Alleged Interest in the LLC*

In his opening, Winston's counsel claimed that Winston had *at least* a 25% interest in the LLC (or a 32% interest, due to an alleged "accounting mistake"), based upon what Winston's counsel claimed was "documentary evidence" and "indisputable business records." At trial, however, Winston failed to carry his burden, as none of the purported "documentary evidence," and certainly not Winston's own bizarre testimony that he is still the 100% owner of the LLC,[83] proved Winston's purported interest in the LLC of 25%, 32% or otherwise.

Winston's case was entirely premised upon: (i) his utterly discredited argument that the Second Department had previously determined (in the prior action), that Winston had at least a 25% interest; (ii) the LLC's completely inaccurate tax returns, K-1 statements and financial statements prepared by Paul Miller's firm; (iii) and a single, isolated piece of paper supposedly listing the

"shareholders" of the LLC and their respective percentage interests.

At trial, this Court completely rejected Defendant's assertion that the Second Department's Decision and Order, dated March 13, 2007, mandated a finding that Winston had at least a 25% interest. On the contrary, this Court unequivocally ruled (which is now the "law of the case") that, "[t]he 25 percent is a starting point, it's not an ending point."[84] As this Court explained, the Second Department held that Justice Blackburne erred in determining that Winston was "never a member" of the LLC, which the Second Department pointed out "would be a difficult conclusion to reach based upon the documentary evidence but they did not say that he has a 25 percent interest" (id.). This Court also questioned the reliability of such "documentary evidence," including the LLC's tax returns prepared by Paul Miller's firm, stating that:

> For example, this witness [Nelson] has testified that the tax returns were not properly reporting the capital contributions of the two partners. Okay, that's an explanation I believe the Appellate Division wants for why it's not 75/25. . . . [I]n my opinion, the Appellate Division is saying you simply can't conclude that your client had no interest. You must take into account the documentary evidence that exists, vis-à-vis the LLC. You can support that position or you can oppose that position, but you've got to start there. And at the end of the process your client Winston is entitled to some interest. How much will depend on this trial.[85]

Indeed, the Second Department recently confirmed, in its two decisions rendered on February 28, 2012, that its prior decision never held that Winston had *at least* a 25% interest in the LLC, by affirming the lower court's (Strauss, J.) denial of Winston's motions for partial summary judgment on this very issue.[86]

As for the so-called "documentary evidence," Plaintiffs proved at trial that the LLC's tax returns, unaudited and uncertified financial statements and the summary of the members' capital contributions to purchase the Property (see Ex. D-A), all of which were prepared by Paul Miller's firm, were absolutely wrong from the outset, because Man Choi was not given proper credit for the nearly $2 million (and not just the $581,000 that was recorded) contributed by him and his wholly-

owned entities in connection with the LLC's acquisition of the Property in 1999.

The Court should reject Defendant's disingenuous attempt to fabricate a "business record" out of a document comprised of three (3) pages that no witness was able to identify, other than that it came from Paul Miller's "files."[87] In fact, no witness testified that these pages were, in any way, "connected" or were even faxed together (the fax cover page refers to a total of "4" pages, while the document contains a total of only 3 pages).[88] Helen testified that she prepared at least one of the pages of the document, listing the "shareholders" of the LLC, for use by the LLC's accountants to prepare the LLC's tax return, which Winston was demanding in order to complete his 1031 exchange.[89] At the time that this document was supposedly prepared (in May 2001), Helen was not the LLC's "Chief Financial Officer."[90] Helen was a college graduate with limited, outside business experience, who was thrust into a role in her father's businesses following the tragic death of her brother Henry in May 2000.

Moreover, there is nothing to support Defendant's spurious claims that such document was either a "business record" of the LLC, or a document prepared in accordance with LLCL § 1102 (listing the membership of the LLC). Nor did Defendant present any credible evidence or testimony to show that Helen (who is not an accountant), and not the LLC's outside accountants, conceived of the (patently erroneous) 75%-25% split in interest between Man Choi and Winston. In fact, Helen testified that she did not come up with the purported 75%-25% split.[91]

B. *Winston Cannot Create a Membership Interest By "Estoppel"*

The Court should reject Defendant's attempt to fabricate a 25% interest for himself by "estoppel." In Heisler v. Gingras, 90 N.Y.2d 682, 665 N.Y.S.2d 59 (1997), reargument denied, 91 N.Y.2d 867, 668 N.Y.S.2d 563 (1997), the Court of Appeals rejected the use of "estopppel" to resolve ownership disputes between competing shareholders, as here.

Moreover, the doctrine of estoppel is inapplicable in the absence of a judgment secured in a

prior action by a party against whom estoppel is sought, which is not the case here.[92] Thus, in the absence of a prior favorable judgment, any prior inconsistent statements or positions may only be used to impeach credibility, but they may not be leveraged to have preclusive effect.[93]

Furthermore, the doctrine of estoppel does not apply in this case where neither Man Choi nor the LLC received or derived any tangible benefit from "holding out" Winston as a purported member of the LLC.[94] Quite to the contrary, the LLC has been substantially harmed by Winston's fraudulent and wrongful conduct and protracted litigation for the past decade.

