SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

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IN THE MATTER OF THE APPLICATION OF
LARRY MILLER,

Index No.: 650203/2022

Petitioner,

(Mot. Seq. 10)

-against-

22 ERICSSON OWNER LLC, *et al.*

Respondents,

-and-

MARC BERLEY, et al.

Nominal Respondents.

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BRIEF IN OPPOSITION OF PETITIONER'S MOTION FOR ORDER OF DISCONTINUANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF FACTS

Respondents respectfully submit this Memorandum in Opposition[1] to Petitioner Larry Miller's motion to discontinue this action, which motion was filed on February 21, 2025. Defendants will demonstrate that Petitioner Larry Miller is engaging in forum shopping in response to Miller's unwarranted frustration with this Court, including its denial of his application for a preliminary injunction. This action has been litigating before Hon. Robert R. Reed, J.S.C., for over three years and is well beyond its infancy. That Miller is unhappy with this Court's rulings is no basis for him to commence a new suit in the Supreme Court, Queens County, which is now pending before Hon. Marguerite A. Grays, J.S.C., known as *Abraham, et al. v. Berley, et al.*, Index No. 728117/2024. Miller has padded the caption in the Queens action to add new plaintiffs, a new defendant, and a litany of nominal defendants, all in a futile attempt to distinguish this latest case from its predecessor, but the attempt fails.

Both suits involve substantially the same parties and issues. In each action, Miller accuses defendant David Berley of breach of contract, breach of fiduciary duty, refusing to disclose business records to him, unlawfully freezing him out of the affairs of these entities, and making imprudent decisions in managing them. In each case, he demands judgment against Berley for compensatory damages as well as equitable relief.

In the Queens Action, Miller is applying – as he did in this Court – for a preliminary injunction that would order Berley, as managing member of the limited liability companies in these cases, to secure Miller's consent to all action taken on behalf of these entities. As the Court will recall, two years ago Miller sought essentially the same relief in this Court, which refused to enjoin

[1] Also filed herewith is the Affirmation of Douglas E. Motzenbecker, attached to which are relevant papers from the Queens action. It also attaches the hearing that this Court conducted in this matter on March 23, 2023.

Berley. Having lost here, Miller has just filed a new suit in Queens and, amazingly, asked that Court to enter substantially the same injunction. To distinguish this case from that one, Miller says in the Queens action that he is suing derivatively on behalf of the entities. The application is completely improper and demonstrates that Miller is simply shopping for a new Judge.

In sum, both cases involve a fight for control over the LLCs in question, even though most of them are out of business, have no assets, and have no prospect of any future operations. This Court has already concluded that Miller is not at risk of imminent harm, that he has offered no evidence in support of that assertion, that he has failed to show that he is likely to prevail in the litigation, and that the balance of the equities does not support his position. Consequently, Miller is deliberately attempting to circumvent this Court's order by seeking an injunction elsewhere. Moreover, this Court noted that Miller had engaged in apparent bankruptcy fraud and held that it was Miller whose own limited liability company had failed to pay hundreds of thousands of dollars in rent toward the 500 Eighth Avenue property.

Further, in light of the forum-selection clauses found in nearly all the Operating Agreements for the LLCs, the plaintiffs in the Queens action are contractually bound to confine any litigation in New York County, where each of these entities operate and where they own (or have owned) Manhattan real estate. Plaintiffs seek injunctive relief in Queens that this Court has already denied. Miller know that these actions are redundant, as evidenced by his current motion to discontinue this action directly following Respondents' reply brief in Queens. Respectfully, Respondents submit that this Court should reject Miller's blatant attempt at forum shopping.

A. <u>Summary of this Litigation</u>

On January 22, 2022, Larry Miller filed a Petition that named eight limited liability companies and David Berley, individually, as respondents. *See* Motzenbecker Affirm., Exhibit A.

Miller commenced the action pursuant to Section 702 of the New York Limited Liability Company Law. The respondent limited liability companies include 22 Ericsson Owner, LLC ("22 Ericsson"), 25 North Moore Owner LLC ("25 North"), 36 LLC, 500 Eighth Avenue Limited Liability Company ("500 Eighth Avenue"), 940 Columbus LLC ("940 Columbus"), Milber 219 Mamaroneck ("219 Mamaroneck"), Milber Holding, LLC ("Milber"), and S&S Investors Two LLC ("S&S") (collectively, the "LLCs"). Each of the LLCs owns or owned a single parcel of commercial property. *See* Petition, ¶ 18.

