To be Argued by:
JONATHAN G. KORTMANSKY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of

DAWN BODENCHAK, as Executor of the Estate of FRANK BODENCHAK,

Petitioner-Respondent,

– against –

5178 HOLDINGS LLC, ADAM RIGGS, SCALABLE LLC and KEITH GOGGIN,

Respondents-Appellants.

For a Judgment Pursuant to New York Limited Liability Company Law Section 702.

Appellate Case No.: 2025-00400

BRIEF FOR RESPONDENTS-APPELLANTS

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QUESTIONS PRESENTED

1. Under CPLR §§ 608 and 702 does Petitioner, who is a non-member of an LLC, have the right to be substituted pursuant to CPLR § 1015(a) to continue the statutory dissolution action against that LLC that was commenced by her late husband, who was a member of the LLC?

The Supreme Court answered yes.

NATURE OF THE CASE

This action is a special proceeding in which the original petitioner, Frank Bodenchak, a minority investor in 5178 Holdings LLC ("5178" or the "Company"), sought the judicial dissolution of a New York Limited Liability Company pursuant to LLC Law § 702. However, Mr. Bodenchak's death in April 2024 divested the IAS Court of jurisdiction over this case, and that is where the matter should have ended.

Instead, the IAS Court erroneously reasserted jurisdiction when, on January 9, 2025, pursuant to CPLR § 1015(a), it permitted Petitioner-Respondent Dawn Bodenchak ("Petitioner" or "Ms. Bodenchak"), Mr. Bodenchak's executrix and widow, to be substituted as petitioner. This holding was erroneous because Ms. Bodenchak, as the executrix of the decedent's estate, never became a member of the Company, meaning she never had standing to pursue a claim for statutory dissolution. Therefore, the IAS Court's Decision and Order granting substitution should be reversed and the case remanded.

By its terms, CPLR § 1015(a) requires that a movant seeking substitution must show that (i) the claim of the deceased (here, Mr. Bodenchak's claim for dissolution) has not been extinguished by his death, and (ii) the movant is a "proper" party to be substituted for the deceased. Petitioner has not made and cannot make either of these required showings.

First, Mr. Bodenchak's claim for dissolution was extinguished by his death. Under LLC Law § 702, only a member of an LLC can seek its involuntary dissolution. Mr. Bodenchak, as a member of 5178, had standing to maintain a dissolution claim. But once he died, under New York law his membership rights did not pass to his estate or to Petitioner—they were extinguished. Without membership rights, Petitioner does not have standing to maintain Mr. Bodenchak's dissolution claim.

To gain full membership status—and therefore be able to assert a claim for statutory dissolution—Petitioner would have had to seek the consent of 5178's Class A members or Class B Members. Petitioner has made no attempt to seek the required consent, and that consent has not otherwise been granted. She is, therefore, not a member of the Company and cannot exercise a member's right to bring an LLC Law § 702 dissolution claim.

Nevertheless, the IAS Court granted Petitioner's substitution motion, concluding that LLC Law § 608 provided her with the right to maintain Mr.

Bodenchak's dissolution claim. This was legally erroneous. LLC Law § 608 is a limited purpose statute. It does not provide Petitioner with membership in the LLC or the right to maintain a statutory dissolution proceeding against the LLC. Rather, it permits Petitioner to exercise Mr. Bodenchak's governance and economic rights in just two express limited circumstances: for settling his estate or administering his property. In other words, Petitioner is permitted to "carry[] on in the usual way the business of the limited liability company." LLC Law § 412(a). Involuntary dissolution has nothing to do with "settling" his estate or "administering" that estate's property. Dissolution, by definition, is not part of the "usual" business of a company.

The IAS Court's reliance on *Crabapple Corp. v. Elberg*, 153 A.D.3d 434, 60 N.Y.S.3d 124 (1st Dep't 2017) is similarly misplaced. The case says nothing about whether an estate (or executors) become members of an LLC upon a member's death or whether dissolution of an LLC constitutes settling an estate or administering property.