C. *Winston Failed to Prove That He Was a 32% Member of the LLC*

Defendant also failed to prove that he had a purported 32% interest in the LLC. Defendant failed to present any evidence to support his claim that an "accounting mistake" was allegedly made with respect to how Winston's $60,000 advance of funds to 1-9 Bondst Realty was allocated. Counsel's statement, in his opening, that some portion or all of the $60,000 should be moved into Winston's column as his "capital," is not evidence, and was not proven by any testimony or evidence offered during the trial. Indeed, Nelson testified that, based upon his own independent review of the LLC's books and records, he was not aware that any such "mistake" had been made.[95]

Notably, Defendant's own valuation expert did not testify as to a purported 32% interest. Nor did Mercer testify as to Winston being the 100% owner of the LLC, as Winston himself had testified at trial, which, if true, would not have required a trial.[96] Indeed, Mercer only valued Winston's interest at 25% (and at 1%, evidently so that his final conclusion of value could be adjusted in case his assumption that Winston was a 25% member were proven wrong).

D. *Mercer's Valuation Testimony Lacked Any Probative Value*

There was absolutely no substance or probative value to Mercer's "multimedia" testimony (on direct, Mercer attempted to read from Powerpoint slides prepared in advance). Mercer sought to mimic the "net asset approach" used by Nelson and, not surprisingly, came up with the same

$10.4 million "net asset value" for the LLC as Nelson did, but only because he likely revised his valuation after Nelson had testified in order to match Nelson's conclusion.[97] Moreover, Mercer used too may shortcuts and made too many unfounded (and erroneous) assumptions for his testimony, and for his final conclusions of value, to have any credibility.[98]

In the first instance, Mercer simply *assumed* that Winston had a 25% interest in the LLC, based upon the instructions given to him by Winston's counsel, and his superficial review of the LLC's limited tax returns and K-1 statements, without having independently verified the information contained in those documents.[99] Nor did Mercer independently analyze and reconstruct the LLC's books and records, as Nelson did, in order to have an accurate reflection of the activity in the LLC's accounts.[100] Mercer wrongly *assumed* that merely because he was asked to value Winston's interest as of February 9, 2008, there was no need for him to actually verify what he referred to as the LLC's "historic financial statements,"[101] without which (as Nelson testified) a true "net asset value" valuation cannot be properly performed. Thus, Mercer never verified whether Winston withdrew all of his capital in May 2001.[102] Nor did Mercer ever verify whether the LLC actually had $450,000 in cash on hand in February 2008. Mercer simply extrapolated the figure from the $432,000 that was recorded on the LLC's books and records a decade ago (in 2002), without taking into account the fact that Winston withdrew such funds in 2001.[103] In fact, as Nelson testified, the correct figure for "cash" as of February 9, 2008, was only $3,195 (see Ex. P-35).

Mercer also failed to make any adjustments to the members' capital accounts. Mercer testified that he accepted the LLC's capital structure "as is."[104] Thus, Mercer failed to credit Man Choi for all of his capital contributions, totaling $3,181,357, above and beyond the initial $581,000, instead (improperly) classifying them as "loans." See Ex. P-34. Mercer also failed to account for approximately $1.8 million in operating expenses paid by Man Choi's entities from 1999 to 2002, a period in which Mercer (without any basis) testified the LLC "broke even." Significantly, had

Mercer properly accounted for the $1.8 million in operating expenses, it would have completely eliminated Winston's fictitious claim for $1.6 million of alleged "foregone [sic] rent."[105]

Moreover, Mercer relied upon pure hearsay and conjecture to come up with his fictional "foregone rent" in the amount of $1.6 million.[106] In the first instance, Defendant's real estate appraiser did not testify as to fair market rent values for 2002 through 2005.[107] Mercer admittedly fabricated the fair market rental values by relying upon his "hearsay" conversations with Mary Mavrogianis, Salmon's associate, and "extrapolating backwards" from the 2006 rental value by *assuming* that rents would be 5% lower each year.[108]

In sum, Mercer "backed into" the same $10.4 million "net asset value" for the LLC determined by Nelson in order to make his analysis and valuation appear to be plausible.

Moreover, in order to maximize the value of Winston's purported interest as much as possible, Mercer incredulously testified that a "zero" lack of marketability discount should be applied.[109] To justify his erroneous conclusion, Mercer attempted to confuse the Court with his own "Three Levels of Value" theory (which he preaches to paid audiences on the lecture circuit), claiming that applying any "discount" at all is inconsistent with valuing a "controlling interest" in a company. However, as Nelson explained, in order to perform a statutory "fair value" valuation, Nelson was obligated by New York law to determine Winston's proportionate interest in the going concern value of the corporation as a whole. Thus, Nelson was not valuing Winston's "minority interest," nor applying an improper "minority discount."

Moreover, Mercer was attempting to confuse the two different types of discounts by (erroneously) claiming that a "discount for lack of marketability" (which must be applied under New York law) was simply a disguised "minority discount." However, as previously noted, the Court of Appeals in Beway Realty could not have been clearer that courts must not only consider, but also apply, a lack of marketability discount, when valuing an illiquid interest in a non-public

company that has no readily available public market. Mercer's flip comment that "zero is a number"[110] does not satisfy the mandate of Beway Realty. As such, Mercer's misreading or misunderstanding of the Court of Appeals' decision in Beway Realty should not be given any weight or credence.[111]

Notably, Mercer's testimony that applying a discount for lack of marketability is inconsistent with Beway Realty was previously rejected by the Court in Giaimo v. Vitale, 31 Misc.3d 1271(A), 930 N.Y.S.2d 174 (Sup. Ct., N.Y. Co. 2011). There, the Court stated that, "[n]otwithstanding Mercer's significant credentials, his testimony in this regard cannot be credited as it is, in fact, inconsistent with *Beway*."[112] Mercer cannot take any credit for the fact that, notwithstanding that the Court in Giaimo rejected his expert testimony, the Court, nonetheless, concluded that no discount should be applied, based upon the referee's finding that the availability of similar properties on the open market was limited, such that investors would readily purchase the properties through a purchase of the corporate shells. Id. at *4. Here, Mercer implausibly testified that the LLC's "warehouse" building in Long Island City, Queens was equivalent to the Manhattan rental buildings in Giaimo.[113] Haims, however, had testified that it would have been difficult to sell the Property in early 2008, as credit markets were already beginning to tighten up.