In the Petition, Miller alleges that he and Berley were co-managers of the LLCs, that these entities owned various commercial properties, that Berley mismanaged the LLCs and engaged in various self-dealing, that he excluded Miller from the management of these entities and failed to secure his consent to various corporate decisions, that he withheld material documents and information from Miller, and that he engaged in other wrongdoing, to the detriment of the LLCs and, in turn, Miller. The Petition seeks an order dissolving each entity and, in the closing lines of the ad damnum clause, an award of money damages by reason of Berley's alleged misconduct. Specifically, Miller maintains that Berley is liable on grounds of breach of contract and breach of fiduciary duty. *See* Petition, ¶ 1.

The Petition avers that each of the eight LLCs was incorporated in the State of New York and purports to attach copies of the Operating Agreements for these entities (together with the amendments thereto, as applicable). Except for 219 Mamaroneck, each LLC owns (or has owned) real property located within New York County. According to the Petition, Section 702 of the LLC Law provides that a dissolution action may be brought in the county in which a given company has an office. Here, Miller alleges that all of the LLCs have offices in New York County, and,

citing these facts and others, asserts that New York County is the proper venue for the litigation. *See* Petition, ¶¶ 14-16.

Miller summarizes what he says are specific instances of Berley's putative misconduct, which include the removal of Miller as a manager of both 500 Eighth Avenue and Milber. *See* Complaint, ¶¶ 20 & 23. Miller also claims that Berley has wrongfully denied him access to the books and records of the LLCs. *Id.*, ¶¶ 30-46.

Miller acknowledges that the Operating Agreements for the LLCs provide that Berley's real estate management firm – Walter & Samuels, Inc. ("W&S") – serves, or has served, as property manager and leasing agent for the LLCs. *Id.*, ¶¶ 26-28. He finds nothing per se improper about the engagement of W&S for these entities, but insists that W&S has charged excessive fees for its services, in violation of the Operating Agreements' reasonableness and fairness requirements for such charges. *Id.*, ¶ 47. He adds that W&S has also charged excessive commissions for the leases it has brokered for the LLCs. *Id.*, ¶ 49.

Apart from these allegations, Miller avers that Berley has attempted to manage the LLCs without Miller's participation and that he has failed to keep Miller advised with respect to their operations. *Id.*, ¶¶ 52 & 53. He claims, for example, that Berley: (a) made $1 million in useless renovations to vacant space at 500 Eighth Avenue and failed to tell him about these expenditures; (b) made an unsuccessful sales pitch by which Amazon would lease space from 500 Eighth Avenue, but, as before, failed to inform Miller about the proposal or its outcome; and (c) caused 500 Eighth Avenue to purchase air rights over another building, also without notifying Miller. *Id.*, ¶¶ 59-61. The Petition cites other examples of how Berley has allegedly operated these entities without conferring with Miller.

As noted earlier, Miller claims that the members of 500 Eighth Avenue adopted a resolution removing him from his position as manager of that LLC, but claims that an insufficient number of members voted in favor of the resolution and that Berley lacked the grounds to take this action. *Id.*, ¶¶ 69-72. A company owned by Miller was a tenant at 500 Eighth Avenue and defaulted on its rent obligations; however, Miller alleges that the underlying lease allowed his company to defer its rent under specified circumstances – in this instance, the pandemic – and that 500 Eighth Avenue brought suit against the company without Miller's consent. *Id.*, ¶¶ 78-80.

Against these facts and others, Miller accuses Berley of breach of his obligations under the Operating Agreements, which has ostensibly caused him to sustain damages. *See* Petition, First Count. The Second Count alleges that Berley has breached his fiduciary duties as a member of the LLCs. The Third through Ninth Counts seek orders dissolving each LLC – except for Ericsson – and appointing a receiver for each entity. The Tenth (and final) Count seeks an order dissolving Ericsson, but demands appointment of a receiver. And the Petition also demands compensatory damages.