Second, Petitioner has failed to establish that she is a "proper" party to seek dissolution. In failing to submit a copy of Mr. Bodenchak's will in support of her motion for substitution, Petitioner could not (and cannot) establish that Mr. Bodenchak's economic interest in 5178 Holdings is part of his estate. If his interest

in 5178 Holdings is not part of his estate, Petitioner cannot meet her burden of showing that she has the rightful power to pursue a dissolution.

With no one else able to pursue Mr. Bodenchak's baseless dissolution claim, the Petition should have been dismissed. The Court should, therefore, reverse the IAS Court's Decision and Order and remand the case for further proceedings.

STATEMENT OF FACTS

A. 5178 Holdings LLC Is Created to Purchase, Own, and Develop a Manhattan Apartment

5178 Holdings LLC ("5178" or the "Company") was formed on December 13, 2013. (R. 12.) At the time, Frank Bodenchak ("Mr. Bodenchak"), Respondent-Appellant Scalable, and Respondent-Appellant Keith Goggin ("Goggin") each owned 33.33% of the Company's Class A membership interests. (R. 46.) Currently, Mr. Goggin is the Company's majority owner with 66.67% of the Class A interests and Mr. Bodenchak is the minority owner with 33.33% of the same. (R. 12.)

The Company is governed by the First Amended and Restated Limited Liability Company Operating Agreement (the "Operating Agreement"). Section 1.4 of the Operating Agreement sets forth 5178's corporate purpose, which is "to purchase, own, and develop" a penthouse apartment in the building known as 5 East 17th Street Condominium (the "Penthouse"). (R. 35.) There is no dispute that the LLC purchased, developed, and now owns the Penthouse. Notably, there is no mention of a "sale" as part of 5178's corporate purpose.

B. Mr. Bodenchak Attempts to Sell His Minority Interest in 5178 to Mr. Goggin

The Operating Agreement does not require that the Penthouse be sold on any particular timeframe—or at all. Nevertheless, 5178 engaged in multiple unsuccessful efforts to sell the Penthouse between 2019 and 2021. (R. 12–15.)

In 2020, with 5178 so far having failed to finalize a sale despite its efforts, Mr. Bodenchak insisted that Mr. Goggin purchase his minority interest in 5178 at a price demanded by Mr. Bodenchak. (R13, 15.) Mr. Bodenchak made this demand despite the fact that neither 5178 generally nor Mr. Goggin in particular had any immediate obligation to sell the unit or to buy Mr. Bodenchak's interest. Mr. Goggin was nevertheless open to purchasing Mr. Bodenchak's share of the LLC, but not at the inflated price that Mr. Bodenchak demanded. (R. 13.) Instead, Mr. Goggin made a counteroffer, which Mr. Bodenchak rejected. (R. 13.)

5178 made another unsuccessful attempt to sell the Penthouse in 2021. (R13–14.) Since then, the Penthouse has remained off the market.

C. Mr. Bodenchak Files a Dissolution Petition in New York Supreme Court, But Passes Away Shortly Thereafter

Three years later, and unhappy the Penthouse remained unsold, Mr. Bodenchak filed a Verified Petition on March 27, 2024 seeking the dissolution of 5178 and alleging tort claims against Mr. Goggin. (R. 8–34.)

On April 18, 2024, Mr. Bodenchak's counsel notified the Court of his client's death. (R. 104.) Pursuant to CPLR §§ 1015 and 1021, Mr. Bodenchak's death instantly "divest[ed] the court of jurisdiction and stay[ed] the proceedings until proper substitution [was] made." (R104.) The Court formalized the mandatory stay on June 12, 2024. (R. 105.)

