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-Appellee,

– 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

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

CPLR § 1015(a) requires a movant seeking substitution to show that the claim of the deceased (here, Mr. Bodenchak's claim for judicial dissolution) has not been extinguished by his death, and that the movant is a "proper" party to be substituted for the deceased. In their opening brief, Respondents demonstrated that the IAS Court wrongly held that Petitioner had met her burden to be substituted. Petitioner's opposition confirms that the IAS Court's Decision and Order granting substitution should be reversed. Pursuant to LLC Law § 702, only a "member" of an LLC can seek dissolution of that LLC. Petitioner's brief fails to address LLC Law § 702 at all, let alone demonstrate that the Decision and Order properly applied the statute. Nor does Petitioner dispute that Mr. Bodenchak's membership interest in 5178 was extinguished upon his death and did not otherwise automatically pass to his estate or his executor. These concessions confirm that Petitioner is not a "proper" party to seek dissolution because, as a non-member of 5178, she lacks standing to do so.

Despite these fatal concessions, Petitioner asserts that she has standing. *First,* Petitioner argues that her substitution as Petitioner is the "most routine of procedural acts" and therefore was "not only proper, it was required." (Opp. Br. at 1–2.) She is wrong. As the Court of Appeals has explained, substitution is "[f]ar from being a mere technical formality," it is "a jurisdictional act." *In re Einstoss' Est.*, 26 N.Y.2d 181, 190 (1970). And as the party moving for substitution, Petitioner bears the

burden of submitting proof sufficient to invoke the Court's jurisdiction. She has failed to meet her burden in this case.

Second, Petitioner argues that Respondents cannot challenge the IAS Court's exercise of jurisdiction in this case because Respondents did not make a cross-motion to dismiss for lack of jurisdiction. (Opp. Br. at 13–14.) This argument misstates the procedural history of the case, which is that Petitioner moved by Order to Show Cause to be substituted. (R. 110–12.) Under that procedural posture, Petitioner bears the burden of proof as to the existence of the IAS Court's jurisdiction; Respondents are not required to establish its absence.

Third, Petitioner argues (and the IAS Court appears to have agreed) that LLC Law § 608 imbues Petitioner with the right to seek statutory dissolution "without requiring formal admission to membership." (Opp. Br. at 6.) This interpretation of LLC Law § 608 is incorrect. Neither LLC Law § 608, nor any appellate court within this State applying it, has ever held that LLC Law § 608 supplants LLC Law § 702's express language that only a member of an LLC has standing to pursue statutory dissolution.

The IAS Court cites to a single case, *Crabapple Corp. v. Elberg*, 153 A.D.3d 434 (1st Dep't 2017), in support of its holding. However, *Crabapple* does not concern a claim for dissolution, nor is dissolution mentioned in the opinion. The remaining New York state law cases on which Petitioner relies fare no better. They

either do not concern dissolution (*Bookhamer*), hold that the executor could not maintain a dissolution action (*Andris*), or are non-binding Supreme Court opinions (*Pachter* and *Estate of Lindenberg*).

The final case on which Petitioner relies, the Delaware Chancery Court's decision in *Gurney-Goldman v. Goldman*, 321 A.3d 559 (Del. Ch. 2024)—which Petitioner lauds for its "thoughtful analysis" of "materially identical" statutes to the ones at issue in this case (Opp. Br. at 11, 14)—is the death knell for her argument under LLC Law § 608. In *Gurney-Goldman*, the Court held that: (i) a decedent's estate is not a member of the LLC, only an assignee; (ii) as a non-member of the LLC, an executor can only exercise "member-level governance rights" for the "limited purposes" of "settling the estate or administering its affairs"; and (iii) statutory dissolution—that is, forcibly destroying a company without the participation of its members—does not fall under either category because the law "provid[es] the right to seek dissolution to members and managers but not assignees." *Gurney-Goldman*, 321 A.3d at 575, 576 & n.42, 577, 590, 598. Petitioner's only argument to the contrary consists of two hallucinated quotes that appear nowhere in *Gurney-Goldman*. (Opp. Br. at 11.) The IAS Court's Decision and Order should therefore be reversed.

Lastly, even assuming this Court finds that Petitioner has met her burden of establishing standing (she has not), Petitioner cannot demonstrate that she is a proper

party for substitution. Petitioner failed to submit a copy of Mr. Bodenchak's will with her motion papers. (R. 4–5.) Without the will, Petitioner could not (and cannot) establish that Mr. Bodenchak's property interest in 5178 is part of his estate. Nevertheless, Petitioner argues—and the IAS Court erroneously agreed—that Petitioner's preliminary letters testamentary "establish her capacity to continue this action" as executor of her late husband's estate. (R. 5.) This was error. While an executor has a duty to preserve the assets that decedent entrusted to them, what those assets are is derived from the will, not from letters testamentary. Petitioner was therefore required to submit a copy of Mr. Bodenchak's will but, to date, has failed to do so. The Decision and Order should be reversed on this basis as well.

ARGUMENT

I. Petitioner Concedes That She Does Not Have Standing to Maintain a Judicial Dissolution Claim Under LLC Law § 702

Despite Count I of the Petition seeking judicial dissolution of 5178 pursuant to LLC Law § 702 (R. 27–28), Petitioner neither mentions the statute in her brief nor makes any legal argument about its applicability. Petitioner's failure to respond to Respondents' argument regarding § 702 (*see* Br. at 8–9) amounts to a concession, which alone warrants reversal of the IAS Court's Decision and Order. *See D'Angelo v. D'Angelo*, 14 A.D.3d 476, 477 (2d Dep't 2005) (holding that a party "concede[s] the [] argument" by "fail[ing] to respond").

Under New York law, only a member of an LLC can bring a statutory dissolution claim. *See* LLC Law § 702 ("*On application by or for a member*, the supreme court . . . may decree dissolution of a limited liability company") (emphasis added). As Petitioner concedes, neither she nor the estate has "formal admission to membership" or is a "full-fledged member" in 5178. (Opp. Br. at 6). The plain language of LLC Law § 702 is therefore inescapable: as a non-member of 5178, Petitioner lacks standing to petition for its judicial dissolution. Her substitution motion should have been denied, and the IAS Court's Decision and Order should be reversed on this basis alone.

II. Having Conceded That She Cannot Maintain a Judicial Dissolution Claim, Petitioner's Attempts to Manufacture Standing Must Be Rejected

Despite these fatal concessions, Petitioner continues to assert that she, as Mr. Bodenchak's executor, is entitled to prosecute his judicial dissolution claim. Her attempts to manufacture standing must be rejected.

A. Petitioner Bears the Burden of Establishing the Court's Jurisdiction, Not Respondents

Petitioner asserts, without citation, that (i) her substitution as Petitioner is the "most routine of procedural acts" and therefore was "not only proper, it was required," and (ii) Respondents cannot challenge the IAS Court's exercise of jurisdiction in this case because Respondents did not make a cross-motion to dismiss for lack of jurisdiction. (Opp. Br. at 1–2, 13–14.) She is wrong. These arguments not

only misstate the procedural history of the case but also attempt to turn the burden of proof on its head.

When Mr. Bodenchak died, the IAS Court was automatically divested of jurisdiction. *Deutsche Bank Nat'l Tr. Co. v. Smith*, 191 A.D.3d 950, 951 (2d Dep't 2021). The only way for Petitioner to restore jurisdiction—and maintain this action—was via substitution pursuant to CPLR § 1015(a). *Hayden v. Brown*, 230 A.D.3d 657, 658 (2d Dept 2024). However, as the Court of Appeals has explained, substitution is "[f]ar from being a mere technical formality." *In re Einstoss' Est.*, 26 N.Y.2d at 190. Rather, permitting substitution is "a jurisdictional act" and "the recognized means by which a court obtains jurisdiction over the [estate's] personal representative." *Id.* at 190–91. As the party seeking to assert jurisdiction, Petitioner "*bears the ultimate burden of proof* to establish a basis for such jurisdiction." *Sacco v. Reel-O-Matic, Inc.*, 183 A.D.3d 567, 568 (2d Dep't 2020) (emphasis added). Without proper substitution, any determinations by the IAS Court "will generally be deemed a nullity." *Singer v. Riskin*, 32 A.D.3d 839, 840 (2d Dep't 2006). Therefore, Petitioner's repeated attempts to mischaracterize substitution as "routine," automatic, or otherwise "required" should be rejected. (*See, e.g.*, Opp. Br. at 1–3, 5, 13.)

Petitioner's assertion that Respondents cannot challenge the IAS Court's exercise of jurisdiction without making a cross-motion to dismiss is similarly

specious. (Opp. Br. at 13–14.) As discussed *supra*, Petitioner bears the burden of proving the existence of the IAS Court's jurisdiction; Respondents are not required to establish its absence.

