

Greenman v Miller

2023 NY Slip Op 32498(U)

July 21, 2023

Supreme Court, New York County

Docket Number: Index No. 650304/2017

Judge: Joel M. Cohen

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

PRESENT: HON. JOEL M. COHEN PART 03M

Justice

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JANE GREENMAN,

INDEX NO. 650304/2017

Plaintiff,

- v -

LARRY MILLER, MILLMAN LLC, 392 COLUMBUS AVENUE
LLC, SDMJD NEXT GENERATION LLC

Defendants.

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DECISION AFTER NON-JURY TRIAL

For many years, Larry Miller (“Defendant” or Mr. Miller) and Charles Greenman were close friends and business partners. They were godfathers to each other’s children and trustees of each other’s family trusts. Their friendship extended to their families, which spent holidays and took vacations together. After Mr. Greenman’s death in 2014, the relationship between Mr. Miller and Plaintiff Jane Greenman (Mr. Greenman’s spouse and executrix of his estate) unraveled, ultimately spiraling into this sprawling litigation involving a barrage of claims and counterclaims ranging from petty to substantial. It is a cautionary tale on many levels. What follows is the Court’s (and its indefatigable law clerk’s) best effort to sort through the financial wreckage after a seven-day bench trial.

OVERVIEW

Mr. Greenman, a partner at the Troutman Sanders, LLP law firm, and Mr. Miller, an entrepreneur and investor, joined in numerous business ventures that they conducted through three limited liability companies: nominal defendants Millman LLC (“Millman”), 392 Columbus

Avenue LLC (“392 Columbus”) and SDMJD Next Generation LLC (“SDMJD”) (the “Entities”), of which only Mr. Miller, Mr. Greenman, and their immediate families were members.

Millman was (and to a limited extent still is) a lending business. Mr. Miller provided the lion’s share of the capital, and Mr. Greenman managed the day-to-day aspects of the investments. Mr. Greenman also sourced the deals, with many of the borrowers being individuals Mr. Greenman knew from his business. It was a surprisingly (and in retrospect unfortunately) informal relationship, oftentimes eschewing formal documentation of rights and responsibilities. The two friends often modified their informal agreements, and later reconciled amounts due from or to either of them without clear documentation. Nevertheless, the business was successful, and the Miller and Greenman families earned millions from this venture (essentially it was a simple arbitrage opportunity between Mr. Miller’s favorable borrowing rates and Millman’s market lending rates).

On February 22, 2014, Mr. Greenman suddenly and unexpectedly passed away. His passing left Mr. Miller solely in charge of the Entities (as the successor manager) and left his spouse, Jane Greenman (“Plaintiff” or “Ms. Greenman”) in control of Mr. Greenman’s interest in the Entities, in addition to her own.

Shortly after Mr. Greenman’s passing, the relationship between Mr. Miller and Ms. Greenman started to unravel—and simultaneously, so did the business of the Entities. The flash point was when Mr. Miller asked Ms. Greenman to sign a personal guaranty for half of the outstanding Millman loans, and Ms. Greenman refused. Mr. Miller testified that he and Mr. Greenman had an understanding to the same effect, but that alleged agreement—like many between them—was never formalized. The effect of Mr. Miller and Mr. Greenman’s informal business relations left Mr. Miller with little accountability, and left Ms. Greenman—not knowing

exactly what Mr. Miller and Mr. Greenman had agreed to—frustrated by Mr. Miller’s assumptions and demands.

The breakdown resulted in this action, in which Ms. Greenman alleges that Mr. Miller began to ignore or infringe her rights as a minority investor with no management powers and disregarded the restrictions imposed on him by the entities’ operating agreements and his fiduciary duties by diverting the Entities’ business and assets for his own benefit to the detriment of both the Entities and Ms. Greenman.

The counterclaims filed by Mr. Miller allege, among other things, that Mr. Greenman (and therefore his Estate), engaged in misconduct as a fiduciary by overbilling legal time to Millman and 392 Columbus, thus, enriching himself at Mr. Miller’s expense.

After a seven-day bench trial, the Court reaches a split decision. The Court finds that Mr. Miller breached his fiduciary duty to Millman by appropriating its loan business to himself after Mr. Greenman’s passing, by causing Millman to pay him a guarantee fee for Mr. Miller’s guarantee of West 61st Street, and by using Millman to indemnify himself for 392 Columbus and SDMJD’s legal costs. The Court also finds that Mr. Miller breached his fiduciary duty to Ms. Greenman by not paying distributions from 392 Columbus to Ms. Greenman in accordance with the 392 Operating Agreement. Additionally, Ms. Greenman is entitled to a declaratory relief relating to her access to financial statements and books and records of Millman and 392 Columbus.

However, Ms. Greenman failed to prove her claims for breach of fiduciary duty to Millman as it relates to the \$3.4 million “distribution” Millman made to Mr. Miller, the loans Mr. Miller made to his sons, or that Mr. Miller paid unreasonable amounts for bookkeeping and accounting services or that Mr. Miller received a personal benefit from Millman paying them to

provide such services. Ms. Greenman also failed to demonstrate that Mr. Miller breached his duty of loyalty to 392 Columbus by “competing with” a specific 392 Columbus’ loan.

Finally, Mr. Miller’s counterclaims that Mr. Greenman breached his fiduciary due to Millman and 392 Columbus by overcharging for his time as an attorney, although troubling, are barred by the statute of limitations.

PROCEDURAL HISTORY

On January 18, 2017, Ms. Greenman commenced this action and sought a temporary restraining order and preliminary injunction seeking to prevent Mr. Miller from engaging in alleged self-dealing (NYSCEF 533 ¶ 1 [Joint Statement of Stipulated Facts (“JSOF”)]; NYSCEF 1 and 2). On January 20, 2017, Justice Scarpulla granted a limited temporary restraining order (JSOF ¶ 2; NYSCEF 17), but Justice Bransten denied Ms. Greenman’s requested preliminary injunction on March 21, 2017 (JSOF ¶ 3; NYSCEF 42).

The Complaint asserted claims against Mr. Miller for breach of contract, breach of fiduciary duty, failure to provide access to books and records, accounting, and declaratory judgment (NYSCEF 1). On March 24, 2017, Mr. Miller answered the complaint and interposed counterclaims against both Ms. Greenman and Mr. Greenman alleging breach of contract, fraud, conversion, unjust enrichment, and against Ms. Greenman individually, he alleged breach of fiduciary duty and conversion (JSOF ¶ 4; NYSCEF 36).

On November 3, 2017, Ms. Greenman moved to dismiss certain of Mr. Miller’s counterclaims (JSOF ¶ 5; NYSCEF 62), and Mr. Miller opposed Ms. Greenman’s motion to dismiss and cross-moved for leave to amend his counterclaims (JSOF ¶ 6; NYSCEF 74). Mr. Miller filed his First Amended Counterclaims on March 9, 2018 (JSOF ¶ 7; NYSCEF 117). The

Court granted in part plaintiff's motion to dismiss and granted in part Mr. Miller's cross-motion for leave to amend his counterclaims (JSOF ¶ 8; NYSCEF 119).

On April 6, 2021, Ms. Greenman filed her Amended Complaint (JSOF ¶ 9; NYSCEF 177), and thereafter, on May 21, 2021, Mr. Miller filed his Second Amended Counterclaims (JSOF ¶ 10; NYSCEF 180). Ms. Greenman then moved to dismiss the Second Amended Counterclaims (JSOF ¶ 11; NYSCEF 193). On February 24, 2022, the Court granted in part Ms. Greenman's motion to dismiss, dismissing the First and Second Counterclaims as they relate to the alleged misappropriation of \$40,000, as well as the Sixth, Seventh, and Eighth Counterclaims against Ms. Greenman for fraud, aiding and abetting breach of fiduciary duty, and tortious interference with contract (JSOF ¶ 12; NYSCEF 225).

On March 28, 2022, Mr. Miller moved for partial summary judgment on Ms. Greenman's claims and Ms. Greenman moved for summary judgment on Mr. Miller's Second Amended Counterclaims (JSOF ¶ 13; NYSCEF 246, 282). The Court granted in part Mr. Miller's summary judgment motion, dismissing the First through Fourth Causes of Action as they relate to the cancellation of certain swap agreements and to certain salary payments, as well as the Eighth Cause of Action for Breach of Contract relating to SDMJD, and Ninth Cause of Action for Dissolution. The Court also granted in part Ms. Greenman's summary judgment motion dismissing the First and Second Counterclaims as they relate to the allocation of building sale proceeds regarding 392 Columbus (JSOF ¶ 14). As to the issue of Mr. Greenman's allegedly improper legal fees (First, Second, and Third Counterclaims), the Court found there were issues of fact precluding summary judgment as to Ms. Greenman's statute of limitations defense (NYSCEF 521; *Greenman v Miller*, 2022 NY Slip Op 33355[U], 6 [Sup Ct, NY County 2022]).

After completion of discovery and filing of Note of Issue, a non-jury trial took place between November 7, 2022, and November 18, 2022 (NYSCEF 555–562) (trial transcripts with stipulated errata).

FINDINGS OF FACT

The Court makes the following findings of fact based on its review of the evidence admitted at trial, including the parties’ joint statement of stipulated facts and procedural history, and its evaluation of the credibility of the witnesses who testified during the proceedings.

I. PARTIES

1. Ms. Greenman is an individual residing in New York, New York and is a member of Millman, 392 Columbus, and SDMJD (JSOF ¶ 1). Mr. Greenman is Ms. Greenman’s late husband (JSOF ¶ 2). Ms. Greenman has been duly appointed as Executrix of the Estate of Mr. Greenman (the “Estate”) (JSOF ¶ 3).

2. Mr. Miller is an individual residing in Rockland County, New York and is both a member and the successor manager of each of the Entities (JSOF ¶ 4).

3. Millman, 392 Columbus, and SDMJD are New York limited liability companies and are named as nominal defendants in this case (JSOF ¶¶ 5–7, 9). Mr. Miller is a 50 percent member and is currently the sole manager of both Millman and 392 Columbus (JSOF ¶¶ 6, 8). He is a 50 percent Class A member and is currently the sole manager of SDMJD (JSOF ¶ 10).

II. MILLMAN

4. In May 2001, Mr. Greenman and Mr. Miller founded Millman LLC, with each as a 50 percent member (JSOF ¶ 29; JX-218). In or around May 2001, Mr. Greenman transferred his 50% membership interest to Ms. Greenman (JSOF ¶ 30). Ms. Greenman and Mr. Miller are parties to an operating agreement for Millman dated as of May 2001 (the “Millman Agreement”)

(JSOF ¶ 31; JX-219). A first amendment to the Millman Agreement is dated as of April 2, 2012 (JSOF ¶ 32; JX-266).

5. By the end of 2015, Millman's loan portfolio was approximately \$8 million (JSOF ¶ 40; NYSCEF 481 no. 15).

A. MILLMAN'S LENDING BUSINESS

6. Until Mr. Greenman's death, Millman operated a lending business generally as follows: (i) Mr. Greenman would source borrowers, originate loans, and negotiate the terms and conditions of such transactions, (ii) Mr. Miller would borrow money from a line of credit available to him at favorable rates, (iii) Mr. Miller would lend that money to Millman at the same rate at which he borrowed, and, in turn, Millman would assume the obligation to repay the credit line and pay the interest agreed to the banks, and (iv) Millman would lend those funds to the borrowers that Mr. Greenman had sourced in transactions that he structured and negotiated on Millman's behalf. That spread in interest rates provided Millman income which, pursuant to the Millman Agreement, was distributed equally between Plaintiff and Mr. Miller (JSOF ¶ 35).

7. The loans were funded by money that Millman had borrowed from Mr. Miller either directly or through his credit lines at certain banks (JSOF ¶ 36; NYSCEF 481). Millman's borrowing for the lending business was done at Mr. Miller's low-cost credit through his preferred lending arrangements with his banks, which allowed Mr. Miller to borrow against his portfolio of municipal bonds at low rates (JSOF ¶ 37; Tr. 337:12–338:3).

8. There were no written agreements for Mr. Miller's loans to Millman (Tr. 162:16–163:14, 409:3–6). Nor was there any agreement for Mr. Miller to extend loans to Millman for any specific period of time (Tr. 409:15–20, Tr. 1070:25–1071:3, 1071:14–18). The loans from Mr. Miller were reflected on Millman's loan schedules and balance sheets, which delineated the

different loan sources to make it easier to track the outstanding loans payable (JX-328; Tr. 756:20–758:2; JX-509; Tr. 693:1–694:5, 698:2–6). While Millman paid Citibank and Merrill Lynch directly for the monthly interest owed on the money that Mr. Miller borrowed for Millman, Millman had no agreement or direct obligation to repay those loans to Citibank or Merrill Lynch because the loans were drawn on Mr. Miller’s personal credit lines for which he was solely liable (Tr. 409:10–14, 433:17–22). Millman never lost any money on the loans (Tr. 165:10–166:17).

9. According to a loan schedule prepared by Millman’s bookkeeper, Aiping Chen (“Chen”), dated as of February 18, 2014, shortly after Mr. Greenman’s death, Millman had at least \$45,810,131 in outstanding loans (JSOF ¶34; JX-328 at 1).

10. As of a June 18, 2014 updated schedule, approximately \$6 million of those loans were paid down and used to pay off all of Mr. Miller’s remaining personal (as opposed to bank) loans to Millman (PX-076; DX-BB; *see also* Tr. 114:3–5). Mr. Miller sent the June 18 loan schedule with a note that the Greenmans had “[n]othing to do until then but bank the money.” (JX-343). Notwithstanding that assurance, over the next fourteen months, Mr. Miller caused Millman’s outstanding loan balance to drop to \$7,975,000 (JX-413 at MILLER00041156).

11. Since Mr. Greenman’s passing, Millman has not had any active business (other than extending loans to Mr. Miller’s sons), and none is contemplated (Tr. 7:8–8:12, 19:20–21:15, 208:24–209:5; 222:19–223:6). At trial, Mr. Miller reiterated prior testimony that he “considered it [his] obligation to wind down Millman as quickly as possible” (Tr. 248:3–7).

1. Millman Guaranty

12. When Mr. Greenman passed away in February 2014, Millman had \$45,801,131 in loans receivable that borrowers owed to Millman and \$46,702,952 in loans payable to Mr. Miller

for the money he had loaned to Millman to fund those loans and certain other investments (JX-328; DX-DD).

13. In December 2014, Mr. Miller asked Ms. Greenman to provide a formal guarantee for half of the loans he had made to Millman (Tr. 601:1–3, 604:11–17; JX-357 [“For me to feel comfortable, it will be necessary for you to memorialize in writing that you are personally liable for one half of the loans incurred by Millman LLC to me. In addition, I want the guarantee secured.”]). Ms. Greenman declined to sign this guaranty.

14. Although Mr. Miller testified that he and Mr. Greenman had a similar arrangement, separately, Mr. Miller wrote to Millman’s accountant, Michael Block (“Block”), in December 2014, “I trusted Charles and I don’t trust Jane. Not for \$22MM” and since Jane did not want to sign a guarantee, “I plan to dismember Millman as fast as I can next year and no longer charge Millman MY rate for money but charge them a market 5%. I’m sure that David would be happy to move loans. I can always write Jane a personal check later if things change. I don’t think she aims to screw me, but I think it is stupid to trust anyone that scared and irrational” (JX-359).

15. Ms. Greenman testified that “[i]n the early weeks and maybe months after Charles died, I asked my daughter, Margot, to step in and help me because my brain was not functioning very well” (Tr. 1045:8–10). Eventually, she stopped having conversations with Mr. Miller and appointed Margot to act as her representative to communicate with Mr. Miller about the shared investments (Tr. 1052:6–12).

2. Outstanding Millman Loans

16. Consistent with Mr. Miller's December 2014 email to Block, Mr. Miller orchestrated the winding down of the Millman loan business by encouraging Millman borrowers to pay off their loans early and substitute new loans from Mr. Miller and his entities.

17. Mr. Miller created a new entity, Corinthian Lending LLC ("Corinthian Lending"), in March 2015 (JSOF ¶41), to replace Millman's loan business. As Block put it, "Cor[inthian] lending got its assets from [M]illman and paid interest on the loans it took from [M]illman." (JX-434).

18. At trial, Mr. Miller admitted to "asking the borrowers to repay Millman as soon as they possibly could" (Tr. 199:23–200:3) despite appearing to deny the same at other points in his testimony (*id.*, 95:24–96:10, 114:9–11, 132:19–21, 448:14–18). When Margot specifically asked him whether the early retirement of a certain Millman loan was caused by Mr. Miller's refinancing, Mr. Miller stated that he is "not renewing but [he is] not offering to lend them to redirect the loan away from Millman to [him] either." (PX-084). Moreover, when Block asked him what he should "do if Jane or [Jane's accountant] asks for details of Millman," Mr. Miller responded to "[I]et him know" (JX-359 at MILLER00156305).

19. Ms. Greenman contends that, upon assuming management control of Millman, Mr. Miller improperly diverted the economic benefits of eight Millman loans to himself or Corinthian Lending:

a. Bergel 14th Street LLC

20. Bergel 14th Street LLC ("Bergel 14") is an entity associated with Millman's largest borrower, real estate investor David Berley ("Berley") (JSOF ¶ 42; Tr. 94:15–24). Bergel 14 owed Millman \$890,000 through a promissory note, dated July 31, 2012, which was originally set to mature on August 1, 2013 and extended to August 1, 2015 (JSOF ¶ 43; JX-271;

PX-076 at P1:R7; PX-078). Corinthian Lending loaned that same amount to Bergel 14 on August 6, 2015 (JSOF ¶ 45). The Millman loan was repaid on August 7, 2015 (JSOF ¶ 44).

21. Two weeks prior to the loan payoff, Mr. Miller advised Ms. Greenman that “[he has] told the [Bergel 14] borrowers that Millman LLC will not renew the loan” (JX-405) while leaving out that he knew the borrowers “underst[ood the loan payoff we]re dependent on the Corinthian loan being finalized” (PX-030; Tr. 141:6–8). Bergel 14 used the Corinthian loan to pay off the Millman loan (Tr. 140:15–20; PX-30).

b. *Three Streets LLC*

22. Three Streets LLC (“Three Streets”) owed Millman \$1.3 million through a promissory note, dated February 14, 2014 and set to mature on February 14, 2015 (JSOF ¶ 46; JX-327). In a purchase and sale agreement dated February 12, 2015, Millman assigned the rights to the promissory note with Three Streets to Mr. Miller (JSOF ¶ 47; JX-370). Mr. Miller admitted that he did not seek Ms. Greenman’s consent for Millman to enter into that agreement (Tr. 134:16–20). Further, the record reflects that he instructed Chen and Block, three days after the loan assignment, not to share any information with Ms. Greenman and that “[Jane] cannot authorize or request anything.” (PX-085).

c. *David Swersky, Jayne Sosland & 90 Hudson*

23. David Swersky (“Swersky”) and Jayne Sosland owed Millman \$1 million as the remaining amount from a \$3 million loan from Millman dated July 12, 2011. The loan’s maturity date was extended to July 7, 2013, and then again to July 7, 2018 (JSOF ¶ 48; JX-328 at P1:R3).

24. 90 Hudson LLC (“90 Hudson”) owed Millman \$7.2 million under a promissory note, dated February 21, 2013, set to mature on February 15, 2018 (JSOF ¶55; JX-284).

25. In late 2014, Swersky proposed that, in coordination with a \$3.4 million investment for one-third of the 90 Hudson syndicate, he prepay his personal loan and a part of the 90 Hudson loan in return for a new Millman loan to his entity, S&S Investors LLC (“S&S”) on the same terms (PX-016). In response, Mr. Miller declared that “new loans will not be from Millman but from me (or some new entity).” (*id.*).

26. On January 20, 2015, upon Mr. Miller’s request, Swersky provided him with an updated proposal (PX-019), which Mr. Miller understood would (1) leave Mr. Miller “in the same position, but \$2.4 [million] of the loan moves from Millman to [him]” and (2) involve Swersky’s use of the new \$2.4 million Mr. Miller loan to prepay his \$1 million Millman loan (JX-368). Mr. Miller updated Margot the next day that Swersky would pay off a portion of 90 Hudson’s loan to Millman, characterizing it as “[a]ll [] good news...and reduction of Millman liabilities.” (PX-083).

27. On February 26, 2015, the parties proceeded with the transaction: S&S purchased an interest in 90 Hudson for \$3.4 million (JSOF ¶¶57; JX-376 at DB00000084-94); 90 Hudson prepaid \$2.4 million of its Millman loan (JSOF ¶¶58–59; JX-117 at MILLER00048434; JX-377); Mr. Miller simultaneously loaned \$2.4 million to S&S (JSOF ¶¶60; JX-378); and Mr. Miller paid off Swersky’s \$1 million personal loan (PX-113; JX-118 at MILLER00048430). Within three months, Mr. Miller issued a personal loan of \$1.1 million to another Swersky entity, S&S Investors Two LLC (JSOF ¶¶50-51; JX-393).

28. Mr. Miller generally denied understanding the transaction or that Swersky would (and did) use Mr. Miller’s \$2.4 million loan to pay off his Millman loan (*see* Tr. 144:22–145:14, 147:15–23, 149:14–152:6, 150:7–16, 155:23–156:25).

29. Mr. Miller wrote a draft email to Margot, dated March 6, 2015, explaining his role in financing the Millman payoffs in return for new loans from him and detailing the transaction (JX-386 at MILLER00053039; *see also* Tr. 175:24–176:5). Mr. Miller never sent the email. Instead, he told her only that Swersky “assumed some of the [90 Hudson] loan [and] also paid in full his outstanding Millman loan (about \$1MM).” (JX-386 at MILLER00053040). Mr. Miller could not explain why he did not send the draft email to Margot (Tr. 176:6–9).

d. *David Berley*

30. Berley personally owed Millman: (i) \$3 million due December 1, 2016; (ii) \$4 million due December 1, 2018 and (iii) \$1.0875 million due October 31, 2017 (JSOF ¶¶63, 65, 67; JX-256; JX-257; JX-275).

31. On November 20, 2014, Mr. Miller loaned Berley \$13 million at a 5 percent interest rate (JSOF ¶69; JX-353 at MILLER00061438). On that same day, Mr. Miller informed Margot that “Berley shows no signs of pre-paying his loans.” (JX-354). He did not disclose to Margot the \$13 million loan (Tr. 179:16–18).

32. Between June and July 2015, Berley prepaid his \$3 million and \$4 million Millman loans, which had a 7.5 percent minimum interest rate of, along with \$77,687 in prepayment penalty fees and owed interest (totaling \$7,077,687) (JSOF ¶¶64, 66; JX-256 at MILLER00121647; JX-257 at MILLER00121651; JX-397; JX-407).

33. Mr. Miller personally loaned Berley a similar amount, \$7,472,750, two months later at an approximately 5 percent interest rate (JX-428 [loan schedule with signed check from Berley for the “\$7.5MM loan interest”]; Tr. 194:23–195:7).

34. Mr. Miller acknowledged at the time of Berley’s prepayments that it was his suggestion and that he was offering Berley a lower interest rate than Berley’s existing Millman

loans, further incentivizing the prepayment (JX-404 at DB00000034). On June 4, 2015, Berley also prepaid his \$1.0875 million loan (JSOF ¶¶67–68; JX-398).

35. After the prepayments of the above-listed loans, Berley still owed Millman \$1,425,000 through his 2008 DIB Family Trust, set to mature on October 31, 2017, and his share of 90 Hudson’s remaining \$4.8 million loan (JX-413 at MILLER00041156; JSOF ¶¶34, 55, 77). Even after prepayments, Mr. Miller requested of Berley’s financial manager that “if there is more to get paid down, I prefer that the outstanding loan to Millman LLC be paid...I am trying to clean up Millman LLC as much as possible.” (PX-041; *see also* JX-448, Tr. 199:23–200:3).

e. Richard Halpern

36. Richard Halpern (“Halpern”), an associate of David Berley, owed Millman \$1.2 million under a promissory note, dated February 28, 2013 which was set to mature on the earlier of the sale and/or refinancing of 6 East 45th Street in New York, and February 20, 2016 (JSOF ¶ 61; JX-285). Halpern repaid this loan on August 7, 2015 (JSOF ¶ 62). Mr. Miller testified that he did not ask Halpern to prepay his loan early. When asked if he or Corinthian, or some other entity he controlled made a new loan to Halpern, Mr. Miller replied, “I think he maybe, I’m not sure” (Tr. 423:23–25). Ms. Greenman offered no further evidence to prove this claim.

B. CONSULTING FEES

37. There were several payments made from Millman to Mr. Greenman, Ms. Greenman, and Mr. Miller labeled as “consulting fees” at various different times. Mr. Miller initially claimed that the Greenmans had fraudulently paid themselves consulting fees in 2013 and 2014 (\$827,471 in 2013 and \$250,000 in 2014 [the “Greenman Payments”]) (PX-099 at 34–35, ¶¶132–140). To correct that purported “fraud,” Mr. Miller decided to pay himself consulting

fees in 2015 (\$250,000 on December 15, 2014, \$250,000 on March 13, 2015, and \$489,016 on June 4, 2015 [the “Miller Payments”]) (JX-157 at P302:R15, P315:R14, P325:R2).

38. Block told Sloane that he and Mr. Miller had been unaware of the Greenmans’ purported scheme and “discover[ed]” it following Mr. Greenman’s death (NYSCEF 243, ¶16; Tr. 933:12–935:21, 940:1–13). But contemporaneous emails indicate that Mr. Miller approved the 2013 Greenman Payments after consulting with Block (JX-307; JX-316; JX-324; JX-309; *see also* Tr. 45:1–46:9).

39. Mr. Miller testified that the Greenman Payments were made as distributions of the interest income Mr. Miller shared with them from a 2012 loan Millman made referred to as 12000 Biscayne (Tr. 595:15–18; *see also* 791:8–792:16 [Block explaining the loan was booked as a “Millman loan”]). Block suggested payments to Mr. Miller and Mr. Greenman be made at different times and amounts to appear unrelated (Tr. 797:24–798:19).

1. 1200 Biscayne

40. 12000 Biscayne Blvd. Owner LLC (“12000 Biscayne Owner”) is a Delaware limited liability company that owns indirect interests in real property located at 1200 Biscayne Boulevard, Miami, Florida (JSOF ¶ 139). Mr. Greenman, Ms. Greenman, and their three daughters, Jacklyn, Danielle, and Margot, owned membership interests in 12000 Biscayne Owner as set out in Schedule A to 12000 Biscayne Owner’s operating agreement dated as of March 28, 2012 (JSOF ¶ 140).

41. In 2012, 12000 Biscayne Owner had an opportunity to acquire its outstanding \$12.8 million mortgage loan at a discount of \$2.55 million. However, structuring the transaction as a discounted payoff or a purchase of the loan by 12000 Biscayne Owner would have resulted in \$2.55 million in cancellation of indebtedness income (JSOF ¶ 141).

42. Mr. Miller contributed \$6,000,000 to 12000 Biscayne Lender and acquired 100% of the Class I membership interests of 12000 Biscayne Lender (JSOF ¶ 144).

43. Mr. Miller testified that he and Mr. Greenman had an agreement to share equally the profits on Mr. Miller's interest in the loan to 12000 Biscayne and the Greenman family's equity interests (Tr. 593:5–20, 785:14–789:23; JX-522; DX-D; JX-523). Mr. Miller further testified that because the Greenmans could not formally share in Mr. Miller's loan to 12000 Biscayne without upending the tax structure of 12000 Biscayne Lender, it was agreed that Mr. and Ms. Greenman would receive their share of Mr. Miller's interest in the 12000 Biscayne loan as consulting payments from Millman (Tr. 595:9–18, 796:9–799:13; JX-303; JX-306).

44. The email correspondence among Mr. Miller, Mr. Greenman, and Block, indicates that there was an understanding that “Charles’ share of 12000 biscayne will be shared” (JX-523 at MILLER00165558; Tr. 789:16–23), and “[g]oing forward, Larry will be receiving distributions directly from 12000 Biscayne - they will no longer be paid to Millman. For each distribution Larry receives, Charles will receive an equal amount as a guaranteed payment” (JX-306). Additionally, in October 2013, Block wrote to Mr. Miller, “I provided the amounts that both you and Charles are to receive from Millman for 12000 Biscayne on 9/26. You are owed \$598,632.82, and so is Charles. I also suggested that instead of you and Charles being paid identical amounts simultaneously, there should be different amounts that Charles is paid so that at some point in time you are both equalized.” (JX-307). Mr. Greenman responded to Mr. Miller, “Do you mind if I take the payment as a consulting payment?” to which Mr. Miller replied, “no problem” (*id.*). Block testified that the Form 1096 filed for 2013 lists “Nonemployee Compensation” in the amount of \$534,520.55 for Mr. Greenman and \$292,950.61 for Ms. Greenman, which were “the funds that Millman classified as consulting, but

they represented the funds that Mr. Miller was getting directly from 12000 Biscayne on the \$6 million investment. This was their -- this was the Greenman section of the sharing” (Tr. 799:14–800:8; PX-105; *see also* JX-46). Block additionally testified that this was taken as a consulting payment for tax considerations (Tr. 796–800). Mr. Miller submitted an email exchange between him and Margot after Mr. Greenman had passed, which states, “12000. There is equity in your name and loan in my name,” to which Margot relies, “on 12000, I know the deal, and think we just need to come up with something that works. We can keep informal agreement to share everything or we can try to formalize this. what do you prefer?” (NYSCEF 333).

45. Mr. and Ms. Greenman received consulting payments from Millman totaling \$827,471 for their share of the 12000 Biscayne loan when Mr. Greenman was alive (JSOF ¶¶ 83–84; Tr. 799:14–800:8; PX-105). However, Mr. Miller continued to receive interest after Mr. Greenman’s death until 2016, when the loan was repaid in full, and never paid or offered to pay any portion of that interest to Mr. Greenman’s Estate (JSOF ¶ 145).

46. Mr. Miller told his accountant Block in March 2015 that “Until I get something from Jane, I am going to assume that the income on the loan is mine and the equity increase is hers” (NYSCEF 504).

47. The other equity investors in 12000 Biscayne, such as the various members of the Greenman family, were not entitled to, and did not, receive any distributions from their equity until after Mr. Miller’s loan had been repaid in full, which did not occur until 2016 (JSOF ¶ 146).

2. Mr. Miller’s \$88,455 “Compensation Offset”

48. Mr. Miller paid himself \$88,455 on December 2, 2015 as a “Compensation Offset to Charles/Jane.” (JX-157 at P337:R14) to purportedly make up for a “consulting payment” made to Ms. Greenman in a similar amount in 2013. Chen testified that the \$88,455 payment

was “Miller’s idea” to “equal 50/50.” (Tr. 731:12–732:24). Mr. Miller testified that he did not recall any specifics for either the 2013 payment to Ms. Greenman or the 2015 payment to himself (Tr. 544:1–23, 547:17–23). Mr. Miller’s counterclaim describes the 2013 consulting payments as unauthorized and fraudulent (PX-099 at ¶¶132–40).

49. Sloane’s 2021 rebuttal report described the \$88,455 payment to Miller as “a guaranteed payment that each was entitled to in connection with West 61st Street.” (NYSCEF 244, ¶23). Sloane relied on Block for this explanation (Tr. 943:2–945:25). Sloane removed any justification of the payment from his trial affidavit because he subsequently discovered Block had misinformed him (*id.*).

50. When shown his own emails, Block testified that the \$88,455 payment related in some part to Millman’s \$4 million 2005 investment related to the West 61st Property and disclosed, for the first time at trial, that Mr. Greenman, just before he died, was entitled to \$300,000 from an agreement he had with Mr. Miller related to the investment (Tr. 621:5–24, 846:8–12; JX-523 at MILLER00165558, item 6). Block testified that these payments were never completed and that he never disclosed to Ms. Greenman that she was owed money under this arrangement (*id.*).

51. In his post-trial brief, Mr. Miller argues that the \$88,455 payment that he received in 2015 reconciled a misunderstanding concerning the applicable interest rate for the \$4 million that Mr. Miller loaned to Millman in 2005 for the West 61st Street investment (Defs’ Br. at 14).

C. \$3.41 MILLION PAYMENT TO MR. MILLER

52. Mr. Miller received payments from Millman totaling \$3,412,302 between February 26, 2015, and March 3, 2015 (JSOF ¶ 85; JX-176 at MILLER00132124, MILLER00132161).

53. Millman's Citibank account records a transfer of funds to Millman of \$2,400,000.00 on February 26, 2015 (JSOF ¶ 86) and Millman's Quicken Files states that the payment was from David Swersky as one-third repayment of Millman's loan to 90 Hudson LLC (JSOF ¶ 87; *supra* ¶¶23–27). Millman's Citibank account records a withdrawal of \$2,363,397.96 on February 26, 2015 (JSOF ¶ 88) and Millman's Quicken Files states that the payment was to Larry Miller with the memo "LM personal loan paid off" (LM is an abbreviation for Larry Miller) (JSOF ¶ 89).

54. Millman's Citibank account records a transfer of funds to Millman of \$1,021,197 on March 2, 2015 (JSOF ¶ 90) and Millman's Quicken Files states that the payment was from David Swersky as payment of a loan (JSOF ¶ 91). Millman's Citibank account records transfers of funds to Larry Miller of \$50,000, \$500,000, and \$500,000 on March 3, 2015 (JSOF ¶ 92).

55. The "repayments" appeared on the "withdrawals & distributions" line of Mr. Miller's 2015 K-1 (Tr. 64–65:1–19). Ms. Greenman received no corresponding distributions (JX-176 at MILLER00132134).

56. Mr. Miller asserts that these payments were not distributions because Mr. Miller was just repaying (to himself) the loans he made to Millman. He testified that the amounts he received are exactly equal to the money that he advanced in 2014 to reduce the Citibank and Merrill Lynch secured credit lines that funded Millman's loan portfolio and were carried as liabilities on Millman's books (Tr. 50–52; 62–64; Tr. 764:11–767:13; JX-157 at 290–91; JX-473 at 6).

57. Block testified that Millman routinely repaid Larry the funds he advanced for Millman's loans and investments, irrespective of whether those advances were characterized as loans or capital contributions and the return of the \$3.4 million to Mr. Miller was consistent with

other advances Mr. Miller had made that were treated as capital and repaid as capital (Tr. 844:16-21; 848:17-850:9; JX-464).

D. MILLMAN'S CAPITAL ACCOUNTS

58. In September 2016, Block made adjustments, by amending Millman's 2014 tax returns, to the capital accounts of Millman's members, decreasing Ms. Greenman's account by approximately \$760,000 and increasing Mr. Miller's account by approximately \$230,000 (JSOF ¶ 95; Plaintiff's Demonstrative A [comparing the parties' original and amended 2014 capital accounts]).

59. Block then converted the remaining \$530,452 taken from Ms. Greenman's account into a distribution to Mr. Miller (Tr. 993:2-994:12 [Sloane testifying that Millman paid Mr. Miller the amount from his capital account]; DX-KK ¶13; Tr. 910:24-911:14 [Donohue]).

60. Block claimed to have made the adjustments without any involvement or role by Mr. Miller (Tr. 631:11-20; JX-174 at MILLER00041182; *see also id.*, 70:21-72:22). Block attributed the amendment to two separate events that occurred in 2004 (*id.*, 634:12-635:4) and 2007 (*id.*, 635:24-639:11).

61. The first event, related to a "facade easement" in 2004, was addressed by Mr. Miller himself in a September 2013 email to Block (with Mr. Greenman copied), who told him the matter was resolved (JX-302 at MILLER00141818). No documents were provided to support Block's subsequent adjustment more than 3 years later, a delay Block could not explain, except to state, "I didn't feel compelled to do it then." (Tr. 645:6-8). Sloane admitted that the September 2013 email was inconsistent with his understanding of the amendment, but that Block had not shared it with him (Tr. 979:9-980:12).

62. As to the second event, related to Millman's \$4 million 2005 investment in the 61st Property, Block testified that Mr. Greenman had "inexplicably" made him divide the parties' capital equally in 2007, then later directed him to return most of it to Mr. Miller through an amendment, all without disclosure to Mr. Miller (Tr. 639:7–11, 649:2–17). However, in a handwritten note to Mr. Greenman two years later, in 2009, Block acknowledged that he had already noticed the error, which he acknowledged as his own, and fixed it (JX-242). His contemporaneous workpapers, the only other documents provided in support of the original "error," were admittedly incomplete and add no support for his recollection years later (Tr. 654:20–658:25; PX-129; JX-481 [contemporaneous handwritten notes stating "see detail on the back" but no "back" produced]).

E. LOANS TO MR. GREENMAN'S AND MR. MILLER'S CHILDREN

63. In or around November 2011, Millman loaned \$1.65 million to Margot Greenman (Mr. and Ms. Greenman's oldest daughter) with Mr. Miller's consent at Mr. Miller's low cost of money (Libor plus 0.50 percent per annum) (JSOF ¶ 96, 97; DX-GG). Interest on the loan was payable quarterly, and the full amount of unpaid principal was payable on December 31, 2018 (JSOF ¶ 98).

64. Margot did not repay her loan when it matured. Millman commenced a litigation in this Court (*Millman LLC v Margot Greenman*, Index No. 650161/2019) to compel her to pay, which she did after the Court ordered her to do so in July 2020 (JSOF ¶ 99).

65. In 2016, 2017, and 2019, Millman made a series of loans to Mr. Miller's children totaling \$1.816 million that matched the interest and repayment terms of Margot's loan (*i.e.*, interest rate equal to Libor plus one-half percent per annum and a 7-year maturity date) (JSOF ¶ 99). Mr. Miller authorized the loans without Ms. Greenman's consent (Tr. 212:4–13).

66. These loans to Mr. Miller's children have not matured are still outstanding (as of trial). Millman receives interest payments on the Millman's Merrill Lynch Bank Statement for account ending in x4287 for October 2021 (JSOF ¶ 100).

67. Other than the loans to Mr. Miller's children, Millman has not issued a new loan since February 14, 2014 (JSOF ¶ 101).

F. EXPENSES OF MILLMAN

68. The following payments by Millman have been identified as legal expenses in connection with this litigation: Kasowitz, Benson, Torres LLP (\$1,243,500), Kudman Trachten Aloe LLP (\$386,029), Special Counsel (\$30,593), Roy D. Simon (\$31,488), Deposition Solutions (Lexitas) (\$1,610), HKA Global (\$201,445), and The Kenrich Group LLC (\$25,000) (*see* JX-216 ["Joint Stipulation of Millman Expenses"]; Tr. 226:17–20, 227:18–228:12, 228:18–229-19, 231:3–18).

69. Block testified that Mr. Miller hired him as an expert in this case for "helping [Mr. Miller's attorneys] to represent Larry Miller... [for] "anything related to this litigation." (Tr. 613:9–614:15). Block billed this time to Millman (*id.*, 239:1–240:3).

70. Chen testified that she provided administrative services in this case and billed her time to Millman (Tr. 719:8–15 [testifying that her Millman timesheet includes all time spent on any tasks related to Millman and the litigation]).

71. Mr. Miller testified that he charged to Millman all his litigation expenses related to various joint investments with the Greenmans without regard to whether such amounts actually pertained to Millman (Tr. 231:21–233:20, 234:24–238:19).

72. Multiple claims have been asserted in this litigation since its filing six years ago. Ms. Greenman asserted several claims against Mr. Miller in his capacity as manager of the three

entities that are party to this litigation: Millman, 392 Columbus, and SDMJD (NYSCEF 177 ¶¶50–104). The members of those entities are in all cases different (JX-217 at MILLER00014635; JX-219 at MILLER00002907; NYSCEF 531 at 17, ¶45).

73. Mr. Miller asserted fiduciary duty claims against Ms. Greenman as executrix of Mr. Greenman's estate for both Millman and 392 Columbus based on Mr. Greenman's actions as Manager (PX-099 at 42-43, ¶¶189-194 and at 44-46, ¶¶206-214). Mr. Miller asserted some claims, like his improper fee allegations, on behalf of different entities (*id.* at 42, ¶192 and at 45 ¶¶209–10). He asserted others (like the 392 Columbus distributions) as direct claims on his own behalf (*id.* at 40–43, ¶¶177–94).

74. Further, Mr. Miller asserted claims against Ms. Greenman directly, all of which were either dismissed or withdrawn in this case (*see* PX-099 [Third, Seventh, and Eighth Counterclaims]).

75. Mr. Miller asserted claims against Ms. Greenman as executrix regarding other non-party entities, none of which remain in this case. Mr. Miller asserted (1) a fraud claim regarding Mr. Miller's ownership in an entity called Stewart & Clinton, which was dismissed (PX-099 at 46–47, ¶¶221–28); (2) a breach of contract claim regarding an entity called Intellidyne, which was dismissed (NYSCEF 36 at 28–29, ¶¶125–30); and (3) a breach of contract claim regarding 12000 Biscayne, which was withdrawn at trial (PX-099 at 46, ¶¶215–20).

G. WEST 61ST STREET PROPERTY

76. In 2005, Millman invested approximately \$4 million to acquire 25 percent of the membership interests of Walsam 61 LLC (JSOF ¶ 103). Walsam 61 LLC owns 85 percent of the membership interests of 61 Owner LLC, which owns a building on West 61st Street in Manhattan that is leased for a New York City school (JSOF ¶ 102; Tr. 284:9–15). Mr. Miller

provided 100 percent of the money for Millman's investment in West 61st Street, which was recorded on Millman's loan schedules as a loan payable to Mr. Miller (Tr. 387:17–18, 538:11–20, 720:22–721:3; JX-328). The promissory note, dated August 30, 2005, was set to mature on August 30, 2015 (JSOF ¶ 104).

77. In 2011, the property was refinanced. In connection with that refinancing, Mr. Miller, among others, signed a personal guarantee, guarantying 25 percent of a \$17,300,000 loan made to 61 Owner from a bank (JX-255). Mr. Greenman did not sign the guaranty (Tr. 253:10–254:19; 390:10–14; 534:11–14). Although Mr. Miller appeared to be surprised by this at trial (Tr. 253:10–254:19; 390:10–14; 534:11–14), Mr. Miller wrote to Berley on November 15, 2016 claiming “Charles paid me 25 [basis points] because he didn’t want to sign” [the 2011 guaranty] (PX-125).

78. On December 9, 2014, Mr. Miller told Ms. Greenman he wanted her to provide a guaranty for the 2011 guaranty (JX-357 at JG00004794 [“One more guarantee. The 61st Street property is owned by Millman. This has turned out to be a solid investment. In order to obtain the mortgage, the partners were required to sign a personal guarantee. I signed this for Millman and declined the normal charges for a guarantee.”]). Ms. Greenman declined to sign this guaranty.

79. In 2017, the property was refinanced again. Three others guaranteed the loan, and although Mr. Miller is listed as a guarantor, he did not sign (JX-460; JSOF ¶110).

80. Instead, Mr. Miller entered Millman into a back-up indemnity agreement (with 16 other co-indemnitors) on that 2017 guarantee for its 21.25 percent interest (JSOF ¶111; JX-460 at MILLERSUPPLEMENTAL010950-51). The signature page contained a line for both Millman and Mr. Miller but not Ms. Greenman, who is not mentioned in the document (JX-460

at MILLERSUPPLEMENTAL010950; *see also* JSOF ¶113). Mr. Miller wrote his signature on his line, adding cryptically “to the extent of 1/2 Millman” (JX-460 at 010950). He testified that he had intended to limit his backup indemnity to his own share of Millman’s liability (Tr. 259:18–25).

81. Mr. Miller did not show Ms. Greenman the back-up indemnity agreement before he signed it (Tr. 281:5–8). Mr. Miller testified that he did not tell Ms. Greenman about the 2017 refinancing because he “just didn’t think it was a good idea.” (Tr. 272:24–273:9; *see also* PX-096 at TROUT007630). Mr. Miller wrote to his then-counsel at Troutman about the guaranty agreement, asking “what about Jane?” (PX-045). Counsel responded, “It does not appear that Jane is a direct owner of the LLC and therefore is not a party to the indemnity agreement.” (*id.*). Mr. Miller responded, “Yes, but Millman own 22% of the deal. Jane owns half of Millman. She will get half of the benefits.” (*id.*). Counsel explained, “If the personal guaranty is triggered then you would seek contribution from Millman for its pro-rata share. Jane would be indirectly paying for such contribution by way of her ownership in Millman.” (*id.*).

82. Mr. Miller further testified that Millman was not required to sign the indemnity; it could instead pay an annual fee (Tr. 260:19–24). Nonetheless, Mr. Miller chose to do so and pay *himself* fees instead, totaling \$285,463 so far (not including any 2022 payments) (JSOF ¶114; Tr. 275:18–276:14). Mr. Miller testified that the 1 percent guarantee fee is common in commercial real estate deals, including investments that Mr. Miller and Mr. Greenman/Ms. Greenman made with Berley (Tr. 259:24–261:4, 394:22–395:17; DX-KK ¶ 40).

83. Mr. Miller testified that he has not distributed any money from Millman in recent years because he is holding those assets as a reserve in case Millman is called upon to satisfy its

obligations under the back-up indemnity (Tr. 394:2–13). No credible evidence was presented to suggest the likelihood or magnitude of that risk.

III. 392 COLUMBUS

84. 392 Columbus was established to purchase property located at 392 Columbus Avenue in New York, New York (the “Columbus Property”). The Columbus Property was sold in 2010, and the proceeds from that sale were distributed to its members by February 2012. The proceeds from the sale were split 50 percent to Mr. Miller and 50 percent to the Greenman family (NYSCEF 177 ¶¶36–37).

85. By decision dated October 4, 2022, this Court granted summary judgment to Ms. Greenman on Miller’s claims that a prior operating agreement that provided for a one-third/two-thirds split—rather than the signed February 29, 2012 operating agreement—governed 392 Columbus (NYSCEF 521 at 5–7; *Greenman*, 2022 NY Slip Op 33355[U], 6). Mr. Miller had alleged in his now-dismissed counterclaim that Mr. Greenman breached his fiduciary duty by splitting the proceeds from the sale 50/50.

86. The proceeds from the sale were sufficient to return the members’ capital contributions plus a contractual preferred return, such that pursuant to §4.5 of the 392 Agreement all future distributions from 392 Columbus would be split evenly between each of Miller and Plaintiff (NYSCEF 177 ¶37).

87. At the time of Mr. Greenman’ death, 392 Columbus also held an interest in W2 Labs LLC (“W2 Labs”), a cosmetics company, for which Mr. Miller and Mr. Greenman each contributed equal capital (JSOF ¶ 115). There is no signed operating agreement for W2 (NYSCEF 547 (“Cooper Tr.”), 32:13–34:14; Tr. 456:15–18), and the agreement between 392

Columbus and IP Brands, the 69 percent member of W2, purportedly proceeded on handshakes (Cooper Tr. 76:9–25).

88. 392 Columbus received at least \$1.55 million between 2015 and 2019 from its investment in W2 Labs (JSOF ¶ 116). Between 2015 and 2019, 392 Columbus made distributions to Mr. Miller totaling approximately \$1.54 million (JSOF ¶ 117), and distributions to Ms. Greenman totaling \$7,729 (JSOF ¶ 118).

89. Specifically, 392 Columbus began receiving a return on its W2 Labs investment in 2016 (Tr. 817:19–23), and the 2016 Form 1065 of the 392 Columbus LLC tax return records \$741,019 in income as sourced from W2 Labs, with \$539,375 in cash distributions, and \$122,913 in “other assets” identified as a “loan receivable” to W2 Labs (JSOF ¶ 119).

90. Mr. Miller paid \$534,120 of those distributions to himself, and only \$5,255 to Plaintiff, contrary to §4.5 of the 392 Agreement. Mr. Miller testified that the cash distributions that 392 Columbus began receiving from W2 in 2016 were distributed by 392 Columbus to Mr. Miller in part to reconcile what he believed was Mr. Greenman’s mistaken split of the 392 Columbus building sale proceeds in February 2012 (Tr. 296:23–297:3, 561:20–562:5, 599:8–12).

91. Ms. Greenman also asserts that Mr. Miller caused \$122,933 identified as “loan receivable” to be extended as a loan from 392 Columbus to W2. Additionally, Ms. Greenman asserts that in 2017, W2 Labs distributed \$1,199,952 to 392 Columbus. In that same year, Miller distributed \$589,575 to himself, loaned \$610,377 back to W2, and paid nothing to Plaintiff. For 2018, Ms. Greenman asserts that \$467,851 was distributed by W2 to 392 Columbus, and that Miller loaned \$97,734 of it back to W2, distributed \$386,347 of it to himself and gave nothing to Plaintiff.

92. Ms. Greenman maintains that the “loan receivable” amounts (\$122,913 in 2016, \$610,377 in 2017, and \$97,734 in 2018) are interest-free loans from 392 Columbus to W2 Labs, made with the remaining distributions from W2 Labs (JX-035, JX-036, JX-037).

93. At trial, Block explained the distribution amount listed on the K-1 that 392 Columbus received from W2 was \$122,913 higher than the amount of cash that 392 Columbus actually received (Tr. 819:1–12; JX-35). This discrepancy created “phantom income” for 392 Columbus, which requires a taxpayer to pay income taxes on money that it never actually received (Tr. 821:20–25). Block testified that he raised the issue with W2 Lab’s accountant, who advised him that W2 Labs had not distributed the cash and acknowledged that W2 Labs owed 392 Columbus the money. Based on that discussion, Block recorded the shortfall as a “loan receivable” on 392 Columbus’s 2016 tax return (Tr. 819:18–821:19).

94. According to Block, the discrepancies between the K-1 distributions amounts and cash that 392 Columbus actually received from W2—and the accompanying “phantom income”—continued in 2017 and 2018 (Tr. 822:7–12). In 2017, the “loan receivable” increased to \$733,290, representing the \$610,377 discrepancy between the K-1 distributions amount and the cash that 392 Columbus actually received from W2 in 2017 (Tr. 823:10–19; JX-36). In 2018, the “loan receivable” increased from \$733,290 to \$831,024, representing an additional \$97,734 discrepancy between the K-1 distributions amount and the cash that 392 Columbus actually received from W2 in 2018 (Tr. 825:4–16; JX-37).

95. All \$733,290 of the “phantom income” generated by W2’s accrual of distributions owed to 392 Columbus in 2016 and 2017 was allocated to Mr. Miller (Tr. 822:15–823:6, 823:22–825:3). Mr. Miller was allocated “phantom income” totaling \$206,899 in 2016 and \$476,067 in 2017 (JX-35 at 21; JX-36 at MILLERSUPPLEMENTAL002661). Ms. Greenman

was allocated “phantom income” of \$296,148 in 2018 (Tr. 825:17–826:8; JX-37 at MILLERSUPPLEMENTAL002914). Over the three-year period, 392 Columbus’s “phantom income” was allocated 70% to Mr. Miller and 30% to Ms. Greenman.

96. Block also testified that the accrued distributions from W2 ultimately were not paid to 392 Columbus, and the “loan receivable” was written off as a loss (Tr. 834:5–9). The resulting tax deduction was split 50/50 between Mr. Miller and Ms. Greenman (Tr. 835:18–836:5).

97. Ms. Greenman provided no argument or evidence to rebut Block’s explanation of phantom income.

98. Next, Ms. Greenman further asserts that during the time that the “loans” remained outstanding, Miller made and collected on two interest-bearing loans to W2 Labs, directly and indirectly.

99. In June 2017, Miller loaned \$500,000 to W2 Labs through one of his entities at a 6 percent interest rate (JX-466). The loan terms prioritized repayment of his personal loan as “senior” over any other repayment owed, including the 392 Columbus loan (*id* at W2-000012). W2 repaid the principal and all interest owed on the loan several months later (Tr. 320:14–21).

100. In December 2017, Mr. Miller, through Corinthian International Foundation (a charitable foundation run by trustees (at Mr. Miller’s direction) but from which Mr. Miller receives no money) (Tr. 320:20–21), loaned \$1.25 million to IP Brands LLC, a holding company that owns the remaining 69 percent of W2 (392 Columbus owns 31 percent) (Cooper Tr. 82:23–83:4, 131:4–133:2).

101. Although Mr. Miller argues that this loan to IP Brands was in connection with one of IP’s other businesses and other brands and had nothing to do with W2 Labs, when explaining

why Mr. Miller made this loan, Douglas Cooper (“Cooper”), the CEO of W2 Labs, testified that “we had the need to get money to get cash to operate our business, some of which affected W2 Labs, because one of the challenges was, if IP Brands did not exist, W2 Labs would be in breach of their agreement with KF Beauty, and we would lose the largest asset of W2 Labs” (Cooper Tr. 131:12–18).

102. At trial, Ms. Greenman offered no evidence connecting either loan from Corinthian to W2’s failure to pay 392 Columbus the distributions or that Mr. Miller agreed that W2 Labs could hold back distributions owed to 392 Columbus (Tr. 464:3–465:14).