D. The IAS Court Erroneously Grants Petitioner's Motion for Substitution to Pursue the Petition in Mr. Bodenchak's Place

On September 13, 2024, Petitioner Dawn Bodenchak filed a motion for substitution pursuant to CPLR §§ 1015(a) and 1021 to allow her, as executrix of her late husband's estate, to prosecute the case in his stead (the "Substitution Motion"). (R. 110–11.) Accompanying her motion, Ms. Bodenchak filed a copy of the Preliminary Letters Testamentary naming her as Mr. Bodenchak's executor (R. 115–16), but failed to file a copy of Mr. Bodenchak's will.

Respondents opposed Ms. Bodenchak's motion, but the IAS Court granted the Substitution Motion on January 9, 2025. Ms. Bodenchak, in her capacity as Mr. Bodenchak's executor, was permitted to be substituted as petitioner (the "Decision and Order"). (R. 4–6.) Respondents timely filed a notice of appeal of the Substitution Motion on January 17, 2025. (R. 3.)

5178 remains a functioning and valuable enterprise. It owns an apartment worth millions of dollars, continues to meet its ongoing carrying costs, and operates

with Mr. Goggin as its managing member—nothing in the Petition is to the contrary. (R. 8–31.) There is no reason the Company can or should be dissolved.

ARGUMENT

I. Petitioner Has Failed to Meet Her Burden of Establishing the IAS Court's Jurisdiction Over This Case

Mr. Bodenchak's death automatically divested the IAS Court of jurisdiction over this case. *Deutsche Bank Nat'l Tr. Co. v. Smith*, 191 A.D.3d 950, 143 N.Y.S.3d 386, 388 (2d Dep't 2021) ("The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a)."). The sole "exception to [the] court's lack of jurisdiction" is its ability to rule on a motion for substitution. *Hayden v. Brown*, 230 A.D.3d 657, 658 (2d Dept 2024). As the party moving for substitution, Petitioner bears the burden of submitting proof sufficient "to obtain jurisdiction over the persons interested in the decedent's estate." *James v. Daughtry*, 22 Misc. 3d 608, 610, 872 N.Y.S.2d 633, 634 (Kings Cnty. Sup. Ct. 2008); *see also Sacco v. Reel-O-Matic, Inc.*, 183 A.D.3d 567, 122 N.Y.S.3d 660, 662 (2d Dep't 2020) ("The party seeking to assert personal jurisdiction bears the ultimate burden of proof to establish a basis for such jurisdiction."). A substitution motion, therefore, "is not a mere technicality," but is the only method "by which the court acquires jurisdiction over a deceased party's successors in interest." *Linyard v. Long Island Coll. Hosp.*, No. 16286/14, 2025 WL 45113, at *1 (2d Dep't Jan. 8, 2025) (citation and internal quotation marks omitted).

To meet her burden, Petitioner must first demonstrate that the claim "for or against [the decedent] is not thereby extinguished" by the decedent's death. CPLR § 1015(a). Only if that element is satisfied should the court "order substitution of the proper parties." *Id*. A "proper party" is the "personal representative" for the decedent's estate who has "obtained appropriate authority to proceed in th[e] action." *Abley Props., Inc. v. Reid*, 52 A.D.3d 442, 443, 860 N.Y.S.2d 135, 137 (2d Dep't 2008); *see also* CPLR § 1021 ("A motion for substitution may be made by the successors or representatives of a party or by any party."). Here, Petitioner failed to meet her burden of establishing the IAS Court's jurisdiction under both elements of CPLR § 1015(a).

II. Mr. Bodenchak's Dissolution Claim Was Extinguished by His Death

With respect to the first requirement, Petitioner cannot establish that Mr. Bodenchak's statutory dissolution action survived his death. Therefore, the IAS Court's Decision and Order must be reversed.

