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

Application of JEFFREY PIKUS, owner of 50% of all the outstanding Class A membership interest in TEN SHERIDAN ASSOCIATES, LLC, Petitioner, for the dissolution of TEN SHERIDAN ASSOCIATES, LLC, a New York Limited Liability Company, pursuant to Section 702 of the Limited Liability Company Law, v. STUART D. GOLDSTEIN, the other 50% owner of all the outstanding Class A membership interests in TEN SHERIDAN ASSOCIATES, LLC, and EDWARD M. FOX, DARIN GOLDSTEIN, SUSAN GOLDSTEIN, DARIN GOLDSTEIN TRUST, DANIELLE GOLDSTEIN TRUST, HANS P. UTSCH, MICHAEL ROSENBERG, DAVID FASTENBERG, PETER SCHWARTZ, GERI SCHWARTZ, JEFF SCHAKIN, ERIC SCHAKIN, DENIS CASLON, ROBERT MINESS, ALAN HOFFMAN, FREDERICK WEINER, MICHAEL WEINSTEIN, CHARLES ROSENBERG, MYRNA ROSENBERG, AARON JUNGREIS, ROBERT WILLIAMS, SUSAN PIKUS, STEVEN GELLES, RICK ASALS, JUAN CARLOS PARKER, LUIS ANDREOTTI, ERWIN GRONER, GERALD GERMAIN, MARTOM ASSOCIATES INC., LYNN BOOTH, ANDREA ANSON, JACQUELINE MARKS NON-EXEMPT TRUST, JACQUELINE MARKS EXEMPT TRUST, ARLENE REISMAN, and ANDREW L. FREY, the owners of all the outstanding Class B membership interests in TEN SHERIDAN ASSOCIATES, LLC, Respondents.	Index No. 653201/14

REPLY MEMORANDUM OF LAW OF RESPONDENT CLASS B MEMBERS IN FURTHER SUPPORT OF MOTION TO DISMISS PETITION

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PRELIMINARY STATEMENT

Respondents Arlene Reisman, Alan Hoffman, Charles Rosenberg, Denis Caslon, David Fastenberg, Eric Shakin (s/h/a "Schaikin"), Erwin Groner, Frederick Weiner, Jeffrey Shakin (s/h/a "Schaikin"), Juan Carlos Parker, Larry Weinstein, Luis Andreotti, Michael Weinstein, Peter and Geri Schwartz, Frederick Asals, Robert Miness, Steven Gelles, Lynn Booth , Hans Utsch[1] and Susan Goldstein (collectively, the "Class B Members"), by their attorneys Reed Smith LLP, submit this Reply Memorandum of Law, along with the accompanying Reply Affidavits of Respondent Luis Andreotti ("Andreotti Reply Aff.") and respondent Steven Gelles ("Gelles Reply Aff."), in further support of the Class B Members' Cross-Motion to Dismiss the Petition of Jeffrey A. Pikus ("Pikus") for, *inter alia*, dissolution of Ten Sheridan Associates, LLC (the "LLC"). Dismissal is proper, pursuant to CPLR 404(a) and 3211(a)(1) and (a)(7), for failure to state a cause of action and based on the documentary evidence, the LLC's Operating Agreement.

More specifically, Petitioner and his counsel continue to reference legal concepts like "oppression of minority interests," "self-dealing," and breach of fiduciary duty that are *irrelevant* to the dissolution issue actually before the Court. This dissolution determination, instead, turns entirely on whether it is "reasonably practicable" for the LLC to continue, an issue New York courts have reduced to: (i) whether the LLC is functioning in its intended purpose (here, the operation of the apartment building (the "Property") that is the LLC's sole asