

**Herman v Herman**

2017 NY Slip Op 31034(U)

April 28, 2017

Supreme Court, New York County

Docket Number: 650205/2011

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

Index Number : 650205/2011  
HERMAN, ROSEMARIE A.  
vs.  
HERMAN, JULIAN MAURICE  
SEQUENCE NUMBER : 031  
OTHER RELIEFS

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/13/17  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1480-1574,  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 1575-1602  
Replying Affidavits \_\_\_\_\_ No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 4/28/17

Shirley Werner Kornreich, J.S.C.  
**SHIRLEY WERNER KORNREICH**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
ROSEMARIE A. HERMAN, et al.,

Plaintiffs,

Index No. 650205/2011

**DECISION & ORDER**

-against-

JULIAN MAURICE HERMAN, et al.,

Defendants.

-----X  
JULIAN MAURICE HERMAN,

Third-Party Plaintiff,

-against-

JOSEPH ESMAIL and SOLITA N. HERMAN,

Third-Party Defendants.

-----X  
SHIRLEY WERNER KORNREICH, J.

Plaintiffs move (Motion Sequence 031) to confirm the amended report, dated January 26, 2017 (Report, Dkt 1480)<sup>1</sup> of Special Referee Jeffrey A. Helewitz (Referee), who conducted an inquest on January 12, 2017, to assess the damages Plaintiffs are entitled to recover from defendant Julian Maurice Herman (Maurice). Maurice’s answer, counterclaims, cross-claims and third-party claims were stricken for failure to provide disclosure.<sup>2</sup> There is no opposition because Maurice was precluded from participating in the inquest for his failure to comply with a

<sup>1</sup> References to “Dkt” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System. References to exhibits entered in evidence at the inquest will be denoted by “Ct” and “P” (Court or Plaintiffs, respectively) followed “Ex” and the exhibit number.

<sup>2</sup> Maurice’s pleadings were stricken in a July 13, 2015, decision and order, entered on July 15, 2015 (Dkt 1190, Default Decision); his motion to reargue was denied on October 20, 2015 (Dkt 1327). The order striking his pleadings was affirmed by the First Department on December 3, 2015, and the Court of Appeals denied his motion for leave to appeal. *Herman v Herman*, 134 AD3d 442 (1st Dept 2015), *lv den* 27 NY 973 (2016).

conditional order for disclosure after his answer was stricken.<sup>3</sup> The inquest against Maurice was severed from the balance of the action and the inquest was referred to the Referee, to hear and report with recommendations, including the appropriate remedy with respect to the conveyance of the interest of the 1991 Trust in the real property located at 952 Fifth Avenue, New York, New York (952 Fifth).<sup>4</sup> For the reasons that follow, the Report is confirmed in part and rejected in part.

### *I. Background*

The reader's familiarity with prior written decisions of this court in this action is assumed, and the facts will be repeated here only as necessary. Terms defined in the Default Decision have the same meaning here.<sup>5</sup> This action is one of several related actions pending before this court involving a 1998 sale of assets owned by two Trusts, in which Rosemarie Herman has a beneficial interest, to Consolidated, a limited liability company owned by Maurice.

In 1990, Harold Herman, as grantor, created a 1990 Trust for the benefit of his children, Rosemarie and Maurice, that named Maurice as trustee. In April 1990, Maurice designated Rosemarie as co-trustee of the 1990 Trust.<sup>6</sup> The 1990 Trust owned the apartment building located at 36 Gramercy Park East (36 Gramercy). On March 1, 1997, pursuant to the terms of

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<sup>3</sup> Maurice was precluded from participating in the inquest by an order of this court, dated May 2, 2016 [Dkt 1444], which was affirmed by *Herman v Herman*, 144 AD3d 433 (1st Dept 2016). On February 7, 2017, the First Department granted leave to appeal from its decision to the Court of Appeals [Dkt 1591]. Maurice requested leave to oppose the motion to confirm, but the court denied it on the ground that it was part of the inquest, from which he was precluded from participating. 2/21/17 Order, Dkt 1600.

<sup>4</sup> The reference orders were as follows: July 15, 2015 [Dkt 1190]; 12/22/15 [Dkt 1360]; 5/17/16 [Dkt 1448]; and 1/19/17 [Dkt 1478].

<sup>5</sup> The Default Decision incorporated terms defined in prior decisions efiled as Dkt 60, 420 & 986.