B. <u>The Amended Petition</u>

Miller later amended the Petition in this action. *See* Motzenbecker Affirm., Exhibit B. Exhibit No. 23 to the Amended Petition attaches a redlined version of the new pleading, which, *inter alia:* (a) names Walsam 40 East LLC as a respondent and, thus, also seeks its dissolution and the appointment of a receiver as to its operations; (b) names numerous trusts and individuals as nominal defendants; (c) avers that Miller is a resident of New York; (d) adds 25 North Moore as a respondent; (e) alleges that Berley has improperly sought to exclude Miller from the LLCs and denied him access to documents and information; (f) charges that Berley has improperly sought to

remove Miller from his positions as manager of 500 Eighth Avenue and Milber; and (g) updates the allegations of the Complaint. Otherwise, the Petition remains substantially the same.

C. The Queens County Complaint

Two trustees of the Corinthian Dynasty Trust (the "Corinthian Trust") bring a derivative action on behalf of 500 Eighth Avenue. *See* Motzenbecker Affirm., Exhibit C. Plaintiffs bring a derivative action on behalf of nine of the LLCs, but also for the benefit of an entity known as SDMJD Next Generation LLC, which is not a respondent in this action. As in the earlier case, the trustees of the Corinthian Trust and Miller bring suit to "recover damages from David Berley for his theft of corporate assets, other acts of self-dealing, and arbitrary mismanagement of the Entities[,]" which consist of nine of the same limited liability companies in the prior case. *See* Queens Complaint, ¶ 1.

Although this action references W&S at multiple points, it does not name W&S as a respondent, whereas the plaintiffs in the Queens County action have now joined it as a party, on the ground that W&S "played a direct role in, and benefited from, David Berley's theft, self-dealing, and mismanagement." *Id.*, ¶ 2. Tracking the allegations in this action, Corinthian Trust and Miller aver that Berley has been attempting to operate the LLCs unilaterally. *Id.*, ¶ 4. Again, Miller charges that Berley has been acting without Miller's knowledge and consent, withheld documents, and caused the LLCs to pay excessive fees and other compensation to W&S. *Id.*, ¶¶ 4 & 5.

The trustees and Miller maintain that the LLCs are in financial distress and likely to collapse. *Id.*, ¶ 7.

According to the Complaint in the Queens action, plaintiffs Connie Abraham and Terry Miller allege, respectively, that they are residents of Queens County and Seattle, Washington, and

are that they are trustees of the Corinthian Trust. *Id.*, ¶¶ 9 & 10. Berley challenged the Miller plaintiffs to identify who founded the trust, when it was founded, who formed and funded it, whether Abraham is the only trustee, and who its beneficiaries are. Even so, the Miller plaintiffs have offered nothing in response to these relevant questions. Since Miller has typically called the entities he has formed "Corinthian" and in light of his silence on the issue, it is fair to assume that the Corinthian Dynasty Trust is an entity of, by, and for Miller and his designated beneficiaries. It is equally fair to assume that he has full control over the trust and the power to direct its actions. Miller has given the Court no reason to conclude otherwise.

The Complaint identifies substantially the same investment properties named in the Petition in this Court. *See* Complaint, ¶ 52. And it dwells at length on the Operating Agreements for the LLCs, purporting to summarize: (a) their limitations on how much they could pay W&S for its services, *id.*, ¶ 55; (b) the excessive compensation that W&S was allegedly paid, *id.*, ¶¶ 57-60; and (c) Miller's alleged ignorance of these matters. *Id.*, ¶¶ 61-63.

Turning to Berley's alleged misappropriation of funds from the LLCs, the Complaint alleges that Miller has engaged an expert known as Resolution Economics, LLC to review the data and documents available to it and to opine with respect to the transactions at issue. *Id.*, ¶¶ 64-75. The draft report – which the Complaint omits – asserts that Berley misused the proceeds of the loans that one or more of the LLCs obtained from their lender(s).

In Paragraphs 82 through 87, the Complaint gives examples of Berley's alleged self-dealing. From there, the Complaint discusses his purported mismanagement of the LLCs on a company-by-company basis. *Id.*, ¶¶ 88-135. Paragraphs 136 through 146 provide additional details

with respect to his claim that Berley has unreasonably denied him access to documents and information concerning the operations of the LLCs.[2]

Against these facts, the First Count alleges – as in this action – that Berley is liable for breach of contract, while the Second Count accuses him, again, of breach of fiduciary duty. The Third Count asserts a cause of action for conversion. In the Fourth and Fifth Counts, Plaintiffs ask the Court to enter a permanent injunction against Berley, citing the conduct described above.

