

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

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In the Matter of the Application of LARRY MILLER,

Petitioner,

- against -

22 ERICSSON OWNER LLC, 25 NORTH MOORE  
OWNER LLC, 36 LLC, 500 EIGHTH AVENUE  
LIMITED LIABILITY COMPANY, 940 COLUMBUS  
LLC, MILBER 219 MAMARONECK LLC, MILBER  
HOLDING LLC, S&S INVESTORS TWO LLC, and  
DAVID I. BERLEY,

Respondents.  
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Index No.

**VERIFIED PETITION FOR  
JUDICIAL DISSOLUTION OF  
LIMITED LIABILITY  
COMPANY PURSUANT TO  
NEW YORK LLC LAW § 702**

Petitioner Larry Miller, by and through his attorneys, A.Y. Strauss, LLC, by way of this Verified Petition for dissolution of the above-captioned limited liability companies pursuant to Section 702 of the New York Limited Liability Company Law (“LLC Law”), for the appointment of a receiver or liquidating trustee to wind up the affairs of the LLCs pursuant to Section 703(a) of the LLC Law, and for related relief, hereby alleges as follows:

**NATURE OF THE ACTION**

1. This is an action to redress mismanagement, breaches of contract, and breaches of fiduciary duty by Respondent David I. Berley in conducting the affairs of multiple commercial real-estate holding companies co-managed by Berley and Petitioner Larry Miller. Berley’s misconduct affects each of the following New York limited liability companies: 22 Ericsson Owner LLC (“22 Ericsson”), 25 North Moore Owner LLC (“25 North Moore”), 36 LLC, 500 Eighth Avenue LLC (“500 Eighth”), 940 Columbus LLC (“940 Columbus”), Milber 219

Mamaroneck LLC (“219 Mamaroneck”), Milber Holding LLC (“Milber Holding”), and S&S Investors Two LLC (“S&S”) (collectively, the “LLCs” or the “LLC Respondents”).

2. Petitioner agreed to invest in and co-manage the LLCs on the basis of trust and confidence in Berley, which Berley has thoroughly betrayed through repeated and continuing improper conduct, including mismanagement of the LLCs, self-dealing to the detriment of the LLCs, withholding of core information to which Miller is plainly entitled under the LLCs’ operating agreements, and failure to involve Miller or obtain Miller’s consent for business decisions that require his consent as co-manager.

3. As a proximate result of Berley’s misconduct in managing the LLCs, it is no longer reasonably practicable to carry on the businesses of the LLCs in conformity with their respective operating agreements. In addition, Petitioner Larry Miller has suffered significant economic damage as a proximate result of Berley’s misconduct in managing the LLCs.

### **THE PARTIES**

4. Petitioner Larry Miller (“Petitioner” or “Miller”) is a resident of the State of New York. Miller is a Member and Manager of 25 North Moore, 219 Mamaroneck, 500 Eighth, 940 Columbus, Milber Holding, and S&S. Milber Holding, a company in which Miller is one of two Managers, is the sole Member with exclusive rights to manage 22 Ericsson. Miller is a Member, but not a Manager, of 36 LLC.

5. Respondent 22 Ericsson is a New York limited liability company with its registered address at 875 Third Avenue, New York, New York 10022. 22 Ericsson owns Commercial Condominium Unit No. 2 located at 27 North Moore Street a/k/a 22-26 Ericsson Place, New York, New York 10013. 22 Ericsson is a wholly owned subsidiary of Respondent

Milber Holding. A true and correct copy of the Operating Agreement of 22 Ericsson dated as of January 6, 2016 is attached hereto as **Exhibit 1**.

6. Respondent 25 North Moore is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. 25 North Moore owns Commercial Condominium Unit No. 1A and Storage Unit 24 located at 25 North Moore Street, New York, New York 10013. A true and correct copy of the Operating Agreement of 25 North Moore dated as of July 30, 2015 is attached hereto as **Exhibit 2**. A true and correct copy of the Amendment to Operating Agreement of 25 North Moore dated as of August 9, 2018 is attached hereto as **Exhibit 3**.

7. Respondent 36 LLC is a New York limited liability company with its principal place of business at 419 Park Avenue South, 15th Floor, New York, New York 10016. 36 LLC owns the commercial space comprised of floors 1-10 in the building located at 315 West 36th Street, New York, New York 10018.

8. Respondent 500 Eighth is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. 500 Eighth owns the real property located at 500 Eighth Avenue, New York, New York 10018. A true and correct copy of the Amended and Restated Operating Agreement of 500 Eighth dated as of June 27, 2002 is attached hereto as **Exhibit 4**. A true and correct copy of the First Amendment to Amended and Restated Operating Agreement of 500 Eighth dated as of September 15, 2014 is attached hereto as **Exhibit 5**. A true and correct copy of the Second Amendment to Amended and Restated Operating Agreement of 500 Eighth dated as of October 2016 is attached hereto as **Exhibit 6**.

9. Respondent 940 Columbus is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. 940 Columbus owns the commercial building located at 940 Columbus Avenue, New York, New York 10025. A true and correct copy of the Operating Agreement of 940 Columbus dated as of September 14, 2017 is attached hereto as **Exhibit 7**.

10. Respondent 219 Mamaroneck is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. 219 Mamaroneck owns the commercial building located at 219 Mamaroneck Avenue, Mamaroneck, New York 10543. A true and correct copy of the Operating Agreement of 219 Mamaroneck dated as of March 2016 is attached hereto as **Exhibit 8**.

11. Respondent Milber Holding is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. Milber Holding is the parent company of 22 Ericsson, which owns Commercial Condominium Unit No. 2 located at 27 North Moore Street, New York, New York 10013. A true and correct copy of the Operating Agreement of Milber Holding dated as of January 6, 2016 is attached hereto as **Exhibit 9**. A true and correct copy of the Amended and Restated Operating Agreement of Milber Holding dated as of July 18, 2017 is attached hereto as **Exhibit 10**.

12. Respondent S&S is a New York limited liability company with its registered address at 419 Park Avenue South, 15th Floor, New York, New York 10016. S&S owns Commercial Condominium Unit No. 1 located at 27 North Moore Street, New York, New York 10013. A true and correct copy of the Second Amended and Restated Limited Liability Operating Agreement of S&S dated as of July 18, 2017 is attached hereto as **Exhibit 11**. A true

and correct copy of the Third Amended and Restated Operating Agreement of S&S dated as of August 9, 2018 is attached hereto as **Exhibit 12**.

13. On information and belief, Respondent David I. Berley (“Berley”) is an individual residing in New York State and working in Manhattan, New York. Berley is the Chairman of Walter & Samuels, Inc. (“Walter & Samuels”), and his main business address is 419 Park Avenue South, 15th Floor, New York, New York 10016. Berley is a Member and Manager of Respondents 25 North Moore, 36 LLC, 219 Mamaroneck, 500 Eighth, 940 Columbus, Milber Holding, and S&S. Along with Miller, Berley is one of two Managers of Milber Holding, which is the sole Member with exclusive rights to manage 22 Ericsson.