<sup>6</sup> See *Herman v 36 Gramercy Park Realty Associates, LLC*, Sup Ct NY Co Index No. 652700/2012, Dkt 235.

the 1990 Trust, half of its principal was distributed to Maurice outright and the other half to Rosemarie, to be held by the trustees in further trust during her life, with remainder to her issue *per stirpes* (the Springing Trust). The next day, March 2, 1997, Maurice signed a letter by which he purported to resign as trustee of the 1990 Trust.

Rosemarie and Maurice inherited the five other properties from Harold (with 36 Gramercy, Herman Properties), all of which were apartment buildings in Manhattan.<sup>7</sup> In 1991, Rosemarie, as grantor, created a 1991 Trust that named her mother, Solita Herman, as trustee for her half of the other five apartment buildings.<sup>8</sup> Thus, the 1991 Trust held Rosemarie's 50% share of five of the Herman Properties, i.e., excluding 36 Gramercy. Pursuant to a deed dated November 27, 1991, Rosemarie and Maurice conveyed 952 Fifth to Solita, as Trustee of the 1991 Trust, and Maurice, as tenants in common. Dkt 1585, Deed Conveying 952 Fifth to 1991 Trust and Maurice (952 Deed). The 952 Deed was recorded in December 1991. *Id.*

Offit, Maurice's boyhood friend, replaced Maurice and Solita as trustee of both Trusts in 1997.<sup>9</sup> Complaint, ¶¶ 61 & 62 & 66-67. However, Rosemarie remained the co-trustee of the 1990 Springing Trust. In April 1997, after Offit was trustee, Maurice executed a deed, as trustee of the 1990 Trust, that purported to transfer 36 Gramercy to Mayfair York, LLC (Mayfair), a New York limited liability company. Complaint, ¶64. By deeds acknowledged in December

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<sup>7</sup> The other five Herman Properties Rosemarie and Maurice inherited were located at 952 Fifth Avenue (952 Fifth), 320-330 East 22nd Street (East 22nd), 8-10 West 74th St (West 74th), 148-154 West 82nd St (East 82nd), and 425 East 76th St (East 76th).

<sup>8</sup> The 1991 Trust was created pursuant to an agreement dated November 27, 1991, between plaintiff Rosemarie A. Herman, as grantor, and her mother, Solita Nahon Herman, as trustee. In early 1997, Michael Offit replaced Solita as trustee. By order dated July 16, 2013, Ariel E. Belen was appointed successor temporary trustee of the 1991 Trust, until conclusion of the related Herman actions. Dkt 564.

<sup>9</sup> By order dated July 16, 2013, Ariel E. Belen was appointed as Offit's successor, temporary trustee of the 1990 Trust, until the conclusion of the related Herman actions. Dkt 564.

1997, but effective January 1, 1998, Maurice and Offit, as trustee of the 1991 Trust, conveyed the five Herman Properties other than 36 Gramercy to the New York limited liability companies Windsor Plaza, LLC (NY Windsor), Avon Bard LLC (Avon), Merit Management LLC (Merit), Primrose Management LLC (Primrose) and Keystone Management LLC (Keystone, collectively with Mayfair, NY Windsor and its successor DE Windsor, Avon, Merit, Primrose, LLCs).

Complaint, ¶68. After the transfers of the Herman Properties to the LLCs they were owned as follows:

<u>Property</u>	<u>LLC Owner</u>
36 Gramercy	Mayfair
952 Fifth East 22nd	NY Windsor
West 74th	Avon
West 82nd	Merit
East 76th	Primrose
	Keystone

*Id.*, ¶70. Maurice was the sole managing member of each LLC. Complaint, ¶70. The 1990 Springing Trust was a 50% member of Mayfair. *Id.* The 1991 Trust was a 50% member of each LLC, except Mayfair. *Id.* Maurice owned the other half of all of them. *Id.* 952 Fifth was conveyed to NY Windsor by a deed dated January 1, 1998 and recorded August 5, 1998. Complaint, ¶39.

The gravamen of the complaint is that, in a 1998 Transaction, Maurice's wholly-owned entity, Consolidated, allegedly paid the Trusts too little, \$8 million, for 50% of the LLCs.<sup>10</sup> Defendant Offit, as Trustee, agreed to the 1998 Transaction on behalf of the Trusts. No independent appraisals were done. The complaint alleges that Offit and Maurice fraudulently concealed the 1998 Transaction from Rosemarie. Contemporaneously with the 1998

<sup>10</sup> The purchase price actually was \$7,978,000, \$22,000 less than alleged in the complaint. Dkt 1487, P Ex 2, 1998 Transaction Contract, Schedule A.