Plaintiffs direct the Sixth and Seventh Counts against W&S, alleging that it has breached its fiduciary duties to Plaintiffs and is also liable for conversion. The Eighth Count says W&S breached its fiduciary duties to Plaintiffs. In the Ninth and Tenth Counts, Plaintiffs allege that W&S aided and abetted Berley in, respectively, breaching his fiduciary duties to Plaintiffs and his conversion of funds from the LLCs. In the Eleventh Count, Plaintiffs add that W&S has been unjustly enriched by accepting compensation and payments to which it is not entitled.[3]

D. <u>This Court Previously Denied Miller's Application for an Injunction.</u>

In its ruling two years ago, the Court denied Miller's application in all respects. It heard oral argument on March 15, 2023. *See* Motzenbecker Affirm., Exhibit D (attaching transcript of the proceedings). The Court noted that Berley had removed Miller from his position as a manager of 500 Eighth Avenue, of which Miller's company Corinthian Communications, Inc. ("Corinthian") was a tenant. The Court refused to order Miller reinstated because Corinthian was

[2] In Paragraphs 147 through 149, Plaintiffs mention this action, but fail to explain why they have opted to bring a new suit in Queens County, rather than amend the Petition in this case.

[3] Milber Holding is the single member of 22 Ericsson so there is no jurisdiction clause in 22 Ericsson's Operating Agreement.

in default of its rental obligations and had filed for bankruptcy. The Court noted there was substantial evidence that Miller had failed to fully disclose substantial assets of the debtor.

Justice Reed announced his ruling at the conclusion of the hearing:

> To be entitled to a preliminary injunction, the applicant must demonstrate by clear and convincing evidence a likelihood of success on the merits of irreparable harm, and a balance of the equities weighing in the applicant' favor.
>
> Based upon the arguments here, based upon the papers that have been provided to the Court, *the relief of the applicant here fails to demonstrate by clear and convincing evidence on any of the requirements of a [preliminary] injunctio*n.
>
> *The likelihood of success on the merits, I will leave that as simply being neutral.* The ball has not been moved upon this application in favor of the petitioner, and, thus, the standard here with the evidence is not there.
>
> In terms of irreparable harm, the only thing that (has) been demonstrated is that petitioner has an entitlement to certain financial information. And petitioner here has not demonstrated that he (was) refused that information.
>
> ***
>
> In all other respects, what has been demonstrated is potentially, if there is success by the petitioner *on some element of money damages that could be collected at the end of this litigation.*
>
> So here, it simply is hard to get away from what's involved here. There is a removal here of the petitioner who, while serving in the role of a manager to 500 Eighth Avenue fails to pay that same company hundreds of thousands of dollars in rent, and then seeks bankruptcy protection.
>
> It's fine to say that an individual is entitled to seek bankruptcy protection, or a company is entitled to seek bankruptcy protection, but you can't divorce that from the roles here where Mr. Miller is on one hand serving [as] a fiduciary to one company, and then acting against his interest in favor of those of another company. And while, ultimately the bankruptcy was dissolved after the intervention trustee, sub-trustee, the language here from the bankruptcy court is unmistakably alarming. *And whether it's a final judgment, or an*

> *order before the final judgment, the bankruptcy judge here removed Miller based on section 1185(a) of the bankruptcy code which only provides for removal of a debtor based upon fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the* [*debtor*].

See Motzenbecker Affirm. Exhibit D, Hearing, T36:11 to 38:21 (emphasis added).