A. Only a Member of an LLC Can Bring a Statutory Dissolution Claim

Only a member of an LLC can bring a statutory dissolution claim. As LLC Law § 702 states,

> *On application by or for a member*, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

LLC Law § 702 (emphasis added). A non-member of an LLC, therefore, lacks standing to petition for the LLC's dissolution pursuant to this statute. *In re Cline*, 72 A.D.3d 471, 473, 901 N.Y.S.2d 2 (1st Dep't 2010). This makes good sense; members of an LLC have "the right to choose their partners" or, conversely, choose with whom they would no longer like to be partners. Peter A. Mahler, McKinney's Practice Commentaries, LLC Law, § 6.8 (2024). A non-member cannot be permitted to unilaterally usurp this right.

B. Mr. Bodenchak's Death Terminated His Membership in 5178

As a member of 5178, Mr. Bodenchak had standing to seek statutory dissolution during his lifetime. However, his membership in the LLC—and any concomitant standing to sustain a statutory dissolution claim—terminated with his death. *See Gurney-Goldman v. Goldman*, 321 A.3d 559, 577 (Del. Ch. 2024) ("the death of a member who is a natural person must terminate that person's membership").

LLC Law § 601 provides that "[a] membership interest in [a] limited liability company is personal property." And like other personal property, Mr. Bodenchak's interest in the LLC "transfer[red] by operation of law to [his] estate." *Gurney-Goldman*, 321 A.3d at 577. The estate, however, only "receives the rights of an assignee," meaning it "possesses economic rights." *Id.* at 575, 577 & n.41 (citation omitted). The assignee "does not receive the full bundle of property rights associated

with ownership." *Id*. at 575 n.41 (citation omitted). Petitioner, as the executor of Mr. Bodenchak's estate, is currently an assignee of Mr. Bodenchak's economic interest in 5178 but is "*not a member*" of the LLC itself. *Id.* at 577 (emphasis added).

C. LLC Law § 604(a) Does Not Provide Petitioner with Membership in the Company

Because Petitioner is only an assignee of Mr. Bodenchak's economic interest in the Company, she "does not receive the right . . . to seek statutory dissolution." *Id.* at 575–76. Only full members of an LLC have that right. *See MFB Realty LLC v. Eichner*, No. 653549/2014, 2016 WL 3541398, at *4 (N.Y. Cnty. Sup. Ct. June 24, 2016) (distinguishing "between assignees, . . . who hold only economic rights, and substituted members, who hold full rights"). To gain full membership status—and therefore be able to assert a claim for statutory dissolution—Petitioner would have had to follow one of the paths to identified in LLC Law § 604. She failed to do so here.

LLC Law § 604(a), entitled "Rights of assignee to become a member," states,

> Except as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign such membership interest.

In other words, an assignee can become a member of an LLC in two ways: (i) pursuant to the express provision(s) of the LLC's operating agreement or (ii) upon the vote or consent of a majority of the LLC's members. "Until the assignee

follows one of those paths, the assignee remains an assignee." *Gurney-Goldman*, 321 A.3d at 577. Here, Petitioner has not established her membership in 5178 under either option.

With respect to the first option, the Operating Agreement does not provide any mechanism by which Mr. Bodenchak's estate automatically became a member of the Company upon his death. *See, e.g.*, *Davies v. Jerry*, 107 A.D.3d 1553, 1555, 966 N.Y.S.2d 797, 798 (4th Dep't 2013) (discussing LLC agreement provision providing for dispersal of membership rights upon the death of a member). Instead, the Operating Agreement states that the only way for Petitioner to become a member of the Company is pursuant to the "Admission of Members" provision. Article 2.4 provides that a new member of the Company can only be admitted "upon the Approval of the Class A Members" or "upon the approval of the existing Class B Members representing 51% of the Class B Interests." (R. 37.) Petitioner has neither sought nor received such "approval."

With respect to the second option, LLC Law § 604(a) states that an assignee can become a member of an LLC with "the vote or written consent of at least a majority in interest of the members." As stated *supra*, Petitioner has neither sought nor received the required consent.

Therefore, Petitioner cannot claim membership in 5178 or standing to maintain Mr. Bodenchak's statutory dissolution claim under LLC Law § 604(a).