#### **JURISDICTION AND VENUE**

14. LLC Law Section 702 provides that an application for dissolution of a New York limited liability company may be brought in “the supreme court in the judicial district in which the office of the limited liability company is located.” Jurisdiction and venue are proper in New York County Supreme Court as to the LLC Respondents because the office of each of the LLC Respondents is located in this judicial district.

15. This Court has personal jurisdiction over Respondent David I. Berley because he resides in the State of New York and transacts business within the State of New York from his principal place of business at Watler & Samuels, 419 Park Avenue South, 15th Floor, New York, New York 10016.

16. This Court is a proper venue as to Respondent David I. Berley because, on information and belief, Berley resides in New York County. In addition, a substantial part of the events or omissions giving rise to the claims herein occurred in New York County.

**STATEMENT OF FACTS****Miller and Berley are Commercial  
Real Estate Co-Investors**

17. Over the past 20 years, Miller has co-invested with Berley in numerous commercial properties in New York City and the surrounding area. Each of these properties is owned by a New York limited liability company in which Miller and Berley hold ownership interests. In some instances, the Members of the LLCs include other investors as well. Each LLC is governed by the terms of an operating agreement.

18. The following chart sets forth the properties at issue in this action (collectively, the “Properties”) and the LLCs which own them, each of which is a Respondent in this action:

<b>Property</b>	<b>Real-Estate Holding Company</b>
500 Eighth Avenue, New York, New York 10018	500 Eighth Avenue Limited Liability Company ( <u>see</u> Exs. 4-6)
Commercial Unit No. 1, 27 North Moore Street, New York, New York 10013	S&S Investors Two LLC ( <u>see</u> Ex. 11-12)
Commercial Unit No. 2, 27 North Moore Street, New York, New York 10013	22 Ericsson Owner LLC ( <u>see</u> Ex. 1) a wholly owned subsidiary of Milber Holding LLC ( <u>see</u> Exs. 9-10)
Commercial Unit No. 1A and Storage Unit No. 24, 25 North Moore Street, New York, New York 10013	25 North Moore Owner LLC ( <u>see</u> Exs. 2-3)
Floors 1-10, 315 West 36th Street, New York, New York 10018	36 LLC
940 Columbus Avenue, New York, New York 10025	940 Columbus LLC ( <u>see</u> Ex. 7)
219 Mamaroneck Avenue, Mamaroneck, New York 10543	Milber 219 Mamaroneck LLC ( <u>see</u> Ex. 8)

**With One Exception, Miller and  
Berley Jointly Manage the LLCs**

19. The operating agreements for the following LLCs designate Miller and Berley as the two Managers, jointly responsible for managing the assets and affairs of the company:

- 25 North Moore;
- 219 Mamaroneck; and
- 500 Eighth.

20. As discussed below (see ¶¶ 68-77), on or about December 15, 2021, Berley and other Members of 500 Eighth attempted to remove Miller as a Manager of 500 Eighth.

However, the resolution attempting to remove Miller was defective and has no force or effect.

(See id.)

21. For the following LLCs, Miller and Berley are two of three Managers responsible for managing the assets and affairs of the company:

- 940 Columbus (the third Manager is Jason Tillis (“Tillis”)); and
- Milber Holding (the third Manager is David M. Swersky (“Swersky”)); and
- S&S (the third Manager is Swersky).

22. 22 Ericsson is owned and managed by a sole Member, Milber Holding, which in turn is co-managed by Miller, Berley, and Swersky.

23. As discussed below (see ¶¶ 92-93), on or about January 5, 2022, Berley and Swersky attempted to remove Miller as a manager of Milber Holding. However, the purported basis for removing Miller was invalid. Therefore, the removal notice should not be given effect.

(See id.)

24. Berley is one of two Managers of 36 LLC. Miller is not a Manager of 36 LLC.

25. As a result of the foregoing, at least until December 15, 2021, Miller has been authorized to co-manage the assets and affairs of each of the LLCs, with the one exception of 36 LLC. For ease of reference, the LLCs that Miller has co-managed (i.e., each of the LLCs except 36 LLC) are hereinafter collectively defined as the “Managed LLCs.”

**Berley also Serves as Chairman of Walter & Samuels,  
which Has Exclusive Agreements with the LLCs**

26. Berley is the owner and Chairman of Walter & Samuels. Walter & Samuels is a real estate leasing, sale, and management agency operating in New York City and the surrounding area.

27. The LLCs have retained Walter & Samuels as the exclusive property manager and leasing agent for each of the Properties.

28. The LLCs have paid Walter & Samuels substantial commissions and management fees as property manager and leasing agent for the Properties.

**Berley Has Breached his Contractual Obligations  
under the LLC Operating Agreements and his  
Fiduciary Duties to the LLCs and their Members**

29. As set forth in detail below, Berley has breached his contractual obligations under the operating agreements of the LLCs and his fiduciary duties to the LLCs and their Members, including Miller.

***Berley Is Improperly Withholding  
Books and Records from Miller***

30. A basic right afforded a Member of the LLCs, whether or not a Manager, is to access the books and records of the company on reasonable prior notice. E.g., Ex. 2 § 5.4(b); Ex. 4 § 5.5(b); Ex. 7 § 5.4(b); Ex. 8 § 5.4(b); Ex. 10 § 5.4(b); Ex. 11 § 5.4(b). Such records include, without limitation, true and full information regarding the status and financial condition of the company.



31. In addition, as a Manager of the Managed LLCs, Miller is further entitled to access the records and information necessary to inform his decision making as a Manager of the assets and affairs of those companies. E.g., Ex. 2 §§ 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 4 §§ 6.1(a), 6.1(e)-(f), 6.2(a)-(b); Ex. 7 §§ 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 8 §§ 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 10 §§ 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 11 §§ 6.1(a)-(c), 6.1(h), 6.2(a)-(b).

32. Miller therefore has a clear and unequivocal right to access the books and records and other business information of the LLCs in order to monitor his investments and, for the Managed LLCs, to participate in managing the companies.

33. Accordingly, Miller has made repeated requests to Berley and his company serving as property manager, Walter & Samuels, for books, records, and information relating to the LLCs and the Properties. Over approximately the last two years, Berley has continually ignored and refused Miller's requests for books, records, and information, without explanation or justification, in violation of Berley's contractual obligations and fiduciary duties. The responses and information Miller has received from Berley and his agents at Walter & Samuels have been only partial and usually delayed. Berley's withholding of information relating to the LLCs and the Properties has continued unresolved, despite repeated follow-up requests by Miller.

34. For example, Miller has requested financial and operational information concerning the LLCs on multiple telephone conferences joined by Mr. Stuart Kudman, an attorney, including on a call in Summer 2021. On that call, Berley promised cooperation, but ultimately responded only partially and belatedly.