Mercer also attempted to confuse the Court by claiming that there is no difference between the sale of realty and the sale of an interest in a privately-held company. Thus, Mercer testified that based upon a *hypothetical* sale of the Property at $13.5 million that occurred on the appraisal date (February 9, 2008), the realty would have been liquidated and converted to cash, which funds the LLC could then have distributed to "buy out" Winston's purported interest.[114] In support of his theory, Mercer testified that the risk of selling the Property was built into the "exposure time" and the "cap rate." According to Mercer, the LLC is merely a "cellophane" wrapper around the realty.

However, contrary to Mercer's testimony, the "exposure time," which occurs *prior to* the

valuation date, is not the same as the "marketing time" for selling the property that occurs *afterwards*.[115] Haims testified that there was no guaranty that the Property would have been sold as of the appraisal date for that price, and that it could have taken as long as 18 months to actually sell it.[116] Indeed, contrary to Mercer's testimony, according to Salmon (Winston's real estate appraiser), it could have taken between 6-12 months to actually sell the Property (after the appraisal date).

Based on the foregoing, the Court should reject Mercer's "astronomically" high valuation of Winston's 25% interest as being worth between $2.2 million and $2.6 million (depending on whether "foregone rent" is included), as it did not come close to passing a "sanity check."[117] Mercer himself admitted that based on Winston's $193,854 "investment," Winston would receive a return on this capital of ten times (based on annual returns of 33%-36.7%).[118] That would value the LLC, an entity that has never earned any actual income, in the same stratosphere as internet companies such as *Google*,[119] and give Winston an unjust "windfall" for an "investment" in which he had no management responsibility, no liabilities and no actual risk.

In sum, Defendant utterly failed to prove his claim that he has an interest of 25%, 32% or otherwise in the LLC, which interest was supposedly worth between $2.2 million and $2.6 million.

POINT III

THE COURT SHOULD DISMISS ALL OF DEFENDANT'S PURPORTED "DERIVATIVE CLAIMS" AND DENY HIS REQUEST FOR ATTORNEYS' FEES

The Court should dismiss all of Winston's purported "derivative claims," as Winston lacked legal standing to assert any such claims in the first instance.[120] At the time that Winston asserted his purported claims (in his Amended Answer, dated March 9, 2009), Winston had already been adjudicated to have "withdrawn" as a member of the LLC, effective as of February 9, 2008.

As the Court noted in Cohen PDC, LLC v. Cheslock-Bakker Opportunity Fund, LP, 2010 WL 4530242 at p. 5 (Sup. Ct., N.Y. Co.) (Oct. 18, 2010), "[t]o have standing in a derivative suit regarding an LLC, a plaintiff must own portions of the LLC both at the beginning of and throughout

litigation."[121] As Winston lacked standing to assert any derivative claims, the Court should dismiss all such claims.[122]

Upon the dismissal of Winston's purported "derivative claims," the Court should also deny Winston's request for attorneys' fees and disbursements (set forth in his pre-trial memorandum), as there is no agreement or statute that would otherwise entitle Winston to seek legal fees.[123] In fact, there is no express provision in the LLCL for an award of legal fees in a derivative action. Notably, while Section 626(e) of the New York Business Corporation Law provides for a discretionary award of legal fees if an action brought on behalf of the corporation is successful,[124] there is no similar provision in the LLCL.[125]

Even if the LLCL were interpreted to provide for an award of legal fees, Winston would still not be entitled to recover any legal fees, because nothing that he has done with respect to the LLC in the past decade has "substantially benefitted" the LLC.[126] To the contrary, Plaintiffs proved at trial that the object of the litigation commenced by Winston was simply to further his own financial interest, rather than provide any tangible benefit for, or on behalf of, the LLC. Moreover, legal fees are not recoverable in an action that is nothing more than a dispute between two (2) individuals as to their respective ownership interests in a privately-held company.[127]

POINT IV

THE COURT SHOULD DISMISS WINSTON'S CLAIM TO "DISSOLVE" THE LLC

The Court should likewise dismiss Winston's claim to "dissolve" the LLC. Rather, given the facts and equities of this matter, the Court should permit Plaintiffs to "buy out" Winston's relatively small interest (if any) in the LLC based on the "fair value" of such interest.[128]

Here, as in In re Superior Vending, LLC, 71 A.D.3d 1153, 898 N.Y.S.2d 191 (2d Dep't 2010), the equities overwhelmingly favor a "buy out" of Winston's purported interest in the LLC, rather than a liquidation of the LLC and a forced sale of the LLC's valuable Property. Moreover, a

"buy out" of Winston's purported interest is the most appropriate and equitable remedy, given the fact that Winston "withdrew" from the LLC more than four (4) years ago. Indeed, no purpose would be served by this Court ordering the LLC to be dissolved and its Property liquidated, which result would be both punitive and inequitable.