Gurney-Goldman, 321 A.3d at 578 (holding estate is not a member of the LLC where, *inter alia*, "[t]he estate has not traveled the member-approval path").

D. LLC Law § 608 Does Not Permit Petitioner to Pursue Mr. Bodenchak's Statutory Dissolution Claim

As LLC Law § 604(a) provides Petitioner with no recourse, the IAS Court instead relied on LLC Law § 608 in holding that Petitioner has standing to maintain Mr. Bodenchak's statutory dissolution action. The IAS Court held as follows,

> Respondents argue that Dawn Bodenchak lacks standing to pursue the deceased['s] claim since she is not a member of the LLC and pursuant to NY Limit Liab Co § 702 an application for dissolution may only be brought by a member. However, pursuant to NY Limit Liab Co § 608, upon the death of an LLC member "the member's executor, administrator, guardian, conservator or other legal representative may exercise all of the member's rights for the purpose of settling his or her estate."

(R. 4 (quoting *Crabapple Corp. v. Elberg*, 153 A.D.3d 434, 435, 60 N.Y.S.3d 124, 125 (1st Dep't 2017)).) This was error. On its face, LLC Law § 608 does not provide Petitioner with (i) membership in the LLC or (ii) the right to maintain a statutory dissolution proceeding against the LLC—which, again, is an extraordinary remedy that has nothing to do with "settling" or "administering" an estate.

1. LLC Law § 608 Does Not Grant Petitioner Membership in the Company

LLC Law § 608 reads, *inter alia*,

> If a member who is a natural person dies . . ., the member's executor . . . or other legal representative may exercise all of the member's rights for the purpose of settling his or her estate or administering his or her

> property, including any power under the operating agreement of an assignee to become a member.

LLC Law § 608. Under the plain text of the statute, an executor can become a member in an LLC only where its operating agreement includes "any power under the operating agreement of an assignee to become a member." *Id*. As discussed *supra*, neither the Operating Agreement nor LLC Law § 604(a) provide Petitioner with the "power . . . to become a member" unless she adheres to the "Admission of Members" provision under Article 2.4. She has failed to do so. Therefore, Petitioner cannot claim membership in 5178 under LLC Law § 608.

To the extent the Decision and Order suggests that "all of the member's rights" in LLC Law § 608 automatically vests Petitioner with membership in the LLC, such a holding cannot be correct as a matter of statutory interpretation. If the estate of a deceased LLC member "automatically became a member, then there would be no reason to enable the personal representative to exercise member rights, because the personal representative already would have them." *Gurney-Goldman*, 321 A.3d at 577–78. Similarly, accepting the IAS Court's interpretation of LLC Law § 608 would render superfluous the clause "including any power under the operating agreement of an assignee to become a member" as the decedent's estate would automatically "become a member." LLC Law § 608; *see also Bank of Am., N.A. v. Kessler*, 39 N.Y.3d 317, 325, 206 N.E.3d 1228, 1233 (2023) ("'Including' may be used to bring into a definition something that would not be there unless specified"

(citation omitted)). To the extent the IAS Court's Decision and Order "violates the rule of construction that words must be harmonized and read together to avoid surplusage," it must be reversed. *Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 10, 132 N.E.3d 568 (2019) (citation and internal quotation marks omitted).