35. Further, on September 27, 2021, Miller contacted the Chief Financial Officer of Walter & Samuels and the agent of Berley, William H. Hesse ("Hesse"), by email to request books, records, and information regarding the finances and operations of the LLCs. Among

other things, Miller requested: copies of rental agreements and their current statuses; updated financial statements and cash flow analyses; a report on the status of renting vacant spaces and spaces with expiring leases; copies of filings in lawsuits involving the Properties; and copies of loan agreements involving the Properties and related indemnity agreements. A true and correct copy of Miller's September 27, 2021 email to Hesse is attached hereto as Exhibit 13.

36. In his September 27, 2021 email to Hesse, Miller stated that he had "requested most of these items before." He further stated: "Sometimes you respond. Sometimes you ignore my request or it gets lost. Sometimes I get a partial answer." Ex. 13.

37. In the same email, Miller implored Hesse: "Let us just move forward. You have all this info or should. I would like to be brought up to date." Miller further explained: "I cannot understand our situation without having all this information for all my investments. Both those where I am a co manager and the others. I do not think this is unreasonable. I get this information from other investments." Id.

38. On September 29 and September 30, 2021, Miller's bookkeeper followed up with additional emails to Hesse, reminding him to please respond to Miller's requests.

39. As of October 14, 2021, Berley and his agents had not provided any of the books, records, and information requested by Miller. Berley and his agents had not even responded to Miller's communications.

40. Accordingly, Miller's bookkeeper made a follow-up request for information by email to Berley and Hesse dated October 14, 2021. That email attached a spreadsheet setting forth the information that Miller required for each of the LLCs and Properties. As with Miller's prior request, the requested information included financial statements, cash flow projections, rental agreements, status updates regarding vacant spaces and expiring leases, copies of bank

loan agreements, and information about lawsuits involving the Properties. A true and correct copy of an email chain dated October 14, 2021 through December 13, 2021, including the October 14, 2021 email sent to Berley and Hesse on Miller's behalf attaching an information request in spreadsheet format, is attached hereto as **Exhibit 14**.

41. By October 20, 2021, Berley and Hesse still had not responded to acknowledge the request made by Miller's bookkeeper, much less provide any of the requested documents and information. Miller's bookkeeper therefore sent a follow-up email on that date. The follow-up was also ignored.

42. By October 28, 2021, Berley and Hesse still had not responded to acknowledge the request by Miller's bookkeeper or to provide any of the requested documents and information. Miller's bookkeeper therefore sent a second follow-up email on that date. See Ex. 14. The follow-up email again was ignored.

43. As of the filing of this lawsuit, Berley and his agents have continued in their refusal to respond to Miller's requests for books, records, and information regarding the finances and affairs of the LLCs and the Properties. Berley's failure to respond to Miller's inquiries or provide any of the requested information is without explanation or justification.

44. Berley's refusal to provide Miller with books, records, and information breaches the operating agreements of the LLCs. Such breaches include, without limitation, breaches of provisions in the operating agreements of the Managed LLCs requiring Berley to co-manage the companies with Miller and provisions in the operating agreements of all the LLCs granting Members access to books and records with reasonable prior notice. E.g., Ex. 2 §§ 5.4(b), 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 4 §§ 5.5(b), 6.1(a), 6.1(e)-(f), 6.2(a)-(b); Ex. 7 §§ 5.4(b), 6.1(a)-(c),

6.1(h), 6.2(a)-(b); Ex. 8 §§ 5.4(b), 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 10 §§ 5.4(b), 6.1(a)-(c), 6.1(h), 6.2(a)-(b); Ex. 11 §§ 5.4(b), 6.1(a)-(c), 6.1(h), 6.2(a)-(b).

45. Berley's failure to provide Miller with books, records, and information regarding the LLCs further constitutes breach of his fiduciary duty of loyalty to the LLCs and their Members, including Miller.

46. In addition, Berley's failure to reasonably communicate with Miller or provide Miller with the information he needs to participate in managing the assets and affairs of the Managed LLCs has made it no longer reasonably practicable to carry on the businesses of the Managed LLCs in conformity with their operating agreements. See LLC Law § 702.

***Berley Has Engaged in Improper  
Self-Dealing through Walter & Samuels***

47. As discussed above, Berley is the owner and Chairman of Walter & Samuels, the company serving as property manager and leasing agent for all of the Properties. The fact that Berley causes the LLCs to engage in interested transactions with Walter & Samuels is not in itself a breach of Berley's duties to the LLCs. However, such transactions involving Walter & Samuels must be on terms that are as fair to the LLCs as alternative arrangements entered into at arm's length. In other words, Walter & Samuels should receive commissions and fees from the LLCs that are customary, not excessive.

48. The operating agreements for most of the LLCs contain a provision requiring that "[a]ny payment to [Walter & Samuels] for services rendered to the Company . . . shall be an arm's length amount, at a rate not exceeding the rate customarily charged in the geographic area for similar services. Any other transaction between [Walter & Samuels] and the Company shall be on terms no less favorable to the Company than an arm's length transaction between unrelated parties." E.g., Ex. 2 § 6.3(b), Ex. 7 § 6.3(b), Ex. 8 § 6.3(b), Ex. 10 § 6.3(b), Ex. 11 § 6.3(b).

Even for LLCs with operating agreements that do not contain this express provision, Berley's duty of loyalty prevents him from causing LLCs under his management to pay excessive fees to his own real estate management firm.

49. On information and belief, Walter & Samuels has received commissions from one or more of the LLCs that are excessive and beyond what Walter & Samuels would receive in an arm's length transaction between unrelated parties. On information and belief, for example, Walter & Samuels has received excessive commissions on co-brokered leases at one or more of the Properties when an outside broker has been retained to procure the lease.

50. In addition, as discussed above (see supra ¶¶ 30-46), Berley has unreasonably refused to provide Miller with financial information regarding the LLCs, including current general ledger information. Given especially that it would be a simple matter to provide Miller with such financial records, Berley's refusal to do so raises questions and concerns about potential improper payments to Walter & Samuels.

51. On January 12, 2022, Miller sent a demand letter to the LLCs in his capacity as a Member, in which he requested that the LLCs immediately demand a full accounting from Walter & Samuels of compensation received from the LLCs for its management and leasing services. Miller further demanded that the LLCs take appropriate action, including initiation of legal proceedings, if their investigation reveals compensation to Walter & Samuels outside of the scope permitted the LLCs' operative agreements.

***Berley Has Attempted to Manage the LLCs  
Unilaterally without Miller's Input or Consent***

52. The operating agreements of the Managed LLCs provide Miller with the right, power, and authority to co-manage the business, assets, operations, and affairs of the companies, either with Berley or with Berley and a third individual.

53. In contravention of their operating agreements, Berley has managed the Managed LLCs and has entered into transactions on behalf of Managed LLCs without seeking or obtaining Miller's consent. In further contravention of Miller's rights, Berley recently has attempted to remove Miller as a Manager of two Managed LLCs, 500 Eighth and Milber Holding, on invalid grounds. Berley's failure to include Miller in management decisions and invalid attempts to remove Miller as a Manager of specific Managed LLCs are detailed in the following paragraphs.