Accordingly, in the event that this Court were to determine that Winston was a member and find that he had any actual interest in the LLC, the proper equitable remedy would be to order a "buy out" of Winston's interest in the LLC at its "fair value," rather than a dissolution of the LLC and a sale of its Property.[129]

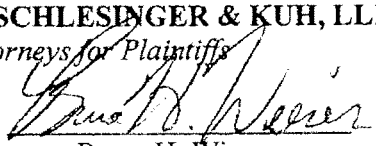
CONCLUSION

For all of the foregoing reasons, the Court should enter a judgment in favor of Plaintiffs as follows: (i) declaring that Winston Chiu withdrew all of his capital (i.e., $193,854) from the LLC on May 21, 2001, and that, *at most*, Winston is owed the sum of $184,326 (the expert opinion that most accurately reflected the value of Winston's purported interest); or (ii), alternatively, and only in the event that the Court were to find that Winston Chiu did not withdraw all of his capital from the LLC on May 21, 2001, declaring that, as of February 9, 2008, the "fair value" of Winston's 5.74% interest in the LLC was $440,471; (iii) dismissing Winston Chiu's claim for "dissolution" of the LLC; (iv) dismissing all of Winston Chiu's purported "derivative claims" and denying his claim for attorneys' fees; and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 5, 2012

Respectfully submitted,

WARSHAW BURSTEIN COHEN SCHLESINGER & KUH, LLP
Attorneys for Plaintiffs

By: 
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ENDNOTES

[1] These two (2) actions, entitled Man Choi Chiu and 42-52 Northern Blvd., LLC v. Winston Chiu (Index No. 21905/07), and Winston Chiu v. Man Choi Chiu *et al.* (Index No. 25275/07), were joined for a joint trial.

[2] See Decision and Order, dated March 31, 2008 (Flaherty, J.), as affirmed by the Second Department at 71 A.D.3d 621, 896 N.Y.S.2d 132 (2d Dep't 2010), and Order and Decision, dated January 26, 2012 (Strauss, J.), as also affirmed by the Second Department at 92 A.D.3d 922, 938 N.Y.S.2d 899 (2d Dep't 2012).

[3] See De Mayo v. Yates Realty Co., 35 A.D.2d 700, 314 N.Y.S.2d 918 (1st Dep't 1970), *aff'd*, 28 N.Y.2d 894, 322 N.Y.S.2d 727 (1971).

[4] Pursuant to the doctrine of "falsus in uno, falsus in omnibus," a trier of fact is permitted "to disregard in its entirety the testimony of a witness who has willfully given false testimony on a material matter." New York Pattern Jury Instructions ("PJI") 1:22; see, e.g., Matter of Goodman, 2 A.D.2d 558, 157 N.Y.S.2d 109 (1st Dep't 1956); Harris v. Rabinowitz, 133 Misc. 507, 231 N.Y.S. 654 (2d Dep't 1928).

[5] See PJI 1:23; Torem v. 564 Central Ave. Rest. Inc., 133 A.D.2d 25, 518 N.Y.S.2d 620 (1st Dep't 1987).

[6] References to the testimony of witnesses at trial is denoted by the date when the witness testified and the page number of the transcript (e.g., 11/02/11 Tr., at p. 100). Plaintiffs' trial exhibits are denoted as "Ex. P-[number]," and Defendant's trial exhibits as "Ex. D-[letter]."

[7] 10/27/11 Tr., at p. 164.

[8] 2/7/12 Tr., at p. 230.

[9] See Articles of Organization of 42-52 Northern Blvd., LLC, dated May 13, 1999 (Ex. D-E). Fishman testified that there is, and was, no "operating agreement" for the LLC.

[10] 11/1/11 Tr., at p. 241.

[11] 12/2/11 Tr., at p. 652; 2/7/12 Tr. at p. 247.

[12] 10/27/11 Tr., at p. 173; 11/3/11 Tr., at p. 359.

[13] See Ex. P-32; 11/1/11 Tr., at p. 242.

[14] See Exs. P-9 and P-31; 10/27/11 Tr., at p. 193.

[15] See Ex. D-K.

[16] See Exs. D-D (at Tab "8"), D-OO and P-39; 4/22/12 Tr., at p. 565; 3/22/12 Tr., at pp. 565-566, 573.

[17] See Exs. D-OO and P-21; 2/2/12 Tr., at pp. 4-5. Joseph Lo, a Vice President of Eastbank, testified that the bank never verified Winston's net worth statement, and that Winston (who has been retired since at least the late 1980's), based on his finances, would not have been able on his own to make the payments on the LLC's $3.5 million mortgage (5/22/12 Tr., at pp. 571-572).

[18] See Ex. D-D (at Tab "8," pp. 513-514, 517-520); 10/27/11 Tr., at p. 186.

[19] 2/7/12 Tr., at p. 233.

[20] In connection with the LLC's refinancing of the mortgage in late 2009, Eastbank willingly released Winston from his guaranty obligation on the mortgage. See Ex. P-6; 2/2/12 Tr., at p. 8. By February 2008, the LLC (using funds advanced by Man Choi's companies) had paid down the mortgage by $916,866.

[21] 11/1/11 Tr., at pp. 246-247.

[22] 11/1/11 Tr., at p. 248; 2/7/12 at pp. 233, 241. Winston was listed as a "member" of the LLC solely to complete his 1031 exchange. See 2/7/12 Tr., at p. 256.

[23] See Ex. D-D (at Tab 2); 12/2/11 Tr., at p. 654.