2. LLC Law § 608 Does Not Permit Petitioner to Bring a Claim for Statutory Dissolution Without Membership in the Company

Moreover, contrary to the IAS Court's Decision and Order, LLC Law § 608 does not provide an exception to the membership requirement of LLC Law § 702. Rather, LLC Law § 608 provides Petitioner with the limited right of "exercis[ing] all of the member's rights *for the purpose of settling [the decedent's] estate or administering [his] property.*" LLC Law § 608 (emphasis added). "Administering property" includes the right "to collect the assets of the decedent, pay his or her debts and expenses, and make distribution to the persons entitled thereto, and to do so in an orderly, expeditious, and efficient fashion." *Gurney-Goldman*, 321 A.3d at 585 (citation omitted). "Settling an estate" is "more limited" as it "brings the estate to a close, with the personal representative providing an accounting to the court with jurisdiction over the estate and to those with an interest in the estate." *Id.* at 587. Statutory dissolution under LLC Law § 702—that is, forcibly destroying a company without the consent of its members—does not fall under either category. *See id.* at

575–76 (holding that an executor has the authority to settle an estate and administer property but "does not receive the right . . . to seek statutory dissolution."). On this basis alone, the Decision and Order should be reversed.

Furthermore, in evaluating an executor's ability to exercise "member's rights" under LLC Law § 608, the Court must look to whether the LLC agreement "expressly vests authority in any managers." *Id.* at 571 (citation omitted). Here, Article 2.2 of the Operating Agreement provides, *inter alia*,

> All powers of the Company shall be exercised by or under the authority of, and all business and affairs of [the] Company shall be conducted by or under the direction of the Class A Members. . . . *No action or management decision of the Class A Members shall be effective unless approved by the Class A Members representing 51% of all of the Class A Interests.*

(R. 36 (emphasis added).) As the owner of "more than 51% of all of the Class A Interests," Mr. Goggin is the "managing member" of 5178. (R. 9 (conceding that Mr. Goggin is the "managing member").) Mr. Bodenchak, by contrast, was a non-managing member. "[T]he member's rights available for the executor of a non-managing member will be quite narrow" under LLC Law § 608—in particular, Petitioner may only "exercise the member-level governance rights that [Mr. Bodenchak] possessed while alive." *Gurney-Goldman*, 321 A.3d at 586, 598.

With respect to dissolution, the only governance right Mr. Bodenchak possessed when he was alive was the right to seek a vote of dissolution pursuant to Article 5.1(a) of the Operating Agreement. (R. 40.) This would have required Mr.

Goggin's consent as managing member. (R. 40.) But Petitioner is not seeking to exercise Mr. Bodenchak's voting rights—instead, she is seeking judicial dissolution pursuant to LLC Law § 702. She is not entitled to do so. Only "members and managers" have the right to seek dissolution, "not assignees." *Gurney-Goldman*, 321 A.3d at 576 n.42 (citation omitted). Unlike the Operating Agreement's voluntary dissolution provision, statutory dissolution is not a governance right "vest[ing] authority in [] managers," *id*. at 571; rather, it is an unwaivable statutory right belonging to all members of an LLC, *Schimel v. Berkun*, 264 A.D.2d 725, 728, 696 N.Y.S.2d 49, 52 (2d Dep't 1999); *see also* LLC Law § 702. Where, as here, Petitioner is not a member of the LLC, she cannot invoke LLC Law § 702. Therefore, the Decision and Order should be reversed.

E. The First Department's Decision in *Crabapple Corp. v. Elberg* Does Not Provide Petitioner with Standing to Pursue a Statutory Dissolution Claim

Lastly, the only case on which the IAS Court relies, *Crabapple Corp. v. Elberg*, 153 A.D.3d 434, 60 N.Y.S.3d 124 (1st Dep't 2017), does not provide Petitioner with membership in 5178 or otherwise provide her with standing to pursue Mr. Bodenchak's dissolution claim.

Consistent with LLC § 608, *Crabapple* adjudicated the issue of the *governance* of an LLC upon the majority member's death. In particular, the case concerned whether the executors of the majority member of the LLC could remove

the minority member of the LLC as co-manager of the company. This Court held that where the operating agreements "contained no provision regarding the *succession of management of the LLCs* in the event of the death of . . . the majority member," the executors could act as co-managers of the LLC because the operating agreement permitted the majority member to "act unilaterally on the LLCs' behalf." *Id.* at 436 (emphasis added). The case says nothing about whether the estate (or executors) became members of the LLC under LLC Law § 608 or whether dissolution of an estate under LLC Law § 702 constitutes settling an estate or administering property. *See Gurney-Goldman*, 321 A.3d at 587.