**500 Eighth**

54. The operations of 500 Eighth are governed by an Amended and Restated Operating Agreement, dated June 27, 2002, as amended by a First Amendment dated September 15, 2014, and a Second Amendment, dated October 2016 (as amended, the "500 Eighth Operating Agreement"). See Exs. 4-6.

55. The 500 Eighth Operating Agreement provides for the company to be co-managed by Berley and Charles P. Greenman. See Ex. 4 § 6.1(a). The agreement further provides that, "in the event Charles Greenman ceases to be a Member, then Larry Miller shall succeed him as a Manager." Id. Charles Greeman passed away in 2014. At that time, Miller succeeded him as a Manager of 500 Eighth.

56. Under the terms of the 500 Eighth Operating Agreement, "[a]ll decisions of the Managers shall be by unanimous consent." Ex. 4 § 6.1(a). This provision requires Berley to obtain Miller's consent for management decisions and transactions. Berley has breached this obligation, including in at least the following instances.

57. In or around 2016, Berley and his company, Walter & Samuels, failed to inform Citibank, a lender to 500 Eighth, that a major tenant left the Property. This caused the bank's attorney to send a letter asserting default, objecting to Berley's conduct, and reminding Berley that he is obligated to inform the bank of material events such as the loss of a major tenant. In

response, because Berley was apparently offended, Berley caused 500 Eighth to pursue financing from other banks, even though the Citibank loan was at a low interest rate and on favorable terms. Citibank has since refused to do business with Berley to the detriment of 500 Eighth.

58. Had Miller known at the time that Berley had failed to disclose the loss of a major tenant to Citibank, he would have objected to this conduct and insisted that the bank be notified. However, Berley failed to confer with Miller about this management decision. Berley took these actions without Miller's involvement or consent, contrary to the terms of the 500 Eighth Operating Agreement.

59. In 2018 through 2019, Berley caused 500 Eighth to spend over \$1 million on building renovations. Berley did not consult with Miller nor obtain his consent for this major expense. Ultimately, the renovations were not successful in attracting significant new tenants.

60. In late-2019 or early-2020, Berley prepared and delivered a pitch to Amazon to lease vacant space at 500 Eighth Avenue. Berley failed to involve Miller in the preparation of the pitch or to seek Miller's input or consent as to its contents. The pitch was unsuccessful.

61. In 2021, Berley caused 500 Eighth to pay for the air rights over a different property, 516 Eighth Avenue, for \$25,000 per month. Miller objected to this transaction as being contrary to the interests of 500 Eighth and its Members, and he refused to sign a letter approving the transaction. Berley nonetheless entered into the transaction on behalf of 500 Eighth without Miller's authorization required under the 500 Eighth Operating Agreement.

62. Although Petitioner does not have full information about the statuses of leases entered into by 500 Eighth due to Berley's failure to provide information, it is Petitioner's understanding that certain tenants ceased paying rent or substantially reduced their rent payments following the onset of the COVID-19 pandemic in March 2020. One of these tenants that

stopped paying full rent was Pearl Spaces LLC (“Pearl Studios”), a company that operates a theater performance and audition studio at the Property.

63. In response to Pearl Studios’ nonpayment of rent, Berley decided to sue Pearl Studios and its owner, who is an individual. Berley failed to consult with Miller or obtain his consent before proceeding to file the lawsuit on behalf of 500 Eighth. In November 2020, Pearl Studios countersued 500 Eighth in New York County Supreme Court. See Pearl Spaces LLC v. 500 Eighth Avenue Limited Liability Company, Index No. 655933/2020 (Sup. Ct. N.Y. Cnty.).

64. Berley refused Miller’s repeated requests to be apprised of developments and to be involved in managing the Pearl Studios litigation. For example, Berley refused Miller’s request to join telephone conferences with Pearl Studios’ owner regarding potential settlement.

65. Although Berley has provided Miller with only limited information regarding the Pearl Studios lawsuits, it is Miller’s understanding that Berley refused a settlement offer. Contrary to the terms of the 500 Eighth Operating Agreement, Berley failed to involve Miller in the decision making process regarding potential settlement. After Berley refused the settlement offer, the Pearl Studios litigation ended on terms unfavorable to 500 Eighth.

66. Although Miller does not have complete information, it is Miller’s understanding that 500 Eighth has entered into a new lease with Pearl Studios. Consistent with his pattern of practice, Berley negotiated and entered into this new lease without consulting with Miller or obtaining Miller’s consent. In addition, despite Miller’s repeated requests for information and documentation about Pearl Studios, Berley has sent Miller only an unsigned copy of the new lease and has ignored Miller’s requests for updates as to the status of the Pearl Studios space. Miller’s emails to Berley and his agents regarding the Pearl Studios space have been ignored entirely.



67. As a general matter, for several years, Berley has refused to keep Miller apprised of the rental situation at 500 Eighth Avenue, despite Miller's repeated requests. Berley is withholding information from Miller regarding the statuses of leases and payments thereunder. He further is refusing Miller's efforts to be involved in planning and decision making regarding the management of spaces that are vacant or have expiring leases within the building. As a result, Miller has no way of knowing the status of the Property and cannot evaluate his investment in 500 Eighth or manage the company's affairs, as he is entitled to do.

68. As discussed above, Petitioner has made numerous requests to Berley for documents and information related to the LLCs, including 500 Eighth, which Berley has ignored. Rather than comply with his obligations under the 500 Eighth Operating Agreement to share information and co-manage the company with Miller, Berley apparently has instead attempted to remove Miller from his position as a Manager of 500 Eighth.

69. Specifically, on or around December 15, 2021, Berley sent Miller a document entitled Action of the Members in Lieu of Meeting of 500 Eighth Avenue Limited Liability Company (the "Resolution") attempting to remove Miller from his role as Manager of 500 Eighth. A true and correct copy of the December 15, 2021 Resolution is attached hereto as **Exhibit 15**.

70. The Resolution is defective. Under the 500 Eighth Operating Agreement, "[a] Manager may be removed **by the Consent of the other Members** only for Cause." Ex. 4 § 6.1(b) (emphasis added). However, the Resolution does not have the consent of the other Members, because Jane Greeman, a Member of 500 Eighth, did not consent to the Resolution. The Resolution therefore has no force or effect.

71. The Resolution is also substantively invalid, because removal requires “Cause,” and there is no “Cause” to remove Miller as a Manager of 500 Eighth. The 500 Eighth Operating Agreement defines “Cause” as: “a material breach of the [500 Eighth Operating Agreement]” that goes uncured for 30 days after notice; “any act, or failure to act, by a Manager under this Agreement in bad faith”; or “the commission by a Manager of an act involving dishonesty, theft, unethical business conduct, or any other conduct which significant harms the Company.” Ex. 4 § 6.1(b)(1)-(3). None of these provisions apply.