[24] 11/30/11 Tr., at p. 586.

[25] See Ex. D-D (at Tab "14," p. 650); 11/30/11 Tr., at p. 589.

[26] 10/27/11 Tr., at pp. 181-182, 196.

[27] 2/7/12 Tr., at pp. 246-248. At trial, the Court properly sustained an objection, on the grounds of the New York Dead Man's Statute (CPLR § 4519), to any testimony by Winston Chiu concerning purported agreements entered into between him and Henry Chiu (2/2/12 Tr., at pp. 58-59).

[28] See Ex. P-17(A-K); 12/2/11 Tr., at pp. 635-636, 639. Significantly, Winston's original 1999 tax return, dated May 24, 2001, at Schedule "E" (see Ex. P-19), did not list any ownership interest in the Property (12/2/11 Tr., at pp. 655, 657). It was not until August 2001—after Winston fraudulently conveyed title to the Property to his own Trust in April 2001—that Winston filed an *amended* return for 1999, in which he listed, for the very first time, his purported 100% ownership interest in the Property. See Ex. P-17A; 12/2/11 Tr., at pp. 658.

[29] See Ex. D-FF.

[30] 11/1/11 Tr., at pp. 271-272, 275; 2/7/12 Tr., at p. 298; 3/21/11 Tr., at 533.

[31] 10/27/11 Tr., at 194-195.

[32] 12/2/11 Tr., at pp. 660-661; 10/27/11 Tr., at pp. 166-168. In a California action entitled, Kim Fai Leung Chiu v. Tsong Jin Leung, the Court, in its decision (see Ex. P-8), found (at page 9) that Winston, was "both a sophisticated and educated man," who had a "problem" with "being unable to distinguish between his own property and the property of others."

[33] See Ex. P-16; 12/2/11 Tr., at p. 617.

[34] See Ex. P-15; 12/2/11 Tr., at pp. 612-614.

[35] See Ex. D-D (at Tab "8," p. 540); 12/2/11 Tr., at pp. 670-671; 2/7/12 Tr., at p. 234.

[36] See Ex. P-20 (for identification only). A copy of the same Form 8824 was admitted in evidence as part of Ex. P-17B. See, also, 12/2/11 Tr., at pp. 668-670.

[37] 12/2/11 Tr., at pp. 664-665.

[38] 12/2/11 Tr., at pp. 663-664.

[39] See Exs. D-I and D-M; 2/2/12 Tr., at pp. 16-17. The name on this account was the LLC, but the address was Winston's and his wife's residence in San Leandro, California.

[40] 12/2/12 Tr., at pp. 15, 18.

[41] See Exs. D-M and P-22; 2/2/12 Tr., at pp. 22-23.

[42] 3/20/12 Tr., at p. 493.

[43] See Prior Sworn Testimony of Winston Chiu Submitted in Support of Plaintiffs' Case-in-Chief (Item 11) (Ex. P-38); 2/2/12 Tr., at pp. 24-31.

[44] See Ex. P-23A; 2/2/12 Tr., at p. 20. In the original fraudulent conveyance action, Winston was represented by Peter Kolodny, Esq., of Kolodny, P.C. Kolodny's legal bills were addressed, and rendered, to Winston personally. See 2/2/12 Tr., at 32-33.

[45] Pursuant to LLCL § 509, in the absence of an operating agreement, a member is entitled to receive "the fair value of his or her membership interest in the limited liability company as of the date of withdrawal based upon his or her right to share in distributions from the limited liability company" (emphasis added). In Matter of Friedman v. Beway Realty Corp., 87 N.Y.2d 161, 168, 638 N.Y.S.2d 399, 403 (1995), the Court of Appeals stated that, "in fixing fair value, courts should determine the minority shareholder's proportionate interest in the going concern value of the corporation as a whole, that is what a willing purchaser, in an arm's length transaction would offer for the corporation as an operating business" (internal quotation marks omitted).

[46] 3/21/12 Tr., at p. 529.

[47] 2/7/12 Tr., at p. 319. While Mercer also claimed to have utilized the same approach, Mercer never bothered to perform an independent review and verification of the LLC's books and records, as Nelson did.

[48] By contrast, Henry A. Salmon, Defendant's real estate appraiser, does not have an MAI designation. Rather, Salmon testified that he was a "candidate" for an SRA designation, which pertains only to residential properties. The bulk of Salmon's practice involves appraising residential properties, in Staten Island, for banks (3/30/12 Tr., at 628-629). Although the conclusions of value for the Property (in renovated condition, as of February 9, 2008), reached by both appraisers were very close (within $200,000 of each other), Salmon used inappropriate comparable properties (that were much smaller and had a higher per square foot value than the Property) and manipulated variables (such as the "cap rate") to skew his value upwards.

[49] 2/6/12 Tr., at pp. 163-154, 169; 3/14/12 Tr., at 361.

[50] Berdon's compilation of the LLC's books and records, together with the workpapers and schedules that it prepared in order to calculate the "net asset value" of the LLC as of the two valuation dates (May 21, 2001 and February 9, 2008), are set forth in a five (5) volume set of exhibits (Exs. P-25 through P-29).

[51] 2/6/12 Tr., at pp. 166, 213; 3/14/12 Tr., at p. 408. In adjusting the members' capital accounts, Nelson simply followed the contributions made by both Man Choi and Winston (3/21/12 Tr., at p. 519). Pursuant to LLCL §§ 503 and 504, in the absence of an operating agreement, as here, the sharing of profits and losses and distributions is allocated on the basis of the "contributions" of the members.