IV. TROUTMAN SANDERS LEGAL FEES

103. Millman and 392 Columbus were clients of Troutman Sanders (JSOF ¶ 121).

104. Mr. Greenman received Troutman Sanders invoices to Millman and 392 Columbus through Troutman Sanders interoffice mail (JSOF ¶ 122; Darlene Morin 09/03/2019 Depo Tr. at 29:8–30:4 [“Morin Tr.”]).

105. Mr. Greenman maintained the checkbooks for the Entities at his Troutman Sanders office (JSOF ¶ 123; Morin Tr. at 30:4–35). He signed checks from Millman and 392 Columbus to pay certain invoices that Troutman Sanders issued to Millman and 392 Columbus (JSOF ¶ 124).

A. Millman Legal Invoices

106. In July 2008, Mr. Miller, Mr. Greenman, and members of their families were on vacation together in China (JSOF ¶ 125). Millman paid \$48,000 to Troutman for that two-week period (DX-KK, ¶20; JX-529 at MILLER00175269–72; Tr. 1013:3–7).

107. On April 3, 2013, Aiping Chen received from Darlene Morin (“Morin”), Mr. Greenman’s assistant, an invoice from Troutman Sanders to Millman dated October 18, 2012 for

\$1,122, that listed Mr. Greenman as the timekeeper and billing attorney. The entries included \$796.53 for “Professional Services” and \$209.79 for “Hotel.” In the cover email, Morin writes that the invoice relates to a Michigan trip and expenses relating to the Brazil transaction (JSOF ¶ 126).

108. On March 14, 2014, Morin emailed Mr. Miller an invoice issued by Troutman Sanders to Millman dated March 14, 2014 for \$722.75 with a note that the invoice related to a February 10-12, 2014 Michigan trip by Mr. Greenman (JSOF ¶ 128; PX-115 at MILLER00065762). Mr. Miller paid the invoice from Millman’s checkbook on March 28, 2014 (JSOF ¶ 129). Mr. Miller told Ms. Greenman at the time that he “will explain” to her whether the invoice “ha[d] to do with Millman or Troutman.” (*id.*). Mr. Miller testified that he knew at that time that “[Mr. Greenman] did not do Millman business” in Michigan (Tr. 518:20–519:16) but “agreed to pay the bill rather than making an issue of it.” (Tr. 524:13–16; *see also* JSOF ¶¶128–29).

109. A few days after receiving the March 2014 invoice, Chen asked Morin about past Millman checkbook entries, dating back to at least 2011 to 2012, to determine whether certain of Mr. Greenman’s Millman expenses through Troutman were “business or personal” (*compare* PX-075 at MILLER00065872 *with* JX-157 at P63:R3, P104:R3). Chen forwarded Morin’s response to Mr. Miller an hour later (PX-075 at MILLER00065871). Mr. Miller testified that he “decided not to” correct this billing even though “[Mr. Greenman] shouldn’t have been” charging for non-Millman business through Millman (Tr. 516:13–517:2).

110. Mr. Miller received the second invoice on April 11, 2014 containing details of Mr. Greenman’s flights to and from Detroit, Michigan (PX-120). A few hours later, Mr. Miller told Chen about the invoices that “[w]e [h]ave to see how much real Millman and Charles

Millman,” i.e., “whether or not it was for business or something personal.” (*id.* at MILLER00100649; Tr. 526:11–527:2). On June 18, 2014, Chen asked Morin about the invoice, stating “Larry needs detail.” (PX-077 at TROUT007741; JSOF ¶130). Morin resent her the invoice two days later (*id.*) and Mr. Miller paid it (JSOF ¶131).

111. On June 21, 2014, Mr. Miller asked Chen and Block if there were “any Millman payments to Troutman...in the last two years.” (PX-121 at MILLER00155586). Several of the challenged Troutman invoices fell within that period, all of which were logged into the Millman Quicken (*compare* Charts A and B with JX-157).

112. There are three other “contested” invoices: a July 2007 invoice, totaling \$18,148, where Mr. Miller specifically identified as “legal services” Mr. Greenman provided (Tr. 476:19–477:15; JX-529 at MILLER00175236); a November 2008 invoice, totaling \$1,312, for expenses (JX-529 at MILLER00175273–5); and a January 2012 invoice, totaling \$1,000 in fees, which includes the description “[t]elephone calls regarding agreement” (*id.* at MILLER00175354–6)

113. Mr. Miller testified that he had “no idea” Mr. Greenman was billing Millman for anything until he received a set of invoices from Troutman in 2019 (Tr. 590:13–17).

114. Mr. Miller first asserted his claim for the Millman invoices in his second amended counterclaims filed May 21, 2021 (PX-099 at 44-46, ¶¶206–14).

B. 392 Columbus Invoices

115. In January 2010, 392 Columbus sold the building for \$4.5 million, \$2.9 million of which was payable to 392 Columbus over time pursuant to a purchase money mortgage (JX-243 at MILLER00023652). Mr. Greenman billed 392 Columbus 14.0 hours on each of January 1, 2010, and January 2, 2010 (New Year’s Day and the Saturday of New Year’s weekend), for “Sale and negotiation of Peratore lease,” and included that time in the \$50,000 invoice that 392

Columbus paid for the closing (JX-530 at MILLER00174959–MILLER00174964; JX-243 at MILLER00023654). Between the sale, closing, and other instances, 392 Columbus paid Mr. Greenman a total of \$190,256 (DX-KK ¶¶ 18–24).

116. The bank records of 392 Columbus’s checking account shows that the last Troutman Sanders invoice was paid on February 22, 2012 (JSOF ¶ 127).

117. For Mr. Greenman’s 392 Columbus invoices, Mr. Miller raised concerns about the correctness of Mr. Greenman billing his time by letter dated September 12, 2016 (JSOF ¶132; NYSCEF 298 [“note that large amount of time billed by Charles personally to this. The correctness of these bills concerns me because I was under the impression that Charles did not bill our deals for his time and this was a part of his contribution.”]). Attached to the letter was an invoice for “professional services rendered through January 31, 2010,” which includes the time Mr. Greenman billed relating to sale of 392 Columbus (NYSCEF 298).

118. All of Troutman Sanders’ invoices to either Millman or 392 Columbus were in Miller’s possession no later than early February of 2019, when he produced them to Ms. Greenman (NYSCEF 335 ¶27).

119. Mr. Miller first brought his counterclaim about these bills in his Amended Answer and Counterclaims filed on March 9, 2018 (NYSCEF 117 at 22–23, ¶55).

120. At trial, Mr. Miller testified that he was unaware that Mr. Greenman was billing 392 Columbus for any of his time because he did not receive the Troutman Sanders invoices to 392 Columbus with the detailed time entries until early 2019, when Troutman Sanders sent them to his prior counsel at Kasowitz Benson Torres LLP (Tr. 490:9–491:4).

CONCLUSIONS OF LAW

I. Millman – Breach of Mr. Miller’s Fiduciary Duty to Millman (Count II)

A. Mr. Miller Improperly Usurped Millman's Loan Business.

“The doctrine of ‘corporate opportunity’ provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation” (*Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]). Courts construe this doctrine broadly, providing that corporate fiduciaries (and, in turn, managers of LLCs) “owe the corporation their undivided loyalty and ‘may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation’” (*Yu Han Young v Chiu*, 49 AD3d 535, 536 [2d Dept 2008] [finding the doctrine is violated where a director secretly forms a new entity and transfers the corporation’s entire business to that entity] (quoting *Foley v D’Agostino*, 21 AD2d 60, 66 [1st Dept 1964]; *see also Shatz v Chertok*, 180 AD3d 609, 609 [1st Dept 2020] [one breaches his fiduciary duty by “failing to pursue a previously-agreed upon investment opportunity [and] diverting that opportunity to another entity in which defendant [] has an interest.”])).

Millman’s outstanding loans to third parties were not only assets of Millman but, at the time of Mr. Greenman’s death, its central business venture (*see e.g.*, PX-130, Ex. 3-R, column 7). Mr. Miller’s transfer of certain existing loans to himself or his entities, without disclosing such efforts to Ms. Greenman and receiving her consent, was a violation of Mr. Miller’s fiduciary duty as Millman’s manager. Specifically, Ms. Greenman proved by a preponderance of the evidence that Mr. Miller violated his fiduciary duty by transferring, to himself or his company, the still-outstanding Millman loans of Bergel 14th, Three Streets, David Swersky, Jayne Sosland, 90 Hudson, and David Berley (*see supra* ¶¶16–36).

Mr. Miller is incorrect in claiming that because he no longer wished to provide Millman with his low borrowing rate, he could not have harmed Millman by taking Millman's loan business for himself (DX-KK ¶¶21, 27–29). His fiduciary obligations to Millman prevented him from acting in his own interest against Millman's interests. While Miller had no obligation to provide *new* financing to allow Millman to extend *new* loans to borrowers, as a fiduciary he was not free to encourage existing borrowers to prepay still-outstanding Millman loans and refinance them through Miller's entity, thus diverting profits from Millman to himself.

Mr. Miller's argument that he was entitled to initiate his own loans to Millman's borrowers since he and Mr. Greenman had always allowed the other to make independent investments (DX-KK ¶27) is unavailing. Mr. Miller offered no evidence that such investments occurred without the others' consent. Regardless, as managing member Mr. Miller was not permitted to appropriate the benefits of an existing contract of the LLC (*Atlantis Mgt. Group II LLC v Nabe*, 2022 NY Slip Op 30399[U], 3 [Sup Ct, NY County 2022] [finding that the managing members "breached their fiduciary duties to the Company by not negotiating for an extension of the Sublease and instead obtaining a new lease for plaintiff's Successor Company."); *see also Laro Maintenance Corp. v Culkin*, 267 AD2d 431, 433 [2d Dept 1999] [company officer is "under a fiduciary duty to refrain from engaging in a competing business" and may not use the company's proprietary information "to build a competing business"]).

Ms. Greenman's expert, James Donohue, calculated Millman's lost profits as directly occasioned by Mr. Miller's competition with and transfer of Millman's outstanding loan business to himself (PX-130, ¶¶ 7–15). The calculations do not include lost profits based on new loans from Miller to borrowers or *extensions* of Millman loans – only the expected profit had the borrowers continued paying off their Millman loans per their terms (as they did after the

refinancing arranged by Miller). Donohue calculated lost profits to Millman in the amount of \$1,721,462 (PX-130, Ex. 11-R) with respect to the loans to borrowers Bergel 14th, Three Streets, Swersky, Sosland, 90 Hudson, Berley, and Halpern. Miller does not seriously dispute the calculation (*see* Tr. 965:9–967:22), only his liability for it.

However, Ms. Greenman did not prove by a preponderance of the evidence that Richard Halpern’s Millman loan was transferred to Mr. Miller. At trial, Mr. Miller testified that he did not ask Halpern to prepay his loan early. When asked if he or Corinthian, or some other entity he controlled made a new loan to Halpern, Mr. Miller replied, “I think he maybe, I’m not sure” (Tr. 423:23–25). Since Ms. Greenman offered no other evidence to support her claim that Halpern’s loan was transferred to Mr. Miller (or Corinthian), this claim has not been proven. Donohue’s calculation of lost profits to Millman with respect to this claim must be reduced by \$28,066 (PX-130, Ex. 10G-R [Donohue’s calculation for lost profits on Halpern’s loan]) to \$1,693,396.

Accordingly, the Court sustains Plaintiff’s derivative claim with respect to Miller’s diversion of Millman’s corporate opportunities, and Miller is required to pay back to Millman the sum of \$1,693,396 with respect to that claim.

B. Ms. Greenman Failed to Demonstrate Mr. Miller Breached his Fiduciary Duty to Millman by Extending Loan to his Sons.

Ms. Greenman’s claim relating to the loans made to Mr. Miller’s sons is denied. Ms. Greenman’s main argument is that Mr. Miller did not seek or receive Ms. Greenman’s consent to this loan, which she argues violates the “interested manager” provisions in the Millman Operating Agreement. The “interested manager” provision provides:

No contract or other transaction between or among the Company and the Manager or any Affiliate of a Manager or any other Person in which a Manager is a partner, member, manager, director or officer, or has a substantial financial interest, shall

be either void or voidable for this reason alone or by reason alone that such Manager is present at the meeting of the Members which approves such contract or transaction, or that his consent was given for such contract or transaction; if the material facts as to such Manager's interest in such contract or transaction and as to any such common partnership, membership, managership, directorship, officership or financial interest are disclosed in good faith or known to the Members, and the Members Consent to such contract or transaction.

(JX-219§ 6.4(2)).

Ms. Greenman has not demonstrated that these loans fall under the “interested manager” provision. Mr. Miller's adult children are not “Affiliate[s]” of Mr. Miller under Millman's operating agreement. “‘Affiliate’ of a Person means another person directly or indirectly Controlling, Controlled by, or under common Control with, such Person,” and “‘Control’ of a Person means the power (whether or not exercised) to direct the policies, operations or activities of such Person by or through the ownership of, or right to vote, or to direct the manner of voting of, securities of such Person, or pursuant to law or agreement, or otherwise.” (JX-219 § 1.1). Mr. Miller's sons are adults, not business entities, and therefore are not subject to Mr. Miller's “Control” and are not his “Affiliates,” as those terms are defined in Millman's operating agreement.