72. The Resolution purports to cite the nonpayment of rent by Corinthian Communications, Inc. (“Corinthian”) since June 2020 as its basis for removing Miller as a manager of 500 Eighth. Corinthian is a media company owned by Miller that leases space on the fifth floor of 500 Eighth Avenue pursuant to a Lease Agreement dated November 30, 2006, as amended by a Partial Surrender of Space and Modification Agreement dated April 5, 2012 (as amended, the “Corinthian Lease”). A true and correct copy of the Lease Agreement between 500 Eighth and Corinthian dated November 30, 2006 is attached hereto as **Exhibit 16**. A true and correct copy of the Partial Surrender of Space and Modification Agreement between 500 Eighth and Corinthian dated April 5, 2012 is attached hereto as **Exhibit 17**.

73. The alleged nonpayment of rent by Corinthian provides no basis for Miller’s removal from management of 500 Eighth. Corinthian has acted within its rights in not paying rent in the amounts demanded, because the disruption to Corinthian’s business caused by the COVID-19 pandemic causes rent to abate under the Corinthian Lease and therefore provides a valid excuse for Corinthian’s nonpayment. Specifically, the Corinthian Lease provides:

**[I]f Tenant is unable to conduct its business in the Demised**

**Premises** for three (3) consecutive business days **all Fixed Annual**

**Rent and Additional Rent shall thereafter abate** to the extent

that Tenant's use of all or a portion of the Demised Premises is adversely affected until Tenant can resume the conduct of its business in the Demised Premises.

Ex. 16 at Footnote 11 to Page 3 of Printed Form (emphasis added).

74. As a direct result of the COVID-19 pandemic, including the health and safety risks of in person office work and commuting and the government orders in place at times since March 2020 shutting down or restricting office capacity, Corinthian has been "unable to conduct its business" in the leased premises. Its rent obligations to 500 Eighth therefore abate under the Corinthian Lease.

75. Further, Berley refused to return calls from Miller to discuss the Corinthian Lease situation and reach some accommodation. Miller had told Berley and other Walter & Samuels executives that Corinthian was suffering significant financial hardship and had been forced to cut salaries due to its reliance on Broadway theater and resort destinations, two industries devastated by the pandemic, as its client base.

76. Notwithstanding Corinthian's valid defense to the nonpayment of rent, on December 15, 2021, Berley attempted to remove Miller as a Manager of 500 Eighth due to the rent dispute with Corinthian, baselessly citing "unethical business conduct or . . . other conduct which significantly harms the Company" on the part of Miller. Ex. 15 at 4. There has been no such conduct by Miller.

77. In addition to citing the rent dispute with Corinthian, the Resolution cites other alleged conduct by Miller involving other properties, which is wholly unrelated to the

management of 500 Eighth. See Ex. 15 at 2-3. Like the rent dispute, this unrelated conduct provides no basis for removing Miller as a Manager of 500 Eighth.

78. Further, on the same day when Berley purported to remove Miller as a Manager of 500 Eighth, Berley caused 500 Eighth to bring a summary eviction action against Corinthian by filing a Commercial Nonpayment Petition dated December 15, 2021 in New York County Civil Court. See 500 Eighth Avenue Limited Liability Company v. Corinthian Communications, Inc., Docket No. LT-308684-21/NY (Civ. Ct. N.Y. Cnty.) (the “Eviction Case”).

79. Corinthian submitted an answer in the Eviction Case asserting various defenses, including that no rent is due under the Corinthian Lease and applicable common law as a result of pandemic disruptions. See Answer (NYSCEF No. 4), 500 Eighth Avenue Limited Liability Company v. Corinthian Communications, Inc., Docket No. LT-308684-21/NY (Civ. Ct. N.Y. Cnty.). In further response to the Eviction Case, Corinthian submitted a Commercial Tenant’s Declaration of Hardship during the COVID-19 Pandemic. See Hardship Declaration (NYSCEF No. 5), 500 Eighth Avenue Limited Liability Company v. Corinthian Communications, Inc., Docket No. LT-308684-21/NY (Civ. Ct. N.Y. Cnty.).

80. Based on the timing of events—specifically, the Resolution attempting to remove Miller from management and the Nonpayment Petition both being dated December 15, 2021—it appears clear that Berley authorized the Eviction Case and caused 500 Eighth to prepare the case against Corinthian by retaining counsel and authorizing work on commencement papers prior to his attempt to remove Miller as a manager of 500 Eighth. Thus, on information and belief, Berley concealed from Miller his plans and efforts to cause 500 Eighth to sue Corinthian and failed to obtain Miller’s consent for the lawsuit at times when Miller was indisputably still a manager of 500 Eighth.

81. Berley's conduct relating to the Eviction Case constitutes further breach of his obligations under the 500 Eighth Operating Agreement to co-manage the company with Miller and obtain "unanimous consent" for management decisions. Ex. 4 § 6.1(a). It also constitutes breach of Berley's fiduciary duties to Miller as a fellow Member of 500 Eighth. In addition, Berley's conduct relating to the Eviction Case further demonstrates that it is not reasonably practicable to carry on the business of 500 Eighth in conformity with the 500 Eighth Operating Agreement, warranting dissolution under LLC Law § 702.

### **219 Mamaroneck**

82. 219 Mamaroneck Avenue in Mamaroneck, New York is a freestanding building currently occupied by a Wachovia Bank branch office. Miller has repeatedly recommended that 219 Mamaroneck sell the building or explore alternative tenants.

83. Instead, in 2020, Berley advocated for a one-year lease extension with Wachovia Bank. The extension has now expired.

84. On November 5, 2021, Miller received a letter from Walter & Samuels stating that Wachovia will not be renewing and that a firm has been hired to co-broker a deal with a new tenant. Miller responded that he would also like to speak with the brokerage firm and be involved in the decision-making process for filling the soon-to-be vacant building. Miller further stated that 219 Mamaroneck should also explore selling the Property.

85. Berley refused Miller's request to be involved in the management of 219 Mamaroneck and to speak with the co-broker, stating that Walter & Samuels was in charge of managing the Property. This was in direct violation of the company's Operating Agreement, which names Berley and Miller as Managers and provides that decisions of the Managers are to be made by majority vote with each Manager having one vote. See Ex. 8 § 6.1(b).

86. With respect to 219 Mamaroneck, on information and belief, Berley's interest in receiving commissions and management fees through Walter & Samuels is interfering with his decision making as an investor and Manager, causing him to irrationally disfavor a sale of the Property to continue receiving "off the top" cash flow in the form of fees and commissions.

87. Notably, in 2020, Miller had offered to be bought out of 219 Mamaroneck for the amount of his investments. Berley refused Miller's offer. If Berley would like to manage 219 Mamaroneck (or any of the other Managed LLCs, for that matter) without Miller's involvement, he should accept Miller's buy-out offer. Yet Berley has shown that he wants to have it both ways—accepting Miller's substantial investments to facilitate commercial real estate purchases yet refusing to acknowledge Miller's rights to participate in management of his investments.