Transaction, Offit, as Rosemarie's Trustee, and Maurice signed a Confidentiality Agreement, in which they agreed not to disclose the 1998 Transaction to anyone, including Rosemarie.

Four years later, in a 2002 Transaction, which closed on January 2, 2003, Consolidated's successor, Ardent, a Delaware entity wholly-owned by Maurice, and Maurice individually, sold five of the LLCs (Transferred LLCs) to Cosmopolitan, for just over \$100 million. The 2002 Transaction contract (2002 Contract) also contained a confidentiality provision.

The one LLC that Cosmopolitan did not buy was NY Windsor, the owner of 952 Fifth. NY Windsor is the predecessor to Windsor Plaza, LLC, a Delaware entity created in 2002 (DE Windsor, with NY Windsor, Windsors), which is the successor by merger to NY Windsor. Complaint, ¶ 40. Maurice's answer admitted the merger and that he owns DE Windsor. Dkt 1481, Ct Ex I, Complaint, ¶40 & 4/19/13 Answer Dkt 451, ¶40.

Rosemarie submitted an affidavit of merit at the inquest, which incorporated and verified the complaint, with some changes not relevant here. 1/10/17 Rosemarie Herman Affidavit, P Ex 1, Dkt 1486. The affidavit of merit also incorporated Rosemarie's previously filed verified bill of particulars and an earlier affidavit that she had submitted. 10/3/11 Verified Bill of Particulars, Dkt 588 & 589; & 7/22/12 Corrected Rosemarie Herman Affidavit, Dkt 282-292.

The default admitted that Maurice breached his fiduciary duty to the Trusts as managing member of the LLCs,<sup>11</sup> that he aided and abetted Offit's breaches of fiduciary duty as trustee of the Trusts, and that they conspired to defraud the Trusts.<sup>12</sup> The first cause of action in the

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<sup>11</sup> A managing member of a limited liability company has a fiduciary duty to a non-managing member. *Pokoik v Pokoik*, 115 AD3d 428, 428 (1st Dept 2014).

<sup>12</sup> Once an answer is stricken, the pleader is deemed to have admitted all traversable allegations of the complaint and all reasonable inferences that can be drawn therefrom, including liability. *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003), citing *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728 (1984).

complaint against Maurice alleges, *inter alia*, that in consummating the 1998 Transaction and transferring the Herman Properties to the LLCs, he fraudulently breached his fiduciary duty as trustee of the 1990 Trust and as managing member of the LLCs, and aided and abetted Offit's fraudulent breaches of fiduciary duty as trustee of the Trusts. Dkt 1, Ct Ex I, ¶¶160-174.<sup>13</sup> The sixth cause of action alleges that Maurice conspired with Offit to defraud the Trusts by, *inter alia*, transferring the Herman Properties to the LLCs and consummating the 1998 Transaction. *Id.*, ¶¶ 217-225.<sup>14</sup>

The only witness called by Plaintiffs was Glenn Liebman, a forensic accountant and business evaluator. Liebman has an undergraduate degree in economics, and a master degree in accounting. He also is a certified public accountant, holds an ABV designation, which he described as something for people who specialize in business valuation for economic accounting. Liebman testified that he had worked in the field of business valuation for 25 years. The Referee qualified him as an expert. Liebman's expert report was admitted into evidence. Expert Report, Dkt 1574, P Ex 62. Liebman testified that everything in his report was true as of the hearing date. Tr, p 52.

At the inquest, Plaintiffs sought to recover the following types of damages:

1) transfer of ownership of 50% of 952 Fifth Avenue to Plaintiffs; 2) half of the profit made by Maurice in the 2002 Transaction; 3) lost cash flow from the Transferred LLCs from 1999

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<sup>13</sup> The Complaint defines the 1998 Transaction as the "Thirteen-Year Transaction".

<sup>14</sup> Plaintiffs are not entitled to a judgment on their cause of action for constructive trust over 952 Fifth against DE Windsor. The default judgment was granted only against Maurice. Dkt 1190, Default Decision. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a constructive trustee. *Simonds v Simonds*, 45 NY2d 233, 241 (1978). A constructive trustee is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee. *Id.* Here, there is no default judgment against DE Windsor pursuant to which it can be compelled to convey 952 Fifth.



through 2002, and from the Windsor Plaza entities that owned 952 Fifth Avenue, from 1999 through the hearing, excluding 2004;<sup>15</sup> and 4) an order directing a judicial sale of Maurice's half of 952 5th to satisfy the judgment. Plaintiffs also requested prejudgment interest at the statutory rate of 9%.

The transcript of the hearing before the Referee was efiled, as were all of the exhibits entered into evidence at the hearing. 1/12/17 Transcript (Tr), Dkt 1584; Dkt 1481-1574. Plaintiffs put into evidence Offit's verified accountings of his actions as trustee of the Trusts, to which Maurice did not file objections. P Exs 57 & 58; Dkt 1563 & 1564.

The Report recommended that the court grant all of the damages Plaintiffs sought except for half of a \$600,000 salary Maurice allegedly took from Avon Bard, plus prejudgment interest, and the judicial sale of 952 Fifth. The Referee found the salary was too speculative. The Referee did not recommend a judicial sale of Maurice's half of 952 Fifth, on the ground that it should not be sold to satisfy a judgment that Maurice might pay.

## II. Discussion

### A. Measure of Damages

At inquest, the standard of proof is "not stringent," but it must amount to "some firsthand confirmation of the facts." *Whittemore v Yeo*, 117 AD3d 544 (1st Dept 2014) (unverified complaint accompanied by affidavit of merit); *Feffer v Malpeso*, 210 AD2d 60 (1st Dept 1994). At an inquest upon a default, the party entitled to judgment may be permitted to submit a properly executed affidavit as proof of damages. 22 NYCRR 202.46.

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<sup>15</sup> DE Windsor's 2004 tax return was not available so its cash flow for that year was excluded from the damages sought.

The Report properly concluded that the damages for breach of fiduciary duty include disgorgement of the profit earned from the transaction [*Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 (1st Dept 1990)], as well as other losses sustained, including lost opportunities for profit by reason of the faithless fiduciary's conduct [*105 E. Second St. Assoc. v Bobrow*, 175 AD2d 746, 746-747 (1st Dept 1991)].<sup>16</sup> One who aids and abets a breach of fiduciary duty is liable for the breach. *Caprer v Nussbaum*, 36 AD3d 176, 193 (2d Dept 2006). The measure of damages for conspiracy to commit fraud is the same as the damages that may be assessed for fraud. *Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 (1st Dept 2011). If possible, unique property transferred by a fiduciary in breach of his fiduciary duty should be returned to make the injured party whole. *In re Estate of Rothko*, 43 NY2d 305, 322 (1977).

Prejudgment interest may be awarded on a claim for breach of fiduciary duty. *Cohen v Gordon*, 297 AD2d 272 (2d Dept 2002); CPLR 5001(B). Where damages are incurred at various times, prejudgment interest may be computed from a reasonable intermediate date, or upon each item from the date the damage was incurred. *Id*; *Wolf v Rand*, 258 AD2d 401 (1st Dept 1999). Prejudgment interest may be charged at the statutory rate. *Estate of Rothko*, 84 Misc2d 830, 880 (Sur Ct NY Co 1975), *modified on other grounds* 56 AD2d 499 (1st Dept 1977), *affirmed* 43

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<sup>16</sup> The Report erroneously described lost opportunities for profit as appreciation damages. Where the breach of fiduciary duty consists of a serious misfeasance or conflict of interest, and the property cannot be returned, appreciation damages are appropriate in order to make the estate whole. *In re Estate of Rothko*, 43 NY2d 305, 321 (1977). Appreciation damages are the difference between the sale price and the value of the property at the time of trial, as opposed to at the time of the sale where there is serious misfeasance, rather than the measure of damages where property is sold for too little when there is no serious fiduciary malfeasance. *Id*. However, although the Report characterized lost opportunity for profit as appreciation damages, the Referee's conclusion was correct that the Trusts were entitled to recover any lost opportunity for profit that resulted from the 1998 Transaction.