Even if this provision did apply and Mr. Miller did not receive Ms. Greenman's consent, this claim fails. Section 6.4(3) of the Millman Agreement provides that “if there was no such disclosure or knowledge, the Company may avoid the contract or transaction, unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the Company.” (JX-219 § 6.4(3)). The loans to Mr. Miller's sons—which are identical to the loan that Millman made to Margot Greenman—are performing assets from which Millman receives regular interest income (JSOF ¶ 100; Tr. 444:25–447:6). Ms. Greenman has

failed to present any evidence that rebuts Mr. Miller's showing that the loans were fair and reasonable to the company. Accordingly, this claim is denied.

C. Mr. Miller Did Not Establish the Fairness of The West 61st Street "Guarantee Fees" Paid by Millman to Mr. Miller.

Mr. Miller's decision to pay himself from Millman's assets a 1 percent "guarantee fee" from Millman in connection with his personal backup indemnity to West 61st Street is not sustainable. As described in more detail *infra* at § II.C., *Millman* did not provide the indemnity, Mr. Miller did personally. But even if there could be a rationale for Millman compensating Mr. Miller for doing so, such a self-interested transaction would not be entitled to a presumption of legitimacy under the business judgment rule. Instead, he would be required to demonstrate the fairness of the transaction to Millman. Aside from general (self-serving) testimony from Mr. Miller and his expert witness that such fees are common in commercial real estate transactions (Tr. 259:24–261:4, 394:22–395:17, 958), Mr. Miller did not produce convincing evidence as to why this fee is fair to Millman (or its other member) in the specific context of the West 61st Street transaction.

Accordingly, the Court sustains Plaintiff's derivative claim with respect to these fees, and Miller is required to pay back to Millman the \$285,463 in fees.

D. Legal and Administrative Expenses of Millman

a. The Bookkeeping and Accounting Expenses are Appropriate.

Millman's bookkeeping and accounting expenses are appropriate under section 6.2(2) of Millman's operating agreement. One of Mr. Miller's discretionary powers is "to employ, retain or otherwise secure the services of various Persons (including the Manager and his affiliates), or to enter into contracts or other arrangements with them, and to delegate one or more of its rights, powers and obligations under this Agreement and applicable law to one or more of them." (JX-

219 § 6.2(2)). Mr. Miller exercised his discretion to continue with the services of the accountant (Michael Block) and bookkeeper (Aiping Chen) who had previously performed services and received payment from Millman for their work. This is not a self-dealing transaction.

At trial, Ms. Greenman failed to offer persuasive evidence showing that either Block or Chen were paid unreasonable amounts for the services they provided to Millman during the relevant period or that Mr. Miller received a personal benefit from Millman paying them to provide such services. Moreover, Ms. Greenman conceded that Millman requires the services of an accountant and bookkeeper to prepare the entity's tax returns and maintain its financial ledgers, and that she is unaware of any accountants or bookkeepers who would perform such services for Millman for free (Tr. 1094:8–25).

b. Mr. Miller Is Not Entitled to Indemnification for his Commingled Litigation Expenses.

Mr. Miller testified that he charged to Millman all his litigation expenses related to various joint investments with the Greenmans without regard to whether such amounts actually pertained to Millman (Tr. 231:21–233:20, 234:24–238:19). In response to Plaintiff's argument that Mr. Miller should have to repay Millman 100 percent of the legal fees and expenses that Millman has incurred since 2014, Mr. Miller only argues that to the extent that the legal costs that Millman paid may have covered his counterclaims and defenses against Ms. Greenman's claims unrelated to Millman, Ms. Greenman failed at trial to meet her burden to prove the amount of non-Millman-related fees that were paid.

However, as a fiduciary, Miller cannot so easily pass the evidentiary buck with respect to sorting out his admitted commingling of funds among distinct entities under his control. "Since the business judgment rule does not protect corporate officials who engage in fraud or self-dealing or corporate fiduciaries when they make decisions affected by inherent conflict of

interest, the burden shifts to defendants to prove the fairness of the challenged acts, in this case the reasonableness of the items of expenses charged to the corporation” (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]). And while the Millman operating agreement may allow Mr. Miller to be indemnified for certain legal expenses related to *Millman* (see JX-219 § 6.2[3]; 6.5, 6.6), Mr. Miller provides no basis on which the Millman operating agreement allows indemnification of Mr. Miller in his capacity of manager member of a different entity (392 Columbus and SDMJD). In these circumstances, it was incumbent upon Miller to distinguish and demonstrate the portion of his self-approved indemnification of litigation expenses that relate to Millman (and even then, he would only be entitled to indemnification to the extent he was not found to have breached his fiduciary duty). He did not do so. Accordingly, the Court finds that Miller is not entitled to indemnification and he must remit to Millman the sum of \$1,929,559 (see JX-216 [“Joint Stipulation of Millman Expenses”]).

II. Millman – Breach of Mr. Miller’s Fiduciary Duty to Ms. Greenman Individually (Count IV)

A. Ms. Greenman is Not Entitled to the Same \$3.4 Million Distribution as Mr. Miller.

Ms. Greenman is not entitled to 50 percent of the \$3.4 million “distribution” Millman made to Mr. Miller. The Court finds, based on the preponderance of the evidence, that this payment to Mr. Miller was the return of loan proceeds, not a distribution. As noted above, Millman was not a company that distinguished itself by corporate or transactional formality. But the evidence showed that the overarching financial principal governing the business was that Mr. Miller supplied the capital for loans, and the Millman was to reap the profits from the lending operation (that is, the spread in interest rate between Miller’s cost of acquiring funds and the interest rate Millman charged to borrowers). In those circumstances, Millman would have no

entitlement to the repayment of principal on a Millman loan, which legitimately was for Mr. Miller's account to repay his original loan.

Although the document trail is not clear cut, the Court is persuaded that the \$3.4 million at issue in this claim rightly belonged to Mr. Miller in his own right (it was not profit to him, merely a repayment of a credit), and not to Millman. Accordingly, the claim is denied.

B. Ms. Greenman is Entitled to Equal Distributions for Mr. Miller's \$1 Million in "Consulting Fees."

Ms. Greenman is entitled to equal distributions for the \$1 million in "Consulting Fees" Mr. Miller paid to himself in connection with 1200 Biscayne and West 61st Street. As a fiduciary to Millman and Ms. Greenman and under the Millman operating agreement (JX-219, §6.4), Mr. Miller has the burden to establish the fairness of his payments to himself. Mr. Miller claims that the payments were distributions he made to himself to offset earlier distributions made to the Greenmans in 2013 and 2014 (Tr. 25:16–28:5, 32:13–17, 474:14–22). Based on the evidence submitted and the testimony presented at trial, Mr. Miller failed to meet his burden of proving the payments to himself were fair.

1. 1200 Biscayne

First, Ms. Greenman seeks one-half of the \$989,016 Mr. Miller paid himself between December 2014 and June 2015 (\$250,000 on December 15, 2014, \$250,000 on March 13, 2015, and \$489,016 on June 4, 2015) to equalize "consulting fees" paid to Mr. Greenman/Ms. Greenman in connection with 1200 Biscayne. Mr. Miller originally claimed that the Greenman Payments were part of a "fraudulent scheme" by the Greenmans that he was unaware of (*see* PX-099 at 34-35, ¶¶132-140; Tr., 32:13-21 (Mr. Miller); 934:12-935:21, 940:1-13 (Sloane)). Confronted at trial with his active, contemporaneous participation in the calculation and payment of the Greenman Payments (JX-307, JX-316, JX-324, JX-309, JX-338, JX-337), Mr. Miller now

justifies the Miller Payments as his “recoupment” of the interest income on the 12000 Biscayne loan that he and the Greenmans shared when Mr. Greenman was alive (Defs’ Br. at 16–17, 35–36). Mr. Miller claims he had an alleged oral agreement with Mr. Greenman on the 12000 Biscayne loan with Mr. Greenman that Ms. Greenman “releged” on, and he therefore “equalized” the Greenman Payments (*id.*). According to Mr. Miller, Mr. Greenman verbally “agreed to share equally the profits on...the Greenman family’s equity interests” in the 12000 Biscayne property.¹

It is undisputed that this alleged deal was not formalized in a written agreement. However, the email correspondence between Mr. Miller, Mr. Greenman, and Block, indicates that there was an agreement that “Charles’ share of 12000 biscayne will be shared.” Based on these communications, (as outlined *supra* ¶¶40–47), Mr. Miller has established that there was an agreement regarding the loan and profits from 12000 Biscayne, which is separate from the operating agreement, which does not dictate whether members, outside of that agreement, can arrange to divide their interests. But there is no evidence that the agreement extended to the equity interests of Ms. Greenman and her adult daughters or that Mr. Greenman had authority to bind the entire Greenman family’s separate equity interests (*see Durso v Baisch*, 37 AD3d 646, 647 [2d Dept 2007]) [requiring the identity of the parties as a necessary element of a contract]).

Furthermore, even if there was an agreement, Mr. Miller cannot establish a breach of this oral agreement. First, Mr. Miller does not dispute that during 2014 and 2015 he continued to

¹ Mr. Miller has never explained, including at trial, how the amounts he paid himself purportedly were equal to the Greenman Payments. Mr. Miller claims that “Charles/Jane received consulting payments from Millman totaling \$827,471 for their share of the 12000 Biscayne loan” and so Mr. Miller took “consulting payments equal to” those payments (*id.* at 17). But after Mr. Greenman died Mr. Miller paid himself \$989,016 in “Consulting Fees” between 2014 to 2015 (PX-130, Ex. 13C-R).

receive income from the 12000 Biscayne loan yet did not offer to split it with Ms. Greenman (as representative of Mr. Greenman' estate) as the oral agreement would have required. Mr. Miller also does not dispute that neither Ms. Greenman nor any other Greenman family member received any of the income from their investment until 2016, necessarily meaning Ms. Greenman could have had no obligation to perform under the alleged deal until 2016 at the earliest. Mr. Miller's assertion that "Jane's refusal to share the Greenman family's profits on their equity interests in 12000 Biscayne was a material breach of the 12000 Biscayne agreement that allowed Larry to suspend any future performance of his obligations, terminate the agreement, and recover damages" (Def's Br. at 35) ignores the timeline, because Mr. Miller had suspended his performance a full two years before any alleged breach by Ms. Greenman could even have happened.

Moreover, Mr. Miller told his accountant Block in March 2015 that "Until I get something from Jane, I am going to assume that the income on the loan is mine and the equity increase is hers" (NYSCEF 504). Thus, instead of attempting to enforce the oral agreement in 2016 when Ms. Greenman would have started to receive distributions, Mr. Miller repudiated it by not distributing income from the loan in the two years prior. "[A] party repudiates a contract when it 'voluntar[il]y disable[s] itself from complying' with its contractual obligations" (*Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002]).

To the extent Mr. Miller argues Ms. Greenman "repudiated" by not affirmatively assenting to the alleged agreement after Mr. Greenman' death, Mr. Miller has offered no evidence that he provided Ms. Greenman, in writing or orally, the supposed terms of the entire agreement. "For an anticipatory repudiation to be deemed to have occurred, the expression of intent not to perform by the repudiator must be positive and unequivocal" (*Princes Point LLC v*

Muss Dev. L.L.C., 30 NY3d 127, 133 [2017] [internal quotations and citations omitted]). “[Mr. Miller]’s anticipatory repudiation defense is unsupported by proof of a definite and final communication by [Ms. Greenman] of [her] intention not to perform” (*1625 Mkt. Corp. v 49 Farm Mkt., Inc.*, 165 AD3d 426, 426 [1st Dept 2018] [internal citations omitted]). The sum total of “evidence” cited in support of this requirement is Mr. Miller’s testimony that “Jane reneged on the agreement” (Defs’ Br. at 16; Tr. 595:19–25). Mr. Miller provides no further evidence or testimony to support this argument.

In sum, the Court finds based on the evidence at trial that there is no persuasive justification for Mr. Miller’s unilateral payment to himself of a \$1 million “Consulting Fee.” Accordingly, the Court finds that this payment was a distribution in which Ms. Greenman should have shared equally (i.e., \$500,000).

2. *West 61st Street*

Separately, Ms. Greenman seeks one-half of the \$88,455 Mr. Miller paid himself on December 2, 2015 as a “Compensation Offset to Charles/Jane” in connection with West 61st Street (JX-157 at P337:R14). Mr. Miller argues that the \$88,455 payment that he received in 2015 reconciled a misunderstanding concerning the applicable interest rate for the \$4 million that Mr. Miller loaned to Millman in 2005 for the West 61st Street investment. According to Mr. Miller, Mr. Greenman set the interest rate at 75 basis points over LIBOR instead of the 50 basis points over LIBOR that applied to the rest of Mr. Miller’s loans to Millman. In 2013, Mr. Miller thought he had been overpaid interest from Millman by 25 basis points, so Ms. Greenman received a \$88,454.78 payment to make up that difference. According to Mr. Miller, that payment was in error, as Mr. Greenman had set the interest rate at 5 basis points over LIBOR, so Mr. Miller reversed the unwarranted payment to Ms. Greenman (Defs’ Br. at 14).