[52] 2/6/12 Tr., at pp. 214, 221; 2/7/12 Tr., at p. 286; 3/14/23 Tr., at p. 403.

[53] 2/6/12 Tr., at p. 215; 3/14/12 Tr., at pp. 402-403.

[54] See Ex. P-31, P-32; 2/6/12 Tr., at p. 210.

[55] 2/7/12 Tr., at p. 282; 3/14/12 Tr., at pp. 353-354.

[56] 2/6/12 Tr., at pp. 200-201.

[57] 2/7/12 Tr., at p. 289. See In re SubMicron Systems Corp., 432 F.3d 448 (3d Cir. 2006).

[58] See Ex. P. 31; 2/6/12 Tr., at p. 206; 2/7/12 Tr., at p. 287; 3/21/12 Tr., at p. 513.

[59] 2/6/12 Tr., at p. 166.

[60] 11/2/11 Tr. at pp. 344-345.

[61] See Exs. P-5 and P-31; 2/6/12 Tr., at p. 199. See Schedule 150-B (Ex. P. 29). Winston admitted that he contributed nothing toward the capital improvements of the Property. See 2/2/12 Tr., at p. 7.

[62] The total amount spent to improve the Property from 2000 to 2002 was $1,223,014. See Ex. P-10(A-D) and Schedule 300-E, which was included in Ex. P-29 (Berdon's Binder #5).

[63] 3/21/12 Tr., at pp. 513-514.

[64] See Illustrative Scenario 1 (Ex. P-35); Ex. P-36; 2/6/12 Tr., at pp. 166-167.

[65] See Ex. P-36 (Amount "At Most" Due Winston Chiu); 2/6/12 Tr., at p. 167; 2/7/12 Tr. at pp. 299-300, 334-335.

[66] 2/7/12 Tr., at pp. 299-300, 337. Notably, after Winston withdrew all of his capital, his interest in the LLC, if he ever had any in the first place, became "zero."

[67] 2/7/12 Tr., at pp. 329-330.

[68] 2/7/12 Tr., at pp. 310.

[69] 2/1/12 Tr., at p. 197; 2/7/12 Tr., at pp. 325-326.

[70] 2/6/12 Tr., at pp. 196-197. Notably, from 1999 to February 2008, Man Choi and his companies funded over $4.8 million in operating expenses, while Winston paid zero (2/7/12 Tr., at p. 313). Man Choi's total contributions to the LLC for the acquisition and improvement of the Property, and payment of operating expenses, through February 9, 2008, totaled $8,068,155, as compared with Winston's $184,326 (after adjusting for Winston's withdrawals). See Schedule 300-E (included as part of Ex. P-29). See, also, 2/7/12 Tr., at p. 341.

[71] Nelson testified that Winston did not have a claim for such "receivable," in the amount of $928,000, because it was already factored into the "fair value" of the LLC and, thus, it would be "double counting" if Winston were to assert a claim for such funds. 2/7/12 Tr., at pp. 316-317.

[72] 3/14/12 Tr., at p. 375; 3/21/12 Tr., at pp. 515-517.

[73] Haims testified that he employed two (2) different approaches—sales comparison and income capitalization—to derive the value of the Property as of February 9, 2008. Haims did not use the cost approach, which is more suitable for newer properties or "specialty use" properties (neither of which is applicable here). Haims testified that because the Property had equal appeal to both users (who would pay more for the Property) and investors, in reconciling the values he gave equal weight (a 50%-50% split) to both, in order to arrive at a final conclusion of value of $13.7 million ($200,000 more than Salmon's conclusion of value). See 11/2/11 Tr., at p. 333.

[74] In deriving a 25% lack of marketability discount, Nelson testified that he relied not only upon precedent in New York, but also on restricted stock studies, including the Pepperdine Studies (2/7/12 Tr., at pp. 322-323).

[75] 2/7/12 Tr., at pp. 321-322.

[76] Id. at 446, 576 N.Y.S.2d at 835. See Matter of Blake v. Blake Agency, Inc., 107 A.D.2d 139, 149, 486 N.Y.S.2d 341, 349 (2d Dep't 1985) (Second Department noting that a discount is properly factored into the value of close corporation shares because they "cannot be readily sold on a public market"), leave to appeal denied, 65 N.Y.2d 609, 494 N.Y.S.2d 1028 (1985).

[77] Id. at 171-72, 638 N.Y.S.2d at 405; see, also, Matter of Raskin v. Walter Carl, Inc., 129 A.D.2d 642, 644, 514 N.Y.S.2d 120, 122 (2d Dep't 1987) (modifying trial court order that failed to apply a lack of marketability discount).

[78] See Matter of Jamaica Acquisition, Inc., Index No. 9278/2007, at p. 24 (Sup. Ct., Nassau Co.) (Sep't 29, 2009) (Warshawsky, J.). There, the court noted that, "[t]he courts of this state have commonly applied [a lack of marketability discount] to net asset valuation," citing (among others) Beway Realty and Matter of Blake. The Court also noted that the lack of marketability discount "is not designed to discount the value of the corporation or any particular asset (i.e. goodwill), but to reflect the lack of marketability of the shares of the corporation. The [lack of marketability discount] is, thus, applied to the aggregate net asset value or to whatever particular method was used to obtain fair value." Id. at p. 24.