**Milber Holding & 22 Ericsson**

88. 22 Ericsson owns a commercial unit at 27 North Moore Street (a/k/a 22-26 Ericsson Place) in lower Manhattan, which is currently being leased to a private nursery school. The sole Member and Manager of 22 Ericsson is Milber Holding, which in turn is co-managed by Berley, Miller, and Swersky. Under the operating agreement of Milber Holding, decisions of the Managers are to be made by majority vote, with each Manager having one vote. See Ex. 10 § 6.1(b).

89. After the onset of the COVID-19 pandemic in March 2020, on information and belief, the tenant school stopped paying rent. Berley has told Miller informally that the school is now back in business and began paying regular rent again in September 2021. Despite repeated requests, Miller has not been provided with records to verify this claim.

90. Recently, the bank holding the mortgage on the 22 Ericsson Property, Deutsche Bank, made a capital call. The bank did so because it performed an appraisal and concluded that the mortgage exceeded the maximum loan-to-value ratio allowed under the note. The Members

of Milber Holding were asked to contribute approximately \$250,000 each to satisfy the capital call. Berley conferred with Deutsche Bank regarding the capital call without apprising Miller of the situation and prevented Miller from participating in negotiations with Deutsche Bank.

91. Miller requested financial information about the 22 Ericsson Property from Berley to inform his decision making concerning the capital call. It was a straightforward request to fulfill, particularly given that the Property is a single-tenant property. Yet, Berley refused to provide the information, in contravention of Miller's rights as a Member and Manager of Milber Holding. See Ex. 10 §§ 5.4(b), 6.2(b). Miller therefore declined to contribute towards the capital call until he could review the financial statements and information of Milber Holding necessary to understand and evaluate his investment and exercise his authority as Manager of the company.

92. On or about October 18, 2021, Miller received a letter from Berley informing him that his percentage share of Milber Holding has been diluted as a result of his refusal to contribute additional capital. Then on January 5, 2022, Berley and Swersky sent Miller another letter, in which they attempted to declare that Miller has "ceased to be a Manager of the Company" as a result of his refusal to fund the Deutsche Bank capital call. A true and correct copy of the letter from Berley and Swersky to Miller dated January 5, 2022 is attached hereto as **Exhibit 18**.

93. The January 5, 2022 letter cites Section 6.1(b) of the Operating Agreement (see Ex. 18 at 1), which provides that a "Defaulting Member . . . shall cease to be a Manager until such default is cured." Ex. 10 § 6.1(b). In turn, Section 3.1(b) defines the term "Defaulting Member" as "any Member [who] fails to contribute all or any portion of his share of the Call," with the term "Call" defined as a capital call made by the Managers. Id. § 3.1(b). Importantly,

the same section of the Operating Agreement provides that a “Call” is only authorized when “the Managers determine that additional funds are required for the proper operation of the Company.” Id. (emphasis added). Berley and Swersky completely excluded Miller, a Manager of Milber Holding, from the determination of how to address the Deutsche Bank capital call, such that he was prevented from taking part in the management decision in contravention of the Operating Agreement. See Ex. 10 § 6.1(a). Regardless of whether Berley’s and Swersky’s votes constitute the majority needed to authorize a capital call, that does not justify withholding financial information from Miller and excluding him from the vote. As a result, the purported basis for removing Miller from management of Milber Holding cited in the January 5, 2022 letter is invalid.

94. The events surrounding Milber Holding and 22 Ericsson further demonstrate that Berley has improperly withheld information from Miller and has attempted to act unilaterally in managing the Managed LLCs, rather than share information and management authority with Miller as required. In this regard, Berley’s conduct further demonstrates that it is not reasonably practicable to carry on the business of Milber Holding in conformity with the company’s Operating Agreement, warranting dissolution under LLC Law § 702.

#### 940 Columbus

95. 940 Columbus owns the building located at 940 Columbus Avenue, which operates as a tenement with restaurant and retail spaces on the ground floor.

96. Under the operating agreement for 940 Columbus, the company is co-managed by Berley, Miller, and Tillis, and decisions of the Managers are to be made by unanimous vote of the three Managers. See Ex. 7 § 6.1(b).

97. On information and belief, one of the retail spaces at the Property is currently open. However, due to Berley’s refusal to provide the financial and operational information



Miller has repeatedly requested and is entitled to (see Ex. 7 §§ 5.4(b), 6.1(a)-(c), 6.1(h)), Miller does not know the status of efforts to fill it.

98. Like with other Managed LLCs, Berley has improperly withheld information from Miller and has attempted to exclude Miller from management of 940 Columbus. Berley's conduct in connection with 940 Columbus further demonstrates that it is not reasonably practicable to carry on the business of this company in conformity with its Operating Agreement, warranting dissolution under LLC Law § 702.

### **FIRST CAUSE OF ACTION**

#### **Breach of Contract (LLC Operating Agreements) against Respondent David I. Berley**

99. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

100. Each of the LLCs operates under the terms of an operating agreement, to which Petitioner and Berley are parties.

101. Petitioner has performed under the operating agreements.

102. Berley has breached his obligations under the operating agreements of the LLCs. Berley's breaches have included, without limitation: (i) improperly refusing to provide Petitioner with books, and records, and information that Miller is entitled to receive under the terms of the LLC's operating agreements; (ii) causing certain LLCs to pay excessive amounts to Walter & Samuels, and (iii) attempting to manage the LLCs without involving Miller, contrary to the terms of the operating agreements of the Managed LLCs.

103. As a result of Berley's breaches of contract, Miller has suffered damages including, without limitation, diminution in the value of his investments in the LLCs. On information and belief, Miller's damages also include losses stemming from the misuse or

mismanagement of company funds, because Berley has failed to provide Miller with any account of how cash on hand is being managed and what expenses are being made from funds belonging to the LLCs.

### **SECOND CAUSE OF ACTION**

#### **Breach of Fiduciary Duty against Respondent David I. Berley**

104. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

105. As a Member of the LLCs, Berley owes duties of care and loyalty to the LLCs and their Members, including Miller.

106. Berley has breached his duty of loyalty to Miller by refusing to provide Miller with the information he needs to evaluate his investments in the LLCs and exercise his authority as a Manager of the Managed LLCs.

107. As a result of Berley's breaches of fiduciary duty, Miller has suffered damages including, without limitation, diminution in the value of his investments in the LLCs. On information and belief, Miller's damages also include losses stemming from the misuse or mismanagement of company funds, because Berley has failed to provide Miller with any account of how cash on hand is being managed and what expenses are being made from funds belonging to the LLCs.

### **THIRD CAUSE OF ACTION**

#### **Judicial Dissolution and Appointment of Receiver: 25 North Moore Owner LLC**

108. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

109. Petitioner is a Member of 25 North Moore and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

110. The breaches of the 25 North Moore Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of 25 North Moore in conformity with the company's Operating Agreement. This is so because the 25 North Moore Operating Agreement requires the assets and affairs of the company to be managed by two Managers, Petitioner Miller and Respondent Berley, by majority vote with each having one (1) vote. The decisions of the Managers therefore must be unanimously decided by Miller and Berley. See Ex. 2 § 6.1(b). In contravention of the Operating Agreement, however, Respondent Berley has attempted to manage 25 North Moore unilaterally without Miller's involvement. Respondent Berley has therefore breached the 25 North Moore Operating Agreement, including by failing to perform his services as Manager diligently and faithfully for the benefit of the company as required by Section 6.1(c), and by failing to act in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances as required by Section 6.2(a). Id. §§ 6.1(c), 6.2(a). As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of 25 North Moore in conformity with the company's Operating Agreement with Berley serving as a Manager.

111. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority for the management of 25 North Moore with Berley as the Operating Agreement requires. This is so because Berley continues to improperly withhold the financial and operational information Miller requires to

carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of Sections 6.1(a)-(b) of the Operating Agreement. See Ex. 2 §§ 6.1(a)-(b).

112. Because it is not reasonably practicable to carry on the business of 25 North Moore in conformity with the company's Operating Agreement, judicial dissolution of 25 North Moore under LLC Law § 702 should be ordered.

113. LLC Law § 703(a) provides that "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

114. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of 25 North Moore pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner.

#### **FOURTH CAUSE OF ACTION**

##### **Judicial Dissolution and Appointment of Receiver: 36 LLC**

115. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

116. Petitioner is a Member of 36 LLC and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

117. The breaches of the 36 LLC Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the

business of 36 LLC in conformity with the company's Operating Agreement. This is so because Berley has failed to carry out his obligations as a Managing Member under the 36 LLC Operating Agreement in a manner that is prudent and appropriate for the proper management and supervision of the business, as required by Section 6.01(a), among other things. As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of 36 LLC with Berley serving as Managing Member and Operating Member in conformity with the company's Operating Agreement, including Section 6.01(a).

118. Because it is no longer reasonably practicable to carry on the business of 36 LLC in conformity with the company's Operating Agreement, judicial dissolution of 36 LLC under LLC Law § 702 should be ordered.

119. LLC Law § 703(a) provides that "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

120. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of 36 LLC pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner.

### **FIFTH CAUSE OF ACTION**

#### **Judicial Dissolution and Appointment of Receiver: 500 Eighth Avenue LLC**

121. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

122. Petitioner is a Member of 500 Eighth and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

123. The breaches of the 500 Eighth Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of 500 Eighth in conformity with the Operating Agreement of the company. This is so because the 500 Eighth Operating Agreement requires the assets and affairs of the company to be managed by two Managers, Petitioner Miller and Respondent Berley, by unanimous consent. See Ex. 4 § 6.1(b). In contravention of the Operating Agreement, however, Respondent Berley has attempted to manage 500 Eighth unilaterally without Miller's involvement. In addition, Respondent Berley has improperly attempted to remove Miller from management of 500 Eighth on pretextual grounds. As a result, Respondent Berley has breached the 500 Eighth Operating Agreement by failing to perform his services as Manager diligently and faithfully for the benefit of the company with ordinary prudent care as required by Section 6.2(a), among other things. See id. § 6.2(a). Due to Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of 500 Eighth in conformity with the company's Operating Agreement with Berley serving as Manager.

124. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority with Berley for the management of 500 Eighth as the Operating Agreement requires. See Ex. 4 § 6.1(a). This is so because Berley has improperly withheld the financial and operational information Miller requires to carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of at least Sections 6.1(a), 6.1(e), and 6.2(b) of the Operating Agreement. See id. §§ 6.1(a), 6.2(e), 6.2(b).

125. Because it is no longer reasonably practicable to carry on the business of 500 Eighth in conformity with the company's Operating Agreement, judicial dissolution of 500 Eighth under LLC Law § 702 should be ordered.

126. LLC Law § 703(a) provides that "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

127. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of 500 Eighth pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up of the company's affairs in a transparent, good faith manner.

### **SIXTH CAUSE OF ACTION**

#### **Judicial Dissolution and Appointment of Receiver: 940 Columbus LLC**

128. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

129. Petitioner is a Member of 940 Columbus and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

130. The breaches of the 940 Columbus Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of 940 Columbus in conformity with the Operating Agreement of the company. This is so because the 940 Columbus Operating Agreement requires the assets and

affairs of the company to be managed by three Managers, who include Petitioner Miller, Respondent Berley, and Jason Tillis, by unanimous consent. See Ex. 7 § 6.1(b). However, in contravention of the Operating Agreement, Respondent Berley has attempted to manage 940 Columbus without Miller's involvement. Respondent Berley has therefore breached the 940 Columbus Operating Agreement, including by failing to perform his services as Manager diligently and faithfully for the benefit of the company as required by Section 6.1(c), and by failing to act in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances as required by Section 6.2(a). See id. §§ 6.1(c), 6.2(a). As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of 940 Columbus in conformity with the company's Operating Agreement with Berley serving as Manager.

131. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority with Berley and Tillis for the management of 940 Columbus as the Operating Agreement requires. This is so because Berley continues to improperly withhold the financial and operational information Miller requires to carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of at least Section 6.1(a)-(b) and 6.2(b) of the Operating Agreement. See Ex. 7 §§ 6.1(a)-(b), 6.2(b).

132. Because it is no longer reasonably practicable to carry on the business of 940 Columbus in conformity with the company's Operating Agreement, judicial dissolution of 940 Columbus under LLC Law § 702 should be ordered.

133. LLC Law § 703(a) provides that "[u]nless cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the



limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

134. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of 940 Columbus pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner

### **SEVENTH CAUSE OF ACTION**

#### **Judicial Dissolution and Appointment of Receiver: Milber 219 Mamaroneck LLC**

135. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

136. Petitioner is a Member of 219 Mamaroneck and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

137. The breaches of the 219 Mamaroneck Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of 219 Mamaroneck in conformity with the Operating Agreement of the company. This is so because the 219 Mamaroneck Operating Agreement requires the assets and affairs of the company to be managed by two Managers, Petitioner Miller and Respondent Berley, by majority vote with each having one (1) vote. The decisions of the Managers therefore must be unanimously decided by Miller and Berley. See Ex. 8 § 6.1(b). However, in contravention of the Operating Agreement, Respondent Berley has attempted to manage 940 Columbus unilaterally without Miller's involvement. Respondent Berley has therefore

breached the 219 Mamaroneck Operating Agreement, including by failing to perform his services as Manager diligently and faithfully for the benefit of the company as required by Section 6.1(c), and by failing to act in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances as required by Section 6.2(a). See id. §§ 6.1(c), 6.2(a). As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of 219 Mamaroneck in conformity with the company's Operating Agreement with Berley serving as a Manager.

138. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority for the management of 219 Mamaroneck with Berley as the Operating Agreement requires. This is so because Berley continues to improperly withhold the financial and operational information Miller requires to carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of at least Sections 6.1(a)-(b) and 6.2(b) of the Operating Agreement. See Ex. 8 §§ 6.1(a)-(b), 6.2(b).

139. Because it is not reasonably practicable to carry on the business of 219 Mamaroneck in conformity with the company's Operating Agreement, judicial dissolution of 219 Mamaroneck under LLC Law § 702 should be ordered.