Although Mr. Miller cites to Chen's testimony for support, this latest version² appears only in part in Chen's testimony (*see* Tr. 729:7–732:18, 768:7–772:14). It is otherwise uncited and contradicts both Mr. Miller's and Block's testimony. Mr. Miller not only testified that he did not pay the \$88,455 to Ms. Greenman in 2013 but also exclaimed about the payment: "How would I know?" (Tr. 547:17–23). He also claimed to have "no idea" why he paid himself \$88,455 in 2015 (Tr. 544:1–23). Block testified that the payment was related to the \$300,000 owed to Mr. Greenman in 2013—and never fully repaid—in connection with Millman's West 61st Street investment (Tr. 626:23–627:22, 847:13–17).³ The Court cannot credit the latest version of this payment due to Mr. Miller's inability to offer a consistent or credible explanation.

Accordingly, Mr. Miller must pay Ms. Greenman half of the payments made to himself in connection with 1200 Biscayne and West 61st Street. As calculated by Donohue, Mr. Miller's four payments (\$250,000; \$250,000; \$489,016; \$88,455) totaled \$1,077,471, not including pre-judgment interest from the dates on which Mr. Miller took them (*see* PX-130, Ex. 13C-R, rows 1-4).

C. Mr. Miller Improperly Withheld Millman Distributions to Secure His Personal Backup Indemnity.

Ms. Greenman demands Mr. Miller distribute her share of Millman's \$3.9 million in liquid assets, including the proceeds of Margot's loan repayment. Mr. Miller counters that he has wide discretion under the "business judgment" rule to withhold distributing the funds,

² Mr. Miller originally argued that Charles "began fraudulently charging Millman for services they never performed. For instance, in or around October 2013, Charles and Jane caused Millman to pay them a total of approximately \$950,000 in "consulting fees" (SACC ¶¶133–34).

³ Sloane's 2021 rebuttal report presented a third explanation ("a guaranteed payment that each was entitled to in connection with West 61st Street") that he received from Block (NYSCEF 244, ¶23). Sloane removed any justification of the payment from his trial affidavit and withdrew his opinion on the \$88,000 payment because "it was under a different understanding" that he had about the payment (Tr. 943:2–946:11).

specifically referencing Millman's backup indemnity to the 2017 West 61st Street loan and his related indemnity (Defs' Br. at 27–31). Although Mr. Miller does have discretionary authority over operational and financial matters under the Millman Agreement (*see* JX-219 § 4.1; JX-219 § 6.2(2)), that discretionary right does not protect bad faith and self-dealing (*Shatz v Chertok*, 180 AD3d 609, 610 [1st Dept 2020]).

With respect to West 61st Street, Mr. Miller previously claimed that he “personally was required to provide a backup indemnity to stand behind Millman’s guaranty in order for the refinancing to close.” (JX-476, ¶34). Mr. Miller admits he never ultimately provided a backup indemnity *for Millman*; he signed only for himself “to the extent of 1/2 Millman.” (JSOF ¶¶107, 110–113). Accordingly, there is no legitimate basis to withhold Millman distributions (to either Mr. Miller *or* Ms. Greenman) on the basis of Mr. Miller’s *personal* backup indemnity. Further, Mr. Miller admitted at trial that, in fact, Millman was not required to sign the indemnity; Millman could instead have paid an annual fee (Tr. 260:19–24). Yet Mr. Miller had Millman both sign and pay him a 1 percent fee he negotiated with himself (*see supra* § I.C.).

Mr. Miller’s self-dealing required him to demonstrate the fairness of his actions to Millman. Yet Mr. Miller has not offered any persuasive rationale for the amounts he is holding in Millman in reserve based on his own contingent liability. Indeed, Mr. Miller was unable at trial to articulate any rationale for the amount Millman should reasonably retain (Tr. 256:5–22). Accordingly, Mr. Miller is directed to distribute Millman’s \$3.9 million in liquid assets, including the proceeds of Margot’s loan repayment.

D. Mr. Miller Must Correct Millman’s Capital Accounts.

Mr. Miller must correct Millman’s Capital Accounts. While it’s true that prior to her post-trial brief, Ms. Greenman sought damages on her claim regarding the Millman capital

account adjustments that Block made in 2016, Ms. Greenman admits in her Post-Trial Brief that while her “request for relief in the complaint does not specifically request a declaratory judgment for reinstatement of the capital accounts, it does request an order ‘voiding all interested transactions undertaken by Miller’” (NYSCEF 531 at 30). Further, Ms. Greenman requested leave, if necessary, to “amend[] the pleadings to comply with the evidence,” which the Court suggested as a “possibility,” since this “is a ripe dispute.” (Tr. 995:10–996:25). This claim is deemed so amended, and is granted as set forth below.

In 2016, Mr. Miller and Block removed \$760,104 from Ms. Greenman’s capital account, attributed \$229,652 of that amount to Mr. Miller’s capital account (Plaintiff’s Demonstrative A), and then converted the remaining \$530,452 into a distribution to Mr. Miller (DX-KK, ¶13, Tr. 993:2–994:12 (Sloane); *id.*, 910:24–911:14 (Donohue)). Defendants’ Brief offers no defense for these adjustments, despite the extensive trial testimony about them and the Court’s rejection of Mr. Miller’s request for a directed verdict on Ms. Greenman’s claim (Tr. 912:16–913:8; *see also id.*, 995:10–998:24).

That the dissolution claim was denied is not a bar to relief. “The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court’s determination will have the immediate and practical effect of influencing their conduct” (*New York Pub. Interest Research Group, Inc. v Carey*, 42 NY2d 527, 531–31 [1977]); *see also Estate of Calderwood v ACE Group Intl. LLC*, 157 AD3d 190, 197 [1st Dept 2017] [quoting same]). Correct capital accounts will be necessary to govern

dissolution, when and if that occurs. At trial, Mr. Miller reiterated prior testimony that he “considered it [his] obligation to wind down Millman as quickly as possible.” (Tr. 248:3–7).

Therefore, Mr. Miller must adjust the Millman capital account balances to their amounts prior to the 2016 adjustments and return the \$530,452 to Millman (DX-KK, ¶13).

III. 392 Columbus (Counts VI and VII)

A. Mr. Miller breached his fiduciary duty to Ms. Greenman by failing to make distributions in accordance with the 392 Columbus Operating Agreement (Count VII).

Mr. Miller breached his fiduciary duty to Ms. Greenman by not paying distributions from 392 Columbus to Ms. Greenman in accordance with the 392 Operating Agreement, and Mr. Miller owes Ms. Greenman 50 percent of whatever distributions he actually received from 392 Columbus, including any cash distributions from W2 Labs.

By decision dated October 4, 2022, this Court granted summary judgment to Ms. Greenman on Mr. Miller’s related counterclaim that a prior operating agreement that provided for a one-third/two-thirds split—rather than the signed February 29, 2012 operating agreement—governed 392 Columbus (NYSCEF 521 at 5–7; *Greenman*, 2022 NY Slip Op. 33355[U], 6). Mr. Miller’s argument that the Court’s finding does not, in and of itself, establish Mr. Miller’s personal liability to Ms. Greenman is unavailing. Mr. Miller relies on Section 6.4 of 392 Columbus’s operating agreement which eliminates the individual liability of a member who acts “in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances” (JX-217 § 6.4). However, Mr. Miller omits the exceptions to the agreement’s limitation of liability provision, including that it does not apply “to the extent that a judgment or other final adjudication adverse to it establishes . . . that the Member personally gained in fact a financial profit or other advantage to which he was not

legally entitled....” (JX-217, §6.6). Here, Mr. Miller received a “financial profit” from the excess cash distributions, and this Court has already determined that Mr. Miller “was not legally entitled” to those amounts (NYSCEF 521 at 5–6).

In the other direction, the Court finds that Mr. Miller was over-allocated 70% of the “phantom income” associated with the company’s W2 Labs investment (*supra* ¶¶93–96). An appropriate adjustment should be made to divide the phantom income equally between Mr. Miller and Ms. Greenman.

B. Ms. Greenman Failed to Demonstrate that Mr. Miller breached his duty of loyalty to 392 Columbus under the Operating Agreement by competing with the 392 Columbus Loan (Count VI).

Ms. Greenman failed to demonstrate that Mr. Miller breached his duty of loyalty to 392 Columbus by competing with the 392 Columbus loan to W2 Labs. In addition to misallocating the cash distributions from W2 Labs, which, as noted above, Mr. Miller must correct, Ms. Greenman argues that from the W2 Labs distributions, Mr. Miller caused a portion (the “loan receivable” amounts listed on 392 Columbus’s 2016, 2017, and 2108 tax return records) to be extended back to W2 as an interest-free loan from 392 Columbus (*see supra* ¶¶90–92). According to Ms. Greenman, during the time that the “loans” remained outstanding, Mr. Miller made and collected on two interest-bearing loans to W2 Labs, one of which prioritized payment of Mr. Miller’s personal loan as “senior” over any other repayment owed. Thus, Ms. Greenman argues that Mr. Miller agreed that W2 Labs could hold back distributions owed to 392 Columbus and did nothing to pursue these distributions because of Mr. Miller’s competing loans.

However, Ms. Greenman presented no persuasive evidence at trial demonstrating that Mr. Miller made interest-free loans to W2 Labs with the remaining distributions from W2 Labs. As noted above, the Court finds Block’s testimony that the “loan receivable” amounts were actually

“phantom income” credible, and thus, 392 Columbus did not actually receive from W2 Labs the amounts listed as “loan receivable.” Block further testified that the “loan receivable” was eventually written off as a loss (Tr. 834:5–9), and that Jane benefitted from receiving 50% of the tax write-off even though she only incurred only 30% of the tax obligation from the phantom income (Tr. 835:18–836:5).

Furthermore, the two loans that Ms. Greenman identifies as “competing” with 392 Columbus were loans were made by Corinthian International Foundation, a charitable foundation set up by Mr. Miller, but run by trustees (Tr. 320:20–21). One of these loans was made to W2 Labs, and the other was made to IP Brands, a holding company for W2 Labs, among other companies. While Mr. Miller’s argument that the loan to IP Brands had nothing whatsoever to do with W2 Labs is contradicted by Mr. Cooper’s testimony that IP Brands needed funds to avoid a breach of contract by W2 Labs with its main asset, KF Beauty (Cooper Tr. 131:12–18), at trial, Ms. Greenman offered no evidence connecting either loan from Corinthian to W2’s failure to pay 392 Columbus the distributions or that Mr. Miller agreed that W2 Labs could hold back distributions owed to 392 Columbus (Tr. 464:3–465:14). Without any evidence to support these allegations, the Court finds that Ms. Greenman has failed to prove her claim that Mr. Miller breached his duty of loyalty to 392 Columbus.

**IV. Financial Information and Books and Records (Millman and 392 Columbus)
(Counts III & V).**

Ms. Greenman is entitled to a judgment declaring that she has a right (i) to financial statements and (ii) to access the books and records for both Millman and 392 Columbus.

First, Section 5.5 of both operating agreements for 392 Columbus and Millman require Mr. Miller to annually distribute to Ms. Greenman her K-1 and the entities’ “financial statement” (JX-217, §5.5(2)-(3); JX-219, §5.5(1)). Mr. Miller does not deny that Ms. Greenman is entitled

to financial statements, he only argues that Millman and 392 Columbus never had any formal financial statements—neither audited, reviewed, nor compiled—prepared throughout their respective existences. To the extent that is true, Mr. Miller must promptly provide whatever business records would be sufficient for Ms. Greenman to have an informed understanding of the finances of the entities (such as general ledgers, trial balances, balance sheets, income statements, and cash receipt, and disbursement ledgers). Mr. Miller cannot avoid sharing any financial information with Ms. Greenman simply because he does prepare formal financial statements.

Second, the operating agreements for 392 Columbus and Millman provide that “[e]ach member may upon reasonable notice to the Manger, for any purpose reasonably related to such Member’s interest, at such Member’s own expense, inspect and copy, during the normal business hours of the Company, any records or information maintained by the Company” (*id.*). While Ms. Greenman may not have “unfettered” access to the books and records, Ms. Greenman is entitled to reasonable and consistent access, without hinderance from Mr. Miller.

Accordingly, Ms. Greenman is entitled to a judgment declaring that Mr. Miller shall provide Ms. Greenman with financial statements (or sufficient records), and access to books and records of both Millman and 392 Columbus.

V. Mr. Miller’s Counterclaims

Mr. Miller’s remaining counterclaims⁴ allege that Mr. Greenman’s estate should be liable for the fraudulent legal fees charged to Millman and 392 Columbus.⁵ It is undisputed that Mr.

⁴ At trial, Mr. Miller withdrew his claim against Charles’ estate for breach of the alleged 1200 Biscayne agreement (Tr. 465:17–466:6).

⁵ Ms. Greenman’s contention that “[p]rotecting the estate from claims against the deceased who cannot defend themselves is the essential function of” CPLR 4519 is misplaced. CPLR 4519 is

Greenman owed Millman and 392 Columbus fiduciary duties as both the manager of those entities and as their attorney. “As a fiduciary, the lawyer is obliged to exercise the highest degree of good faith, honesty, integrity, fairness, and fidelity and may not have personal interests antagonistic to those of his client” (*U.S. Ice Cream Corp. v Bizar*, 240 AD2d 654, 655 [2d Dept 1997]). “This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf—‘giving counsel’—is imbued with ultimate trust and confidence” (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]). However, as outlined below, both of Mr. Miller’s counterclaims are denied.