F. As Petitioner Is Not a Member of 5178, She Does Not Have Standing to Maintain Mr. Bodenchak's Statutory Dissolution Action

As discussed *supra*, only a member of an LLC can maintain a statutory dissolution action pursuant to LLC Law § 702. Where, as here, Petitioner is not a member of the LLC, she lacks standing to maintain Mr. Bodenchak's dissolution claim. The claim, therefore, must be deemed extinguished by death and the IAS Court's Decision and Order to the contrary should be reversed.

III. Petitioner Failed to Meet Her Burden to Establish that She Is a Proper Party for Substitution

Even assuming the Court finds that Petitioner has met her burden of establishing that Mr. Bodenchak's dissolution claim survived his death (she has not), Petitioner cannot demonstrate that she is a proper party for substitution.

In its Decision and Order, the IAS Court acknowledged that Petitioner failed to submit a copy of Mr. Bodenchak's will with her motion papers. (R. 4–5.) However, rather than denying the substitution motion on that basis alone, the IAS Court erroneously concluded that Petitioner was not required to submit a copy of the will because her Preliminary Letters Testamentary "establish her capacity to continue this action." (R. 5.) This is plainly incorrect. While an executor "has a duty to preserve the assets that decedent entrusted to them," what those assets actually are "is derived from the will, not from the letters issued by the Surrogate." *In re Est. of Schultz*, 104 A.D.3d 1146, 1148, 961 N.Y.S.2d 618, 621 (4th Dep't 2013); *see, e.g., In re Cleary*, 44 Misc.3d 211, 215-16 (N.Y. Sur. Ct. Queens Cnty. 2014) (denying summary judgment because the petitioner had not submitted proof that the asset was a part of the estate). Without the will, Petitioner could not (and cannot) establish that Mr. Bodenchak's economic interest in 5178 Holdings is even part of his estate and cannot meet her burden of showing that she has the rightful power to pursue dissolution. Under these circumstances, the Decision and Order should be reversed.

CONCLUSION

For the foregoing reasons, Respondents-Appellants request the Court reverse the IAS Court's Decision and Order and remand the case for further proceedings.

Dated: July 17, 2025

By: */s/Jonathan Kortmansky*

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PRINTING SPECIFICATIONS STATEMENT

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Dated: July 17, 2025

STATEMENT PURSUANT TO CPLR § 5531 [1-2]

New York Supreme Court

Appellate Division—First Department

In the Matter of

DAWN BODENCHAK, as Executor of the Estate of FRANK BODENCHAK,

Petitioner-Respondent,

– against –

5178 HOLDINGS LLC, ADAM RIGGS, SCALABLE LLC and KEITH GOGGIN,

Respondents-Appellants.

For a Judgment Pursuant to New York Limited Liability Company Law Section 702.

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1. The index number of the case in the court below is 152916/24.

2. The parties have changed by order dated January 8, 2025, naming Petitioner Dawn Bodenchak as executor of the estate of Frank Bodenchak, deceased. The full names of the original defendants are set forth above and remain unchanged.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about March 29, 2024 by filing of a Verified Petition. On June 21, 2024, the case was marked stayed due to the death of Petitioner Frank Bodenchak. Thereafter, a motion to substitute named petitioner and amend the caption was filed. The respondents joined the matter with the filing of a Memorandum of Law in Opposition filed on or about October 7, 2024.

5. The nature and object of the action is for dissolution of corporate assets and to recover monetary damages allegedly sustained due to breach of fiduciary duty, good faith and fair dealing.

6. This appeal is from the Decision and Order of the Honorable Paul A. Goetz, which granted Petitioner's motion to substitute the named petitioner and amend the caption.

7. This appeal is on the full reproduced record.