140. LLC Law § 703(a) provides that "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

141. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of 219 Mamaroneck pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner

### **EIGHTH CAUSE OF ACTION**

#### **Judicial Dissolution and Appointment of Receiver: Milber Holding LLC**

142. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

143. Petitioner is a Member of Milber Holding and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

144. The breaches of the Milber Holding Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of Milber Holding in conformity with the Operating Agreement of the company. This is so because the Milber Holding Operating Agreement requires the assets and affairs of the company to be managed by three Managers, who include Petitioner Miller, Respondent Berley, and David M. Swersky, by majority vote with each having one (1) vote. See Ex. 10 § 6.1(b). However, in contravention of the Operating Agreement, Respondent Berley has attempted to manage Milber Holding without Miller's involvement. Respondent Berley has therefore breached the Milber Holding Operating Agreement, including by failing to perform his services as Manager diligently and faithfully for the benefit of the company as required by Section 6.1(c), and by failing to act in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances as required by Section

6.2(a). See id. §§ 6.1(c), 6.2(a). As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of Milber Holding in conformity with the company's Operating Agreement with Berley serving as Manager.

145. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority for the management of Milber Holding with Berley and Swersky as the Operating Agreement requires. This is so because Berley continues to improperly withhold the financial and operational information Miller requires to carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of at least Sections 6.1(a)-(b) and 6.2(b) of the Operating Agreement. See Ex. 10 §§ 6.1(a)-(b), 6.2(b).

146. Because it is not reasonably practicable to carry on the business of Milber Holding in conformity with the company's Operating Agreement, judicial dissolution of Milber Holding under LLC Law § 702 should be ordered.

147. LLC Law § 703(a) provides that "[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee."

148. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of Milber Holding pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner.

**NINTH CAUSE OF ACTION****Judicial Dissolution and Appointment  
of Receiver: S&S Investors Two LLC**

149. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

150. Petitioner is a Member of S&S and therefore is authorized to bring this Petition for dissolution under LLC Law § 702.

151. The breaches of the S&S Operating Agreement and breaches of fiduciary duty by Respondent Berley have caused it to be no longer reasonably practicable to carry on the business of S&S in conformity with the Operating Agreement of the company. This is so because the S&S Operating Agreement requires the assets and affairs of the company to be managed by three Managers, who include Petitioner Miller, Respondent Berley, and David M. Swersky, by majority vote. However, in contravention of the Operating Agreement, Respondent Berley has attempted to manage S&S without Miller's involvement. Respondent Berley has therefore breached the S&S Operating Agreement by failing to perform his services as Manager diligently and faithfully for the benefit of the company as required by Section 6.1(c), and by failing to act in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances as required by Section 6.2(a). See Ex. 11 §§ 6.1(c), 6.2(a). As a result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable to carry on the business of S&S in conformity with the company's Operating Agreement with Berley serving as Manager.

152. As a further result of Berley's breaches of contract and breaches of fiduciary duty, it is not reasonably practicable for Petitioner Miller to share authority with Berley and Swersky for the management of S&S as the Operating Agreement requires. This is so because Berley

continues to improperly withhold the financial and operational information Miller requires to carry on his responsibilities as a Manager and exclude Miller from management decisions in contravention of at least Sections 6.1(a)-(b) and 6.2(b) of the Operating Agreement. See Ex. 11 §§ 6.1(a)-(b), 6.2(b).

153. Because it is no longer reasonably practicable to carry on the business S&S in conformity with the company's Operating Agreement, judicial dissolution of S&S under LLC Law § 702 should be ordered.

154. LLC Law § 703(a) provides that “[u]pon cause shown, the supreme court in the judicial district in which the office of the limited liability company is located may wind up the limited liability company's affairs upon application of any Member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee.”

155. Good cause exists to appoint a receiver or liquidating trustee to wind up the affairs of S&S pursuant to LLC Law § 703(a). This is so because Berley has demonstrated through his failure to provide books, records, and information to Miller and his failure to involve Miller in management of the company's affairs that he cannot be relied upon to participate in the winding up the company's affairs in a transparent, good faith manner.

### **TENTH CAUSE OF ACTION**

#### **Declaratory Judgment: 22 Ericsson Owner LLC Is Dissolved**

156. Petitioner repeats and realleges the matters set forth in the preceding paragraphs as if full set forth herein.

157. This Court has jurisdiction to render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to this controversy.

158. The sole Member of 22 Ericsson is Respondent Milber Holding. In turn, Petitioner is a Member and Manager of Milber Holding.

159. Respondent Milber Holding should be dissolved pursuant to LLC Law § 702 for the reasons set forth in this Petition.

160. Section 6.1(d) of the Operating Agreement of 22 Ericsson provides that the company “shall be dissolved . . . if there are no Members.” Ex. 1 § 6.1(d). Because Milber Holding is the sole Member of 22 Ericsson, there will be “no Members” of 22 Ericsson upon the dissolution of Milber Holding.

161. Petitioner respectfully requests that the Court declare as part of the Court’s final judgment in this action that Respondent 22 Ericsson is dissolved pursuant to Section 6.1(d) of the company’s Operating Agreement as a result of the dissolution of its sole Member, Milber Holding.

162. Petitioner further respectfully requests that the Court appoint a receiver or liquidating trustee to wind up the affairs of 22 Ericsson pursuant to LLC Law § 703(a) upon declaring that the company is dissolved by the terms of its operating agreement.

**WHEREFORE**, Petitioner demands judgment against Respondents as follows:

- (i) Dissolving 25 North Moore, 36 LLC, 219 Mamaroneck, 500 Eighth, 940 Columbus, Milber Holding, and S&S pursuant to LLC Law § 702;
- (ii) Upon dissolving the sole Member of 22 Ericsson, Milber Holding, declaring that 22 Ericsson is therefore also dissolved pursuant to Section 6.1(d) of its Operating Agreement because “there are no Members”;
- (iii) Appointing a receiver or liquidating trustee to wind up the affairs of the LLCs pursuant to LLC Law § 703(a);

(iv) Awarding compensatory damages to Miller in an amount to be determined by the Court; and

(v) Such other relief as the Court deems equitable and just.

Dated: New York, New York  
January 12, 2022

By: /s/ Jordan M. Engelhardt  
Jordan M. Engelhardt

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Tel.: 646-253-6305



VERIFICATION

STATE OF FLORIDA                    )  
COUNTY OF MIAMI-DADE ) SS.:

Larry Miller, being duly sworn, says that he is the Petitioner in this action, and that the foregoing Petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

By:   
Larry Miller

The foregoing instrument was acknowledged before me by means of ☒ physical presence or ☐ online notarization, this 12<sup>th</sup> day of January, 2022 by Larry Miller, who ☐ is personally known to me or ☒ produced I.D./Drivers License as identification, regarding the attached instrument described as Petition Letter and to whose signature this notarization applies.



  
Notary Public Signature

Austin Wiesel  
Notary Public Printed Name