This Court further found that, at least at the preliminary injunction stage, Berley had made a sufficient showing that Miller's misconduct, as found by the Bankruptcy Court in the Corinthian proceedings, gave him more than sufficient grounds to deny the application. *Id.*, T38:7 to 39:15. In sum, Miller had caused Corinthian to conceal assets from the debtor estate, of which 500 Eighth Avenue was a substantial creditor. In other words, despite his fiduciary duties to this LLC and his disclosure obligations under Chapter XI, Miller had attempted to convert monies from the debtor. To be sure, the parties in the bankruptcy action later agreed to resolve their differences, but only after the Subchapter V trustee caught Miller in the act and then because the Bankruptcy Judge was about to hammer Miller for his dishonesty. This Court observed:

> I don't think that when you have a person who has failed to pay hundreds of thousands of dollars to respondent, I think [removed] because of his incompetence, or dishonesty, or his fraud, the respondent here should be forced until whatever date this litigation ends to suffer his potential fraud, or dishonesty, or incompetence continuing with them. I, frankly, just don't see it.
>
> The blending of a[n] [ir]reparable harm not being established, and blending of the final element of preliminary injunction relief, the balance of equit[ies] is weighing in favor of the applicant. But here, certainly, the Court cannot overlook it.
>
> ***
>
> So the Court believes certainly that there is no – the balance of the equities does not weigh in favor of the applicant.
>
> ***

> The respondent shouldn't have to suffer someone serving in their role when a bankruptcy court judge stated those things on the record in the public records, whether they did a final judgment, or an interim.
>
> ***So, for those reasons, it is ordered that the application for preliminary junction be denied.*** The court is not satisfied that the application for attorney's fees has any merit, at all.

Id., T39:8 to 41:9 (emphasis added).

For the reasons that follow, Respondents respectfully oppose Miller's motion to dismiss this action without prejudice, submit the motion should be denied, and, in the alternative, ask that the dismissal be with prejudice and that the Court award Respondents the counsel fees and costs they have incurred in resisting this action.

LEGAL ARGUMENT

I.

BECAUSE PETITIONER MILLER IS ENGAGING IN FORUM SHOPPING AND ATTEMPTING TO CIRCUMVENT THE ORDERS OF THIS COURT, THE COURT SHOULD DENY THE MOTION TO DISCONTINUE.

A. New York Courts Have Established That a Plaintiff Cannot Discontinue an Action Where It Is Attempting to Circumvent an Order.

CPLR 3217(b) speaks to the circumstances under which an action may be discontinued when fewer than all parties consent to its dismissal:

> By order of court. Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

Further to the principles underlying CPLR 3217(b), the determination of whether a voluntary discontinuance is appropriate lies within the sound discretion of the court and, if

permitted, may be dismissed upon such terms and conditions as the court may deem proper. *See Bank of Am., Nat. Ass'n v. Douglas*, 110 A.D.3d 452, 973 N.Y.S.2d 42, 43 (1st Dept. 2013). *Douglas* notes that the stage of litigation is a factor in determining special circumstances, as well as whether the plaintiff sought the discontinuance only to avoid an adverse determination in the current action. *Id*. "Generally such motions should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results." *JPMorgan Chase Bank, N.A. v. Starr–Klein*, 221 A.D.3d 677, 678, 200 N.Y.S.3d 35 (2d Dept. 2023) (internal quotation marks omitted).

The court will typically deny a plaintiff's motion to dismiss the action when the plaintiff is using the dismissal to bypass an adverse order in the case he is seeking to discontinue under CPLR 3217(b). *See Venture I, Inc. v. Voutsinas*, 8 A.D.3d 475, 778 N.Y.S.2d 311, 312 (2d Dept. 2004) (denying motion to discontinue where record showed that the plaintiff was merely attempting to circumvent the order directing it to assign the subject mortgage); *Jamaica Hosp. Med. Ctr., Inc. v. Oxford Health Plans (N.Y.), Inc.*, 58 A.D.3d 686, 687, 871 N.Y.S.2d 665, 667 (2d |Dept. 2009) (denying motion to discontinue because the record supported a finding that the plaintiffs were merely attempting to circumvent a prior order compelling arbitration); *Kaplan v. Vill. of Ossining*, 35 A.D.3d 816, 817, 827 N.Y.S.2d 278, 279 (2d Dept. 2006) (denying the plaintiffs' motion to discontinue, finding that they were merely attempting to circumvent the effect of a preceding conditional order of preclusion).

B. The Miller Plaintiffs Are Seeking to Obtain Substantially the Same Relief in Queens that Miller Demanded in this Action and Are Doing So to Circumvent this Court and its Prior Rulings.