A. Millman Invoices – Breach of Fiduciary Duty Against Ms. Greenman as Executrix (Fourth Counterclaim)

In his fourth counterclaim, Mr. Miller argues that Mr. Greenman breached his fiduciary duties to Millman by, among other things, fraudulently causing Troutman Sanders to generate various invoices to Millman for services never rendered or not properly incurred on behalf of Millman. In defense, Ms. Greenman argues that this claim is time-barred by the statute of limitations. On summary judgment, the Court held that based on the CPLR §213(8)’s two-year “discovery rule,” an issue of fact remained as to “when Miller discovered the purported fraud or when he was on notice of it” (NYSCEF 521 at 6).

While there is certainly evidence in the record that supports Mr. Miller’s argument that Mr. Greenman billed for time spent performing non-legal tasks, including entries during a Miller

an evidentiary rule, not an affirmative defense (*see In re Tschernia*, 18 Misc 3d 1114(A) [Sur Ct, Nassau County 2007] [noting that “CPLR 4519 is not an affirmative defense, but, rather, a statute that in substance provides that a person interested in the outcome of the litigation is, upon proper objection, incompetent to testify to a personal transaction or communication with a deceased or mentally ill person, when the testimony is offered against the decedent's estate or the mentally ill person.”]). As long as Mr. Miller relies on the Troutman Sanders invoices and financial records to demonstrate what Charles did, Mr. Miller’s claims do not violate CPLR 4519.

and Greenman family trip to China, and for Mr. Greenman's trips to Michigan where Millman did not have any investments or prospective business opportunities (JX-529), Mr. Miller's argument that he "discovered" this fraud in 2019 is not credible.

The statute of limitations for a breach of fiduciary duty based on allegations of actual fraud must be commenced within "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (*Marasa v Andrews*, 69 AD3d 584, 584 [2d Dept 2010], citing CPLR 213[8]; CPLR 203[g]).⁶ "The test as to when fraud should with reasonable diligence have been discovered is an objective one" (*Gutkin v Siegal*, 85 AD3d 687, 688 [1st Dept 2011]). "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." (*id.* [internal citations and quotations omitted]).

Here, while Mr. Miller might not have had the "full set of Troutman Sanders invoices" prior to January 2019, the record and the testimony offered at trial indicates that Mr. Miller was aware no later than shortly after Mr. Greenman died—when he received, reviewed, and paid two

⁶ While the parties' arguments focus on the two-year discovery rule, the Court notes that the fourth counterclaim is also untimely under the six-year limitation. ["A] cause of action for breach of fiduciary duty accrues at the time of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 121 n3 [1st Dept 2003]). Here, the last Millman invoice at issue was dated March 14, 2014 (JSOF ¶127; JX-529), so this claim accrued, at the very latest, on March 14, 2014. Thus, Mr. Miller had six years from that date to file this claim, which would be March 14, 2020. However, Mr. Miller first made his improper billing allegations in this litigation regarding Millman on May 21, 2021 (NYSCEF 180 ¶¶ 206–14). Since this claim was stale prior to the Executive Orders tolling the statute of limitation due to the COVID-19 virus (*see* Executive Order (A. Cuomo) No. 202.8 [9 NYCRR 8.202.8]; *Brash v Richards*, 195 AD3d 582, 584 [2d Dept 2021] [noting that New York's governor implemented the first Executive Order tolling the statute of limitations on March 20, 2020]), Mr. Miller's claim is facially time-barred under the six-year limitation.

of the now-challenged invoices—that Mr. Greenman had been submitting allegedly fraudulent invoices to Millman. As outlined in the Findings of Fact (*supra* ¶¶106–114), Mr. Miller asked Chen and Block to investigate certain invoices, and testified that he knew at that time that “[Mr. Greenman] did not do Millman business” in Michigan (Tr. 518:20–519:16) but “agreed to pay the bill rather than making an issue of it” (Tr. 524:13–16; *see also* JSOF ¶¶128–29). From March to June 2014, there are various emails between Chen, Morin, and Mr. Miller which indicate that Mr. Miller had concerns about which expenses of Mr. Greenman’s were business or personal, but Mr. Miller chose not to correct the billing or raise the issue and paid the invoices (*see* PX-075; PX-120; PX-121 at MILLER00155586; PX-077 at TROUT007741; JSOF ¶¶13; 131; Tr. 516:13–517:2; Tr. 526:11–527:2). Given this record, Mr. Miller clearly was, at the very least, on notice that Mr. Greenman had been billing for time Mr. Miller believed to be incorrect, and a “duty of inquiry a[rose]” (*Gutkin*, 85 AD3d at 688) in June of 2014, at the very latest.

The Court obviously is no privy to all of the informal arrangements that may have existed between Mr. Greenman and Mr. Miller, and Mr. Greenman is not available to tell his side of the story, but it was clearly a relationship in which formalities were not the norm and in which “looking the other way” seemed to be common, though the reasons for the latter remain unclear. In any event, the notion that Mr. Miller was not aware of Mr. Greenman’s questionable billing practices as far back as 2014 is not supported by the evidence.

Since the last Millman invoice was dated March 14, 2014, the latest the claim could have been asserted is the later of March 14, 2020 (prior to the COVID tolling date, which was March 20, 2020) or two years from when Mr. Miller was on inquiry notice (which was June 2014, at the

very latest). Accordingly, because this claim was not filed until March 21, 2021, it is denied as time barred.⁷

B. 392 Columbus Invoices – Breach of 392 Columbus Operating Agreement Against Ms. Greenman as Executrix (First Counterclaims) and breach of fiduciary duty Against Ms. Greenman as Executrix (Second Counterclaim).

Mr. Miller also brings a breach of contract and a breach of fiduciary duty claim alleging that Mr. Greenman improperly charged 392 Columbus at least \$90,000 in legal fees. Both counterclaims are denied.

First, Mr. Miller’s breach of contract claim is premised on the incorrect allegation that the 392 Columbus operating agreement did not permit Mr. Greenman bill his time to 392 Columbus (JX-462, ¶7) where no such provision is found in the operating agreement. Further, unlike the Millman operating agreement, the operating agreement for 392 Columbus does not prohibit Mr. Greenman from charging for his work as Manager (*see* JX-217, §6.1(4) [“Any transaction between the Company and the Manager or any Affiliate of the Manager shall be at arm’s length, and any payment to the Manager or his Affiliate for services rendered or property transferred to the Company shall not exceed the prevailing rate in the area for comparable items”]).

Mr. Miller points to invoices that he argues reflect Mr. Greenman’s work “that could only be in his capacity as manager/principal of 392 Columbus” (Def’s Reply Br. at 22). Specifically, Mr. Miller takes issue with invoices reflecting Mr. Greenman’s time allegedly spent in connection with the 392 Columbus building sale closing and mortgage payoff, arguing that billing this time was improper because Mr. Greenman was not a real estate or transactional attorney, “and his only role in the transaction was as the manger and 1/3 owner of 392 Columbus

⁷ Although Mr. Miller combines his arguments in his brief, the “relation-back doctrine” does not apply his claim regarding the Millman invoices, because Mr. Miller never brought any claims related to Millman in his original answer and counterclaims (NYSCEF 36).

as the seller” (Def’s Br. at 40). However, as noted, the operating agreement does not prohibit billing for work as a manager. Mr. Miller offered no personal knowledge or other evidence to support the allegations that these time charges are improper (*see* JX-530). Thus, both counterclaims fail on the merits.

Second, in addition, like the Millman invoices, the statute of limitations bars Mr. Miller’s claims. In this instance, Mr. Miller’s claims are contract-based,⁸ and the statute of limitations is six years on breach of contract claim (CPLR 213(2)) and up to six years on a breach of fiduciary duty claim, depending on the substantive remedy sought (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Here, since Mr. Miller seeks monetary damages on his breach of fiduciary duty claim, a three year limitation applies (*Kaufman v Cohen*, 307 AD2d 113, 117 [1st Dept 2003] [noting that a breach of fiduciary duty claim seeking equitable relief is subject to a six year statute of limitations and courts have often applied a three year limitation to claims seeking monetary damages]). 392 Columbus’ bank records show that the last payment was on February 22, 2012 (JSOF ¶127; JX-529; NYSCEF 300).

Mr. Miller first raised this issue in the first amended counterclaims filed on March 12, 2018 (NYSCEF 117 ¶¶76–77). Thus, even when assuming these causes of action accrued on the latest possible date of February 22, 2012 (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [“In New York, a breach of contract cause of action accrues at the time of the breach”]; *Kaufman*, 307 AD2d at 121 n3 [1st Dept 2003] [“A] cause of action for breach of

⁸ Unlike the claims related to Millman, Mr. Miller did not allege any fraud in connection with his claim regarding 392 Columbus. Furthermore, Mr. Miller does not request that his allegations conform to the evidence presented at trial. In any event, “courts will not apply the fraud statute of limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims” (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

fiduciary duty accrues at the time of the breach”]), the first counterclaim for breach of contract is barred by the passage of six years prior to his filing his claim, and the second counterclaim for breach of fiduciary duty is barred by the passage of three years prior to the filing of this counterclaim.

Nor can the relation-back doctrine save Mr. Miller’s counterclaims. “Under this doctrine, a new theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original complaint” (*Cady v Springbrook NY, Inc.*, 145 AD3d 846, 847 [2d Dept 2016]). However, “when the nature of a newly asserted cause of action is distinct from the causes of action asserted in the original complaint, and requires different factual allegations as to the underlying conduct than were contained in the original complaint, the new claims will not “relate back” in time to the interposition of the causes of action in the original complaint” (*Calamari v Panos*, 131 AD3d 1088, 1089 [2d Dept 2015]).

Although Mr. Miller points to the allegation that “Jane and the Estate are liable to compensate Mr. Miller for all of the funds Mr. Greenman and his family, including Jane, improperly collected that they were not entitled to receive under the 392 Columbus operating agreement” (NYSCEF 36 ¶ 83), that is in reference to Mr. Miller’s allegation that Mr. Greenman improperly took the wrong distribution amount from the *sale* of 392 Columbus. Nowhere in Mr. Miller’s original counterclaims filed on March 24, 2017 does he allege that Mr. Greenman improperly billed for legal services. Nor did Mr. Miller allege any wide-ranging attack, even a vague one, on Mr. Greenman’s stewardship of 392 Columbus. Thus, this is not simply a new theory of recovery based on the same transactions alleged in the original counterclaims, but rather an entirely new transaction with different underlying facts. This was not sufficient to put Ms. Greenman on notice of a different claim for improperly billed services.

Accordingly, the first and second counterclaims are denied.⁹

CONCLUSION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED and **ADJUDGED** that the second cause of action for Breach of Mr. Miller's Fiduciary Duty to Millman is **GRANTED IN PART**, and Millman is entitled to damages due to (i) Mr. Miller's Appropriation the Loan Business in the amount of \$1,693,396, with one half to be distributed to Ms. Greenman; (ii) Mr. Miller's payments to himself of West 61st Street "Guarantee Fees" in the amount of \$285,463, with one half to be distributed to Ms. Greenman; and (iii) the inappropriate Indemnification by Millman of Mr. Miller's Litigation Expenses in the amount of 1,929,559, with one half to be distributed to Ms. Greenman; the second cause of action is otherwise **DENIED**; it is further

ORDERED, DECLARED, and ADJUDGED that the third cause of action is **GRANTED**, and Mr. Miller shall provide Ms. Greenman with annual financial statements for Millman and access to books and records; it is further

⁹ Even if Mr. Miller's first, second, or fourth counterclaims were successful, punitive damages against Mr. Greenman's estate would not be appropriate. While "[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996]), "as a threshold matter under New York law, punitive damages are unavailable in a case against personal representatives of a decedent tortfeasor's estate" (*Doe v Indyke*, 468 F Supp 3d 625, 631 [SDNY 2020] [citing by EPTL § 11-3.2(a)(1) ["No cause of action for injury to person or property is lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages"]]). This is because "punishment and deterrence — the recognized bases for imposing punitive damages on a tortfeasor — are not advanced by imposing punitive damages on his or her estate" (*id.*).

ORDERED and **ADJUDGED** that the fourth cause of action for Breach of Mr. Miller's Fiduciary Duty to Ms. Greenman Individually is **GRANTED IN PART**, and Ms. Greenman is entitled Equal Distributions for Mr. Miller's "Consulting Fees" in the amount of \$1,077,471, with one half to Ms. Greenman; and that Mr. Miller is directed to (i) increase Ms. Greenman's capital account by \$760,104 and decrease Mr. Miller's capital account by \$229,652; and (ii) distribute the balance of liquid assets in Millman; the fourth cause of action is otherwise **DENIED**; it is further

ORDERED, DECLARED, and ADJUDGED that the fifth cause of action is **GRANTED**, and Mr. Miller shall provide Ms. Greenman with annual financial statements for 392 Columbus and access to books and records; it is further

ORDERED and **ADJUDGED** that on the sixth and seventh cause of action for breach of contract and breach of fiduciary duty to Ms. Greenman under the 392 Columbus Operating agreement is **GRANTED IN PART**, and Ms. Greenman is entitled to 50 percent of the actual cash distributions received by Mr. Miller (as offset by phantom income); the branch of these claims which relate to competing with 392 Columbus' loan is **DENIED**; it is further

ORDERED and **ADJUDGED** that Mr. Miller's first, second, and fourth counterclaims for legal fees billed by Mr. Greenman are **DENIED** in their entirety; it is further

ORDERED that Plaintiff submit a proposed judgment within ten (10) days of the date of this Order.