[79] See, e.g., Cooper v. Cooper, 84 A.D.3d 854, 923 N.Y.S.2d 596 (2d Dep't 2011) (applying a 25% discount); Matter of Murphy v. United States Dredging Corp., 74 A.D.3d 815, 818, 903 N.Y.S.2d 434, 437 (2d Dep't 2010) (applying a 15% discount, as requested by both sides, and holding that such discount is not limited only to "goodwill"); Matter of Blake, *supra* (Second Department applying a 25% discount); Jamaica Acquisitions, *supra* (applying a 25% discount); Matter of Beattie, 2009 NY Slip Op 30181 (U) (Sup. Ct., Suffolk Co. 2009) (applying a 25% discount).

[80] 2/7/12 Tr., at p. 324; 3/21/12 Tr., at pp. 530-531.

[81] Illustrative Scenario 2 (Ex. P-35); 2/6/12 Tr., at p. 168; 2/7/12 Tr., at p. 340.

[82] See Ex. P-36; 2/7/12 Tr., at p. 343.

[83] 12/2/11 Tr., at pp. 610, 619, 625.

[84] 3/14/12 Tr., at p. 391.

[85] 3/14/12 Tr., at pp. 391-392.

[86] 3/14/12 Tr., at pp. 348-350.

[87] 10/26/11 Tr., at pp. 146, 148.

[88] 11/28/11 Tr., at p. 434.

[89] 10/25/11 Tr., at p. 87.

[90] 11/28/11 Tr., at p. 434.

[91] 10/25/11 Tr., at p. 44.

[92] See Angel v. Bank of Tokyo-Mitsubishi, Ltd., 39 A.D.3d 368, 835 N.Y.S.2d 57 (1st Dep't 2007).

[93] See Baie Realty Corp. v. Cutler, 32 A.D.3d 307, 310, 820 N.Y.S.2d 57 (1st Dep't 2006).

[94] 11/1/11 Tr., at p. 21. Notably, all of the authorities relied upon by Defendant in support of his estoppel theory, including Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 881 N.Y.S.2d 369 (2008), Zemel v. Horowitz, 11 Misc. 3d 1058(A), 815 N.Y.S.2d 496 (Sup. Ct., N.Y. Co. 2006), and Naghavi v. N.Y. Life Ins. Co., 260 A.D.2d 252, 688 N.Y.S.2d 530 (1st Dep't 1999), are inapposite for exactly the same reason, i.e., the party against whom estoppel was sought to be applied derived either a tax or some other type of tangible benefit as a result of the tax filing. Moreover, courts have held that information contained in tax returns is not conclusive and dispositive of evidence of ownership, particularly where (as here) the purported ownership percentages reflected in tax returns is contradicted by other evidence or testimony. See, e.g., Chassier v. Brasserie Julien Corp., 2007 WL 2815085 (Sup. Ct., N.Y. Co. 2007).

[95] 2/6/12 Tr., at p. 216.

[96] 4/5/12 Tr., at p. 843.

[97] 4/5/12 Tr., at pp. 886-887.

[98] See Felt v. Olson, 51 N.Y.2d 977, 435 N.Y.S.2d 708 (1980) (noting that the weight, if any, to be given to an expert's opinion, is within the court's discretion).

[99] 4/3/12 Tr., at p. 82; 4/5/12 Tr., at pp. 832-833. Mercer admitted that he did not independently verify the extent of Winston's claimed 25% interest in the LLC.

[100] 4/5/12 Tr., at pp. 835-836.

[101] 4/5/12 Tr., at pp. 848.

[102] 4/5/12 Tr., at p. 833.

[103] 4/5/12 Tr., at pp. 854-855.

[104] 4/5/12 Tr., at pp. 848.

[105] 4/5/12 Tr., at pp. 857-859, 864-865; 4/3/12 Tr., at p. 866.

[106] 2/2/12 Tr., at pp. 41-42.

[107] 4/5/12 Tr., at pp. 846, 883.

[108] 4/3/12 Tr., at p. 49; 4/5/12 Tr., at p. 883. See Wright v. NYCHA, 208 A.D.2d 327, 624 N.Y.S.2d 144 (1st Dep't 1995) (holding that an expert cannot create facts upon which his conclusion is based). Indeed, an expert's testimony must be based either upon his or her own personal knowledge or facts in evidence. See People v. Smith, 91 N.Y.2d 372, 670 N.Y.S.2d 978 (1998).

[109] 4/3/12 Tr., at p. 770. Mercer's testimony that a "zero" discount should be applied when he is representing the "economic plaintiff" in a case was in sharp contrast to the position Mercer's firm took in Swopes v. Siegel-Robert, Inc., 748 F. Supp.2d 876 (E.D. Mo. 1999), a case in which his firm was representing the "economic defendant" and advocated a 35% lack of marketability discount.

[110] 4/5/12 Tr., at p. 904.

[111] See Nevins v. Great Atlantic and Pacific Tea Company, 164 A.D.2d 807, 559 N.Y.S.2d 539 (1st Dep't 1990) (holding that expert testimony that conflicts with legally established standards must be disregarded). Indeed, while Mercer claimed that he relied upon the principles that he derived from Beway Realty (his so-called "Seven Commandments"), he testified that the Court of Appeals was itself "inconsistent" in the way it had applied its own principles (4/5/12 Tr., at pp. 916-917).

[112] Id. at *4. There, the Court also refused to follow Vick v. Albert, 47 A.D.3d 482, 849 N.Y.S.2d 250 (1st Dep't 2008), a First Department decision upon which Mercer testified he relied for his testimony, to the extent that such decision was inconsistent with Beway Realty. Id. at *3. Indeed, at trial, Mercer admitted that he did not recall or rely upon controlling authorities in the Second Department on this critical valuation issue (4/5/12 Tr., at pp. 911-912).