Moreover, this argument misrepresents the procedural history of this case. On September 16, 2024, the IAS Court issued an Order to Show Cause as to "why an Order should not be made and entered pursuant to N.Y. C.P.L.R. §§ 1015(a) and 1021, substituting proposed petitioner Dawn Bodenchak." (R.110–12.) Respondents filed their response on October 7, 2024, arguing that Petitioner bears the burden of establishing the IAS Court's jurisdiction and if she could not meet her burden, the case should be dismissed. (R. 146–63.) Respondents' argument is not an independent request for relief and does not require a cross-motion, as Petitioner claims. (Opp. Br. at 13–14; *see also id.* at 1 (stating Respondents are asking the Court to "not just deny[] substitution but *sua sponte* dismiss[] the case for lack of jurisdiction"); *id.* at 2 (accusing Respondents of "attempt[ing] to transform a routine substitution motion into an outright dismissal").) Rather, Respondents make the uncontroversial point that if Petitioner cannot meet her burden of proof, substitution should be denied and the case dismissed as extinguished by death. *See* CPLR § 1021 (permitting the Court to dismiss an action for failure to substitute).

B. LLC Law § 608 Does Not Provide Petitioner with Standing

To avoid the membership requirement of LLC Law § 702, Petitioner argues that LLC Law § 608 permits her to "maintain proceedings related to [Mr. Bodenchak's] membership interest without requiring formal admission to membership," including "the statutory right to seek dissolution." (Opp. Br. at 6, 8.) This interpretation of LLC Law § 608—which, although not explicitly stated, appears to have been adopted by the IAS Court (R. 4)—is patently incorrect.

LLC Law § 608 reads, in pertinent part,

> 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. By its express terms, LLC Law § 608 provides a "member's executor" with the limited right of "exercis[ing] all of the member's rights for the purpose of settling his [] estate or administering his [] property." *Id*. But these "member's rights" do not include membership in the LLC, they only include "any power under the operating agreement of an assignee to become a member." *Id.* As discussed at length in Respondents' moving brief, Petitioner would have had to follow one of the paths to identified in LLC Law § 604 to gain full membership in 5178. (*See* Br. at 10–12.) She has not done so. Therefore, 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.

Nevertheless, Petitioner repeatedly asserts that LLC Law § 608 allows her to "exercise *all of the member's rights*, including the statutory right to seek dissolution." (Opp. Br. at 8 (emphasis added); *see also id.* at 7 (same).) However, neither the IAS Court nor Petitioner cite to any precedent justifying such a result.

In granting substitution, the IAS Court relied on a single case, *Crabapple Corp. v. Elberg*, 153 A.D.3d 434 (1st Dep't 2017). (R. 4.) But *Crabapple* provides no justification for the IAS Court's ruling. It does not concern a claim for dissolution (nor is dissolution mentioned at all). The case instead involves the question of whether the executors of the majority member of an LLC could remove the minority member of the LLC as a manager of the company. *Crabapple*, 153 A.D.3d at 435. Petitioner also cites to *Crabapple*; however, she cites it for a non-existent proposition. She writes, without citing or quoting from the case, that the First Department "expressly emphasized that the powers of an estate representative under § 608 are neither limited nor constrained. Estate representatives may exercise all of the member's rights, including the statutory right to seek dissolution." (Opp. Br. at 8.) But *Crabapple* says no such thing—the case has nothing to do with "the statutory right to seek dissolution" and its only reference to LLC Law § 608 is quoting the statute. *See Crabapple*, 153 A.D.3d at 435.

The remaining cases on which Petitioner relies fare no better. (Opp. Br. at 8–9.) In *Andris v. 1376 Forest Realty, LLC*, 213 A.D.3d 923 (2d Dep't 2023), the

Second Department held that the petitioner could not maintain a dissolution action because the LLC's operating agreement "contain[ed] no provision entitling the petitioner to dissolution of the LLC as a matter of law."[1] Like *Crabapple*, *In re Bookhamer v. Karten-Bermaha Textiles Co., L.L.C*, No. 1041642004, 2004 WL 7329684, at *1 (Sup. Ct. N.Y. Cty. Dec. 14, 2004) does not involve a dissolution claim, but a motion for access to books and records. The final two New York state law cases that Petitioner cites—*Pachter v. Winiarski*, No. 502779/2020, 2021 WL 1794565, at *1 (Sup. Ct. Kings Cty. May 05, 2021) and *Estate of Lindenberg v. Winiarsky*, No. 520682/2020, 2021 WL 1794560, at *1 (Sup. Ct. Kings Cty. May 05, 2021)—were wrongly decided. In those related cases, the Supreme Court held that LLC Law § 608 permitted an estate administrator to "maintain[] membership status" and assume the decedent's "membership responsibilities," including pursuing a judicial dissolution action under LLC Law § 702. *Estate of Lindenberg*, 2021 WL 1794560, at *2; *see also Pachter*, 2021 WL 1794565, at *2 (same). However, these cases are neither binding on this Court, nor have their holdings been adopted by other New York courts. Moreover, neither opinion contains any analysis of LLC Law § 608 or provides any case law to support their holding.