NY2d 305 (1977); *In re Intermediate Settlement of the Account of Karl A. Kirchner*, 132 Misc 384, 385 (Sur Ct Rockland Co 1928). The statutory rate is 9%. CPLR 5004.<sup>17</sup>

*B. Re-Conveyance of 952 Fifth to Tenancy in Common*

Real property is unique. *Dinicu v Groff Studios Corp.*, 257 AD2d 218, 223 (1st Dept 1999). The complaint sought a judgment requiring Maurice to convey title to 952 Fifth to the 1991 Trust. Complaint, ¶173. Prior to the breaches of fiduciary duty, starting with the conveyance of the Herman Properties to the LLCs, Maurice individually and the trustee of the 1991 Trust, who at the time was Solita, owned 952 Fifth as tenants in common. 952 Deed, Dkt 1585. Subsequently, 952 Fifth was conveyed by Offit and Maurice to NY Windsor, which was merged into DE Windsor, which is owned by Maurice. As Maurice admitted in his answer that he owns DE Windsor, he can cause it to convey the unique real property, 952 Fifth, to himself and the current trustee of the 1991 trust, as tenants in common. This is an appropriate remedy because the default admitted that Offit transferred the 1991 Trust's half of 952 Fifth to NY Windsor in violation of his fiduciary duty, a breach Maurice aided and abetted, and as part of a conspiracy between them to defraud the 1991 Trust. *In re Estate of Rothko*, 43 NY2d 305, 322 (1977) (where unique property is transferred in breach of fiduciary duty, appropriate remedy is return of property). Plaintiff are entitled to a judgment enjoining Maurice to cause DE Windsor to execute and record a deed conveying 952 Fifth to himself and the current trustee of the 1991 Trust, as tenants in common.

The court declines to issue a judicial sale of 952 Fifth to satisfy the judgment. The court agrees with the Referee's recommendation that this is not appropriate because there is no

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<sup>17</sup> The 6% statutory rate used in *Rothko* was effective in 1972 was raised to 9% in 1981. Compare L 1972, ch 358, §1; L 1981, ch 258, §1, eff June 25, 1981.

showing that Maurice cannot or will not pay the judgment after it is entered.<sup>18</sup> Plaintiffs cite no authority for granting a post-judgment enforcement remedy at this stage of the proceedings.

*C. Disgorgement of Half of the 2002 Transaction Profit*

The Report is confirmed with respect to requiring Maurice to disgorge half of the profit he earned from the 2002 Transaction, but the court modifies the Report with respect to the calculation of damages. The court finds that the profit recoverable is \$42,931,782, allocated 25% to the 1990 Trust and 75% to the 1991 Trust, plus prejudgment interest at 9% from January 2, 2003. Plaintiffs offered two alternative methods for calculating the profit.<sup>19</sup> The method the court is confirming took half of the taxable gain of \$88,183,565 that Maurice reported on his 2003 tax return [Dkt 1495, P Ex 5A, Schedule D - showing gains for Maurice and his entities on the closing date 1/2/03], which equals \$44,091,782, minus the \$1,160,000 (excluding interest) that Consolidated paid the 1991 Trust for NY Windsor [Tr p 60, Line 20-21; 1998 Contract, Dkt 1487, P Ex 2, Schedule A],<sup>20</sup> which leaves \$42,931,782.<sup>21</sup> Plaintiffs erroneously calculated this as \$40,257,689. Tr 60; Plaintiffs' Post-Hearing Memorandum of Law, Dkt 1595, p 10; Plaintiffs' Pre-Inquest Memorandum of Law, pp 19-20. Of the \$42,931,782, the court allocates

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<sup>18</sup> *Keating v Hammerstein*, 196 AD 18, 21-22 (1st Dept 1921), the sole authority cited by Plaintiffs, did hold that a court should authorize a judicial sale to satisfy a judgment before it is entered. *Keating* held that a notice of pendency could be canceled if the plaintiff posted an undertaking.

<sup>19</sup> The Report is rejected insofar as it relied on Plaintiffs alternate calculation because it rested in part on hearsay bills from Maurice's broker and attorneys that were not authenticated. There was no "firsthand confirmation" of those expenses. *Whittemore v Yeo, supra*. The calculation the court is using is based on Maurice's signed tax return, which is an evidentiary admission.

<sup>20</sup> The complaint's allegation that the 1998 purchase price was \$8,000,000 is \$22,000 more than Consolidated was paid. 1998 Contract, Dkt 1487, P Ex 2, Schedule A. The credit for NY Windsor's purchase price is needed because the Trust should not receive half of 952 Fifth and also keep what Consolidated paid for it.

<sup>21</sup> The court is not subtracting the 1998 Transaction purchase price because the net capital gain on the tax return should have been the 2002 Transaction sale price minus the basis, i.e., the 1998 Transaction purchase price.