[113] 4/5/12 Tr., at p. 934.

[114] 4/5/12 Tr., at pp. 888-889.

[115] 4/5/12 Tr., at p. 893-893.

[116] 11/2/11 Tr., at p. 330; 11/29/11 Tr., at p. 505-506; 3/21/12 Tr., at p. 530.

[117] 4/5/12 Tr., at p. 828.

[118] 4/5/12 Tr., at pp. 829-830.

[119] 4/5/12 Tr., at p. 837. An investor who purchased *Google* stock when it went public in 2004, and retained the stock, would have realized a nine-fold return on his or her investment. See Wall St. J., May 22, 2012, A17.

[120] Winston's purported "derivative claims" include an alleged breach of fiduciary duty claim against Man Choi, and against Helen and Teresa for allegedly "aiding and abetting" a breach of same by Man Choi, and a claim for "lost rent" (in excess of $4.7 million) which, at trial, his counsel referred to as a claim for "foregone [sic] rent" (and was reduced to $1.6 million). Notably, at trial Defendant did not present any evidence or testimony with respect to the former; nor did Defendant prove his claim with respect to the latter.

[121] See Billings v. Bridgeport Partners, LLC, 21 Misc.3d 535, 540-541, 863 N.Y.S.2d 591, 594 (Sup. Ct., Erie Co. 2008) (holding that a person who is not a member at the time that the derivative claims are asserted, lacks standing to bring those derivative claims).

[122] See, e.g., Ciullo v. Orange and Rockland Utilities, Inc., 271 A.D.2d 369, 369, 706 N.Y.S.2d 428, 429 (1st Dep't 2000) (holding that plaintiffs who have sold their shares in a corporation lacked standing to challenge dismissal actions), leave to appeal denied, 95 N.Y.2d 760, 714 N.Y.S.2d 710 (2000).

[123] See, e.g., Matter of A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1, 511 N.Y.S.2d 216 (1986) (holding that fees and disbursements may only be recovered in a litigation if authorized by an agreement between the parties, statute or court rule); Chapel v. Mitchell, 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994).

[124] BCL § 626(e) provides that in a successful derivative action, the court "may award the plaintiff . . . reasonable expenses, including reasonable attorney's fees[.]"

[125] As noted in Tzolis v. Wolff, 10 N.Y. 3d 100, 855 N.Y.S.2d 6 (2008), the Legislature considered, but ultimately failed to include in the final version of the law, a provision that would have expressly vested courts with discretion to award reasonable expenses, including reasonable attorneys' fees, to the successful plaintiff in a derivative action. Accordingly, in the absence of a specific provision in the LLCL permitting the recovery of legal fees in a derivative action, Winston should not be permitted to recover any legal fees in connection with his pursuit of purported "derivative claims. See H & H Reinsurance Brokers Ltd. v. Hermitage Ins. Co., 254 A.D.2d 328, 678 N.Y.S.2d 651 (2d Dep't 1998) (noting that the failure of the legislature to include a matter within a statute is an indication that its exclusion was intended, citing McKinney's Con. Laws of NY, Book 1, Statutes, § 74).

[126] The basis for an award of attorneys' fees in a derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf. See Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967). In order to warrant an award of fees, there has to be a "substantial benefit" which accrued to the corporation as a result of the action. See, e.g., Seinfeld v. Robinson, 246 A.D.2d 291, 296-298, 676 N.Y.S.2d 579, 582-583 (1st Dep't 1998); Kaplan v. Rand, 192 F.3d 60, 71 (2d Cir. 1999); Matter of Edelman v. Goodman, 47 Misc.2d 8, 261 N.Y.S.2d 618 (1965), aff'd, 24 A.D.2d 557, 260 N.Y.S.2d 617 (2d Dep't 1965).

[127] See First Westchester Nat'l Bank v. Olsen, 25 A.D.2d 661, 662, 268 N.Y.S.2d 232, 234 (2d Dep't 1966), aff'd, 19 N.Y.2d 342, 280 N.Y.S.2d 117 (1967).

[128] See In re Superior Vending, LLC, 71 A.D.3d 1153, 1154, 898 N.Y.S.2d 191 (2d Dep't 2010); Lyons v. Salamone, 32 A.D.3d 757, 758, 821 N.Y.S.2d 188, 189 (1st Dep't 2006) (holding that trial court could order mutual buyout rights in a dissolution proceeding, even in the absence of express statutory authority).

[129] The allowance of interest in an accounting action is a matter within the court's discretion based upon equitable principles. See Susi Contracting Co. v. Orlando, 33 A.D.2d 548, 304 N.Y.S.2d 452 (1st Dep't 1969), leave to appeal denied, 26 N.Y.2d 610, 309 N.Y.S.2d 1027; John Hancock Life Ins. Co. of New York v. Hirsch, 77 A.D.3d 710, 909 N.Y.S.2d 519 (2d Dep't 2010) (holding that an award of pre-judgment interest in an equitable action rests within the court's discretion). Here, the LLCL does not expressly provide for interest on a distribution upon withdrawal of a member (LLCL § 509). Moreover, Winston should not be awarded any *pre*-judgment interest based upon his own inequitable, wrongful and bad faith conduct toward the LLC. Further, there has been no showing by Defendant that Plaintiffs "wrongfully" withheld any funds from him.