In this action, Miller filed a motion that asked the Court to order Respondents to produce certain books and records and imposing sanctions on Berley, and to impose a preliminary injunction against all Respondents. The injunction would enjoin them from: (a) declaring that Miller has ceased to be a manager of the LLCs; removing Miller as a manager of 500 Eighth Avenue; and (b) reducing Miller's percentage ownership in the LLCs. Until Miller withdrew his motion for appointment of a receiver, he was also asking this Court to order that relief as well.

In the Queens action, the Miller plaintiffs seek an injunction barring Berley from taking any action on behalf of the numerous LLCs that have been named as nominal defendants, without Miller's consent. *See* Motzenbecker Affirm., Exhibit E. His new suit, of course, seeks relief that is redundant of that which he is seeking here. In each case, he is alleging that Berley is liable on grounds of breach of contract and breach of fiduciary duty, and he is seeking compensatory damages from Berley in both actions (albeit with the addition of W&S in the Queens action). He seeks to differentiate this latest suit by including a trustee who reportedly has a Queens address – which, indeed, would be the only nexus this new case would have to Queens. He has padded the caption with new parties, but without specifying who founded the Corinthian Trust, who funded it, who its beneficiaries are, or what his role in relation to it might be. It is, however, logical to infer that the Corinthian Trust is of, by, and for Miller and his privies.

The prosecution of two suits involving the same subject matter invariably raises the specter of conflicting outcomes and the needless additional burden on both the judiciary and Respondents. This Court has already ruled that Larry Miller is not entitled to a preliminary injunction, finding no evidence that Miller stands to sustain irreparable harm, given that – even taking his allegations

as true – the harm he has described would be compensable through monetary relief. Nor did this Court find that Miller is likely to prevail on the merits. Despite these rulings, Miller has asked the court in Queens to apply a preliminary injunction against Berley, offering no more substantive evidence than he did to this Court. This is a blatant attempt to circumvent this Court's order denying a preliminary injunction.

This Court has also ruled on the corporate control issues that the Miller plaintiffs are raising anew in Queens. Although the Miller plaintiffs also complain that Defendants have failed to produce documents and things of and concerning the LLCs, this issue has always been squarely before this Court, which, at oral argument on March 13, 2023, noted that the disclosure issue had been resolved. If the Miller plaintiffs wish to raise any issue concerning the production of records, it should be before this Court.

C. Miller Misrepresents the Current Stage of Litigation.

Petitioner avers that this case is in its infancy and has been pending for more than three years. Thus, the early stages of litigation add to Miller's assertion that no special circumstances are shown. However, Miller intentionally minimizes the intricacies of the ongoing litigation before this Court. Not only has this case been litigated for over three years but it has also come at a considerable cost for Respondents, both temporally and financially. Moreover, written discovery is ongoing, and this Court ordered that counsel meet-and-confer to resolve a discovery dispute (but stayed that order once Respondents' former counsel filed to withdraw in September 2024). Still, Respondents have several outstanding motions including a motion to dismiss the action and a motion for a protective order. Respondents have contributed significant resources to litigate this matter and granting a motion to discontinue an action that will return to New York County based on the forum selection clauses of the LLCs is a waste of judicial resources.

II.

BECAUSE THE OPERATING AGREEMENTS PROVIDE, IN ALMOST EVERY CASE, THAT ANY SUIT INVOLVING THESE ENTITIES WOULD BE FILED IN STATE OR FEDERAL COURT IN NEW YORK COUNTY, THE MILLER PLAINTIFFS MUST LITIGATE IN NEW YORK COUNTY.

A. Forum-Selection Clauses Are Enforceable.

New York courts have consistently held that a "contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." *BHRE Grp., LLC v. Boger*, 216 A.D.3d 898, 899, 189 N.Y.S.3d 630, 632 (2d Dept. 2023) (citation omitted). Such agreements are readily enforceable, except for the rare instance when the opponent can make a compelling showing that the clause should be set aside. *Id.* Forum-selection clauses are applicable to plaintiffs who may not have executed a given agreements but whose rights and interests are derivative of those of the signatory. *See Harry Casper, Inc. v. Pines Assocs., L.P.*, 53 A.D.3d 764, 765, 861 N.Y.S.2d 820, 821 (3d Dept. 2008).