25%, \$10,732,945.50, to the 1990 Trust, and 75%, \$32,198,836.50 to the 1991 Trust, because Maurice and Ardent received 25% of the 2002 Contact purchase price for Mayfair.<sup>22</sup> Interest is awarded on these amounts from the date of the closing, January 2, 2003, at the statutory rate of 9%.

*D. Damages for Lost Cash Flow due to the 1998 Transaction*

*1. Purported Avon Bard Salary Properly Disallowed by Referee*

The Referee correctly refused to recommend an award of damages for half of a \$600,000 salary from Avon reported on Maurice's 1998 tax return. P Ex 59, Dkt 1565 at Bates Herman 12230(A). Plaintiffs' theory is that because only \$263,505 in wages and salaries was reported on Avon's 1998 tax return [P Ex 10, Dkt 1510 at Bates 4049], Maurice improperly took a \$600,000 salary from Avon. The court agrees with the Referee that it was speculation whether Maurice took \$600,000 from Avon Bard in 1998. There was no firsthand confirmation of the fact that Avon paid Maurice \$600,000. *Whittemore v Yeo, supra*. None of the Avon Bard records submitted in evidence reflected it. As the Referee noted, the amount reported on Maurice's return could have been an error.

*2. Disallowance of other Components of Lost Cash Flow*

The court modifies the Report with respect to the calculation of damages for lost cash flow, which necessitates a recalculation of interest.

Plaintiffs' expert included in the lost cash flow commissions paid by the LLCs that were reported on their tax returns for 1998 through 2002. His theory was that the commissions were paid to Sheffield, Maurice's wholly owned entity. The commissions appear in schedules for

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<sup>22</sup> Maurice received \$25,626,000 for Mayfair divided by total purchase price of \$101,925,000 equals .25 or 25%. Dkt 1494, P Ex 4, 2002 Contract, Schedule B, Herman BATES 003357.

Rental Real Estate Income and Expenses, Form 8825, of the LLCs' tax returns. Dkt 1510, P Ex 10 through Dkt 1510, P Ex 39.<sup>23</sup> However, the tax returns do not say that all of the commissions were paid to Sheffield. *Id.* Plaintiffs rely on a letter from Maurice's lawyer stating that Maurice's *personal tax returns*, not the LLCs' returns, reflected entries for commissions paid to Sheffield by some of the LLCs. Dkt 1550, P Ex 44, 12/7/15 Darren Traub Letter.<sup>24</sup> However, there is nothing in the record to support the conclusion that all commissions on the LLCs' tax returns were paid to Sheffield. In addition, the Report incorrectly found that DE Windsor reported commissions in 2003. Expert Report, Dkt 1574, P Ex 62, Ex 7 thereto. In fact, the \$28,598 reported on DE Windsor's 2003 tax return was for insurance, not commissions. Dkt 1540, P Ex 40. Consequently, the commissions reported on the LLCs' tax returns should not be included in the damage award.

With respect to lost cash flow from DE Windsor, the court will not confirm damages for alleged personal expenses of Maurice in the amount of \$9,850.56, and legal and professional expenses in excess of 6% per annum in the amount of \$ 5,736,229. The Expert Report schedule for the personal expenses says that it is a list of personal expenses "Per Counsel representation." Expert Report, Ex 6 & 7, Dkt 1574, P Ex 62. This is not firsthand confirmation that they were personal expenses. *Whittemore v Yeo, supra.* With respect to the legal and professional expenses, the Expert Report said that based on a search of public records, "we" determined that there were payments relating to lawsuits unrelated to DE Windsor, and that fees over 6% of

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<sup>23</sup> Maurice stipulated to the admissibility of the LLCs' unsigned tax returns for the years 1998 to 2002. 5/26/16 Stipulation, P Ex 9, Dkt 1509. He also filed an affidavit authenticating them. 5/8/15 Maurice Herman Affidavit, *id.*

<sup>24</sup> Traub's letter was written after the court issued an order directing Maurice to submit an affidavit stating whether redacted entries on his 1998 through 2003 personal returns reflected transactions with the LLCs. Dkt 1327, 10/20/15 Order.

annual revenue were not consistent with 1998 through 2002, and exceeded industry norms. *Id.*, p 10 & Ex 7 (calculation in box on bottom). This was entirely conclusory. No firsthand evidence concerning the other lawsuits was admitted in evidence. No witness testified concerning them or presented evidence of industry norms. The factual conclusion that the existence of unrelated lawsuits increased professional and legal expenses of DE Windsor from 2003 through 2015 went beyond the scope of opinion evidence.