[1] Petitioner incorrectly states that in *Andris* the Second Department "affirmed an order denying summary judgment seeking dismissal of a dissolution proceeding due to the purported absence of estate authority." (Opp. Br. at 8.) To the contrary, the Court affirmed the denial of *an executor's* summary judgment motion on its dissolution claim.

In addition to relying on New York law, Petitioner spends more than one-quarter of her brief discussing a single case: the Delaware Chancery Court's decision in *Gurney-Goldman v. Goldman*, 321 A.3d 559 (Del. Ch. 2024). (Opp. Br. at 10–13.) Petitioner lauds the opinion for its "thoughtful analysis" of "materially identical" statutes to the ones at issue in this case. (Opp. Br. at 11, 14.) However, *Gurney-Goldman* stands for the proposition that Petitioner *cannot* maintain a statutory dissolution claim under LLC Law § 608.

Gurney-Goldman concerns a Delaware LLC owned equally by four siblings. *Gurney-Goldman*, 321 A.3d at 566. In 2022, one of the siblings who managed the business died and his 25% interest passed to his estate. *Id.* Because the company lacked a written LLC agreement, the decedent's executor subsequently sought a declaration that, under the Delaware LLC Act, the decedent's estate "is a member of [the LLC] or, to the extent the estate is only an assignee, that [the executor] can exercise governance rights equivalent to those of a member in his capacity as the executor to [the decedent's estate]." *Id.* at 571.

The Court held that the decedent's estate was "an assignee, *not a member*" of the LLC because the member's death "terminate[d] that person's membership." *Id.* at 577 (emphasis added; internal quotation omitted); *see also id.* at 598 ("[The] estate holds an assignee interest, not a member interest."). The Court further held that without membership in the LLC, an executor can "exercise member-level

governance rights" for the "limited purposes" of "settling the estate or administering its affairs." *Id.* at 590, 598. As the Court explained, "administration" of an estate 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." *Id.* 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. Outside of "settling the estate or administering its affairs," an executor "cannot exercise member-level governance rights *for any other reason*." *Id.* at 598 (emphasis added).

Statutory dissolution—that is, forcibly destroying a company without the participation of its members—does not fall under either category. This is because, as *Gurney-Goldman* explains, the law "provid[es] the right to seek dissolution to *members . . . but not assignees*." *Id.* at 576 n. 42 (emphasis added); *see also id.* at 575–76 (explaining that an assignee does not "have the right to . . . seek statutory dissolution"). Therefore, under the reasoning of *Gurney-Goldman*, Petitioner's motion for substitution should have been denied because maintaining a statutory dissolution claim is neither administering nor settling Mr. Bodenchak's estate.

To overcome this explicit holding, Petitioner purports to quote from a different portion of *Gurney-Goldman*, writing,

> As the court explained, the statute "expressly empowers the decedent's personal representative to step into the shoes of the member" to protect the estate's interest, and any narrower construction "would deprive estates of any meaningful way to realize the value of the deceased member's interest."

(Opp. Br. at 11 (emphasis added).) Petitioner attributes the underlined to pages 575 and 576 and footnote 86 of *Gurney-Goldman*. (*Id.*) However, those quotations do not appear anywhere in the opinion—they do not exist. In fact, they are contrary to the Court's actual holding. *Gurney-Goldman* expressly eschewed a broad construction of "administering and settling the estate." As described *supra*, it held that the ability to exercise member-level governance rights was "for limited purposes" and that an executor "cannot exercise member-level governance rights for any other reason." *Id.* at 590, 598. On this basis, the Decision and Order should be reversed.

C. 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.

The IAS Court erroneously held that Petitioner was not required to submit a copy of Mr. Bodenchak's will because her Preliminary Letters Testamentary "establish her capacity to continue this action." (R. 5.) But the issue is not Petitioner's "capacity to continue this action." (*Id.*) It is whether the LLC

membership interest that Petitioner purports to represent is actually part of Mr. Bodenchak's estate. According to Petitioner, "Mr. Bodenchak owned his interest in 5178 in an individual capacity" and "did not assign or otherwise transfer it," ergo, it is part of his estate. (Opp. Br. at 5.) But Petitioner appears to be asking Respondents, and the Court, to take her at her word. That is the entire purpose of a will: to prove what is in the estate. *See In re Est. of Schultz*, 104 A.D.3d 1146, 1148 (4th Dep't 2013) (explaining that 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") (citations omitted). Given Petitioner's failure to prove that Mr. Bodenchak's membership interest in 5178 is part of his estate, the Decision and Order should be reversed.

CONCLUSION

For the foregoing reasons and those set forth in their moving brief, Respondents-Appellants request that the Court reverse the IAS Court's Decision and Order and remand the case for further proceedings.

Dated: September 12, 2025

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