B. The Miller Plaintiffs Are Parties to The Operating Agreements – and Are Bound by Them.

The Operating Agreements for nearly every LLC in question contain forum selection clauses, which uniformly hold that, if any suit involving these entities should arise, the aggrieved party must bring suit in state or federal court in New York County. *See* Motzenbecker Affirm., Exhibit F. What is more, the Miller plaintiffs are signatories to the Agreements and, thus, are bound by their terms. It is highly improper for them, as part of their forum-shopping effort, to sue outside New York County. Ironically, Miller alleged, in this action, that New York County was absolutely

the proper venue for this dispute. *See* Petition, ¶¶ 14-16. However, since this Court has refused to grant a preliminary injunction, Miller has shifted gears and decided that he should bring this new action in Queens. Again, he has sought to add a few new parties to the litigation, but this changes nothing.

C. Despite Miller's Assertions in Queens, the Forum Selection Clauses are Mandatory.

In the Queens County action, Miller parses the text of the forum selection clauses, *see* Motzenbecker Affirm., Exhibit G (attaching Plaintiffs' Memorandum of Law), insisting that they are merely permissive with respect to the agreed-upon choice of venue. The Operating Agreements, however, are crystal clear with respect to their mandate where venue is concerned:

> EACH OF THE PARTIES HERETO HEREBY *IRREVOCABLY CONSENTS AND SUBMITS TO THE JURISDICTION OF THE SUPREME COURT OF THE STATE OF NEW YORK LOCATED IN NEW YORK COUNTY AND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CONNECTION WITH ANY SUIT, ACTION OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREIN, AND HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY OBJECTION TO VENUE IN NEW YORK COUNTY OR SUCH DISTRICT*[.]

See Motzenbecker Affirm., Exhibit F (attaching Operating Agreement for S&S Investors Two, LLC, and quoting Section 11.7 thereof) (emphasis added).

It is difficult to see how the Miller plaintiffs can find anything permissive, optional, or voluntary about the cited clause, which is common to nearly all the Operating Agreements. *First*, the signatories to the Agreements gave their *irrevocable* consent to litigating in New York County. *Second*, they agreed to submit to the jurisdiction of the state and federal courts in that county and waived any objection to that forum. Thus, it follows that if any party were to demand that the case be moved to New York County, they would have no choice to but consent to transfer of the action.

Therefore, by suing in Queens and resisting Defendants' objections to that forum, the Miller plaintiffs are in breach of the forum selection clause, which is binding and enforceable upon them.

Further to this point is the Fourth Department's ruling in *Fear & Fear, Inc. v. N.I.I. Brokerage, L.L.C.*, 50 A.D.3d 185, 851 N.Y.S.2d 311(4th Dept. 2008), which affirmed an order granting a motion to transfer venue to the agreed-upon forum. The court held that a nearly identical forum-selection clause required the parties to litigate in the agreed-upon jurisdiction: "We reject plaintiff's contention that the language of the forum selection clause was not mandatory." *Id.* at 187. The court added: "[W]e also conclude that the use of the phrase '*may* be litigated in any federal or state court of competent jurisdiction located in the Borough of Manhattan' (emphasis added) does not negate the mandatory nature of the forum selection clause." *Id.* at 188. The court concluded its analysis by observing that the "phrase in the agreement otherwise requires the parties thereto to submit to the personal and exclusive jurisdiction of one or the other of the Manhattan courts identified." *Id.* Accordingly, *Fear* fully supports Respondents' position.

Should the Court decide to grant Petitioner's motion to discontinue this action, this case will swiftly return to the New York Commercial Part to be re-litigated in its entirety, wasting valuable judicial resources and creating an undue burden on Berley.

III.

EVEN ASSUMING THE COURT COULD GRANT PETITIONER'S MOTION TO DISCONTINUE, THE DISMISSAL WOULD HAVE TO BE WITH PREJUDICE AND PETITIONER WOULD HAVE TO PAY RESPONDENTS' LEGAL FEES INCLUSIVE OF ATTORNEY'S FEES, COSTS AND DISBURSEMENTS.