### 3. Calculation of Trusts' Damages for Lost Cash Flow from the LLCs

The LLCs' lost cash flow damages should not have added the commissions for the reasons previously stated. Expert Report, Ex 1-5 & 7 (derived from Transferred LLCs' tax returns). The Report added the commissions to the LLCs' cash flow. *Id.* However, exhibits to the Expert Report show the cash flow before commissions, which the court will use instead to calculate damages. *Id.*

Plaintiffs offset from the cash flow the interest received by the Trusts from the notes in the 1998 Transaction, which were paid at 7% until 2003, when the notes were fully paid off. The Expert Report calculated that \$1,425,375 in interest was paid to both Trusts, which was based on Offit's accountings, to which Maurice filed no objections. Expert Report, p12; 1990 & 1991 Trust Accountings, Dkt 1563 & 1565, P Exs 57 & 58. The 1990 Trust Accounting shows that Mayfair's share of the interest was \$224,000. 1990 Trust Accounting, Dkt 1563, P Ex 57, Schedule A-2. This leaves \$1,201,375 as the interest received by the other Transferred LLCs.

Additionally, Plaintiffs offset four years of interest at 7% interest on the \$3,000,000 cash portion of the purchase price paid to the Transferred LLCs in the 1998 Transaction. Expert Report, p 12. Mayfair's portion of this cash was \$480,000. 1990 Trust Accounting, Dkt 1563, P

Ex 57, Schedule F; 1998 Transaction Contract, Dkt 1487, P Ex 2, Schedule A. This leaves \$2,520,000 as the cash received by the other Transferred LLCs. *Id.*

*a. NY & DE Windsor*

The evidence did not support damages for lost cash flow from NY and DE Windsor (collectively, Windsors) payable to the 1991 Trust. Plaintiffs' expert calculated the Windsors had a loss for the years 1999 through 2015, not including 2004, and before commissions, in the amount of (\$2,770,667). Expert Report, Ex 7, Aggregate of Subtotal. The numbers were taken from tax returns for 1999 through 2010 (excluding 2004), and tax assessment challenges filed with New York City and certified DE Windsor's accountant for the years 2011 through 2015. Expert Report, p 9; Dkt 1515, P Ex 15; Dkt 1521, P Ex 21; Dkt 1527, P Ex 27; Dkt 1533, P Ex 33; Dkt 1539, P Ex 39; Dkt 1540-1546, P Exs 40A-40G; Dkt 1567-1572, P Exs 60B-60G. There was a loss before commissions in eleven of the sixteen years. Expert Report, Ex 7, Subtotal. The court would add a 1998 unequal distribution from NY Windsor in the amount of \$1531, but this would still leave a net loss. Expert Report, p 15. The expert report found that the 1991 Trust would have earned cash flow from the Windsors because he added to the loss \$121,923 in commissions, \$5,736,238 of alleged excess legal and professional fees for the years 2003 through 2015 (excluding 2004); and \$63,462 in alleged personal expenses. Expert Report, p 9 & Ex 7. The court is not adding those items due to lack of evidence, which leaves a cash loss for the 1991 Trust attributable to the Windsors. It is unnecessary to calculate the offsets as there is no gain. Thus, Plaintiffs did not prove that the 1991 Trust was damaged by lost cash flow from the Windsors.

*b. Mayfair*



Plaintiffs failed to prove that the 1990 Trust suffered lost cash flow. The 1990 Trust's had negative cash flow for January 1, 1999 through December 31, 2002 in the amount of (\$255,852.69). Mayfair's cash flow before commissions was \$173,809. Expert Report, Ex 5. The 1990 Trust's half is \$86,904.50. Its net income with prejudgment interest was \$102,547.31, calculating interest from January 1, 2001, a reasonable intermediate date, between January 1, 1999 through December 31, 2002. [ $\$86,904.50$  lost cash flow +  $\$15,642.81$  interest =  $\$102,547.31$ .  $\$86,904.50 \times 9\% = \$7,821.405 \times 2$  years =  $\$15,642.81$ ]. This is offset by  $\$358,400$  [ $\$224,000$  in interest received on the note, plus  $\$134,400$ , plus interest on  $\$480,000$  cash [ $480,000 \times 7\% = 33,600 \times 4$  years (January 1, 1999 through December 31, 2002) =  $\$134,400$ ; together  $224,000 + 134,400 = \$358,400$ ]. This leaves  $(\$255,852.69) [102,547.31 - 358,400 = -255,852.69]$ . In sum, the evidence did not support damages to the 1990 Trust for lost cash flow.

*c. Transferred LLCs other than Mayfair*

Plaintiffs presented evidence to support total damages to the 1991 Trust for lost cash flow and prejudgment interest in the amount of  $\$3,742,596.90$ , which was attributable to the Transferred LLCs owned by the 1991 Trust (1991 Trust Transferred LLCs). The cash flow for the 1991 Trust Transferred LLCs before commissions was  $\$9,123,282$ , half of which is  $\$4,561,641$ . Expert Report, Exs 1-4.<sup>25</sup> In addition, Maurice distributed  $\$162,064$  more to himself than the 1991 Trust in 1998, all of which was attributable to the 1991 Trust Transferred LLCs. Expert Report, p 15.<sup>26</sup> Adding the two yields  $\$4,723,705$ . With interest at 9% from

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<sup>25</sup> As previously noted, the court agrees with the Referee that  $\$300,000$  should not be added for the alleged salary Maurice received from Avon.

<sup>26</sup> This subtracts a 1998 excess distribution in the amount of  $\$1531$  from NY Windsor, which owned 952 Fifth [ $163,595 - 1,531 = 162,064$ ]. Expert Report, p 15.

January 1, 2001, a reasonable intermediate date, through December 31, 2002, this amounts to \$5,573,971.90 lost cash flow plus interest [ $4,723,705 \times 9\% \text{ interest} = 425,133.45 \times 2 \text{ years} = 850,266.90 + 4,723,705 = \$5,573,971.90$ ]. From this it is necessary to subtract \$1,831,375 in income that the 1991 Trust Transferred LLCs earned from the 1998 Transaction, i.e., 1) the sum of interest income from the notes, and 2) 7% interest earned on the cash paid. The 1991 Trust received in \$1,201,375 of interest on the notes, and \$630,000 in interest at 7% on the cash of \$2,520,000 received by the 1991 Trust Transferred LLCs [ $2,520,000 \times 7\% = 157,500 \times 4 \text{ years} = \$630,000$ ]. This yields a total offset of \$1,831,375 [ $1,201,375 + 630,000 = \$1,831,375$ ]. The record supports a total cash loss by the 1991 Trust from the 1998 Transaction, plus prejudgment interest, in the amount of \$3,742,596.90 [ $5,573,971.90 - 1,831,375 = 3,742,596.90$ ]. Accordingly, it is

ORDERED that Plaintiffs' motion (Motion Sequence 031) to confirm and modify the Amended Report of the Referee [Dkt 1480] is granted to the extent indicated in this opinion and is otherwise denied; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the Clerk is directed enter judgment against Julian Maurice Herman as follows:

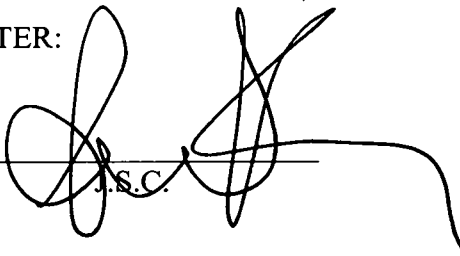
1. Julian Maurice Herman is hereby enjoined to cause Windsor Plaza, LLC, a Delaware limited liability company, to execute and record a deed conveying the real property located at 952 Fifth Avenue, New York, NY, to Julian Maurice Herman and Ariel E. Belen, as temporary trustee of the trust created by Rosemarie A. Herman on November 27, 1991, as tenants in common;
2. in favor of Ariel E. Belen, as temporary trustee of the trust created by Rosemarie A. Herman on November 27, 1991, in the amount of \$32,198,836.50, plus prejudgment interest at

9% from January 2, 2003 in the amount of \$ \_\_\_\_\_, and \$3,742,596.90, for a total sum of \$ \_\_\_\_\_, with statutory interest from entry of judgment at 9%; and

3. in favor of Rosemarie A. Herman and Ariel E. Belen, as trustees of the Trust created by Harold Herman on March 1, 1990, in the amount of \$10,732,945.50, plus prejudgment interest at 9% from January 2, 2003 in the amount of \$ \_\_\_\_\_, for a total sum of \$ \_\_\_\_\_, with statutory interest from entry of judgment at 9%.

Dated: April 28, 2017

ENTER:

  
\_\_\_\_\_  
J.S.C.

**SHIRLEY WERNER KORNEICH**  
**J.S.C.**