A. At the Very Least, the Petition Would Have to Be Dismissed With Prejudice.

Assuming arguendo that Petitioner can successfully move to discontinue this action, Respondents respectfully submit that any dismissal must be with prejudice and with counsel fees

and costs. When litigation has been ongoing for more than three years and the petitioner has had the opportunity to amend the petition, the court may grant the motion to discontinue under 3217(b) with prejudice. *Hersh v. Cohen*, 171 A.D.3d 1062, 1063, 98 N.Y.S.3d 247, 248 (2d Dept. 2019). Moreover, where the petitioner is provided the full opportunity to have the petition heard and elects not to move forward with a hearing, dismissal with prejudice is appropriate. *Sellers v. Gardner*, 166 A.D.3d 785, 786, 85 N.Y.S.3d 772, 773 (2d Dept. 2018).

This matter has been pending in this Court for more than three years. With a small delay attributable to Respondent's former counsel filing a motion to withdraw, Petitioner has been provided every opportunity to amend his Petition to join any additional parties. Instead, Miller has decided to quit this case and bring a separate suit in Queens. Miller's request to discontinue this action without prejudice is nothing more than a clear acknowledgement that the two cases are substantially related, and that a with-prejudice dismissal here would have preclusive effect in the Queens case. If this action and the Queens action were truly distinct, Miller would continue to seek relief in both courts. He knows, of course, that the two actions are redundant and, dissatisfied with the rulings he is getting in this Court, wants to try his chances in Queens. Should the Court grant Miller's voluntary discontinuation of this action, Respondents request that the matter be dismissed with prejudice, to ensure that Miller cannot raise these claims a second time.

B. New York Courts Have Routinely Awarded Counsel Fees and Costs in Comparable Circumstances.

Even assuming the Court were to grant Petitioner's motion to discontinue this action, Respondent must be awarded fees and expenses he incurred in defending this action. The First Department has observed:

> After service of an answer and bill of particulars, the holding of a preliminary conference, and a change of plaintiffs' attorney, plaintiffs moved to discontinue the action. Plaintiffs

> asserted that their new attorney discovered that the building was managed by a corporation with a principal office in Brooklyn, and that a voluntary discontinuance would allow them to commence a second action in Kings County. The motion was properly granted upon conditions that eliminated any prejudice attributable to the discontinuance. In the latter regard, the motion court aptly noted defendant's failure to show that the discontinuance will cause it to incur additional attorneys' fees, and appropriately limited plaintiffs' payment of defendants' attorneys' fees to those incurred on the instant motion. We have considered defendant's other arguments and find them unavailing.

Carter v. Howland Hook Hous. Co., 19 A.D.3d 146, 146, 797 N.Y.S.2d 11, 11 (1st Dept. 2005); *see also Beigel v. Cohen*, 158 A.D.2d 339, 340, 551 N.Y.S.2d 28, 29 (1st Dept. 1990) (holding that trial court did not abuse its discretion by conditioning the grant of plaintiffs' motion for aa voluntary discontinuance on their payment of defendants' legal fees, costs, and disbursements).

This litigation is well beyond the stages described in *Carter*. Petitioner has filed a petition and requested dissolution, receivership, and money damages. Subsequently, Petitioner filed to amend that petition. In kind, Respondents filed a motion to dismiss, thus completing the pleading stage. Both parties filed additional motions and letters to the Court, even appearing for oral argument in December 2022 and March 2023. Disclosures have been completed, written discovery is ongoing, and discovery disputes have led to a court-mandated meet-and-confer. If the court grants Petitioner's motion to discontinue, Respondents respectfully submit that the dismissal should be with prejudice and that the Court award them attorneys' fees and costs as a condition of the dismissal.

CONCLUSION

For the reasons set forth above, Respondents respectfully submit that the Court should deny Petitioner's motion to discontinue the action pursuant to CPLR3217(b), or if the Court is so moved to grant Petitioner's motion, that the Court grant the motion with prejudice and order Petitioner to pay Respondents' legal fees inclusive of legal fees, costs, and disbursements related to the case.

Respectfully submitted,

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CERTIFICATION

This confirms that this Brief consists of 6,080 words, exclusive of the caption and Tables of Contents and Authorities, and the signature block immediately above.

s/Douglas E. Motzenbecker
Douglas E. Motzenbecker

DATED: March 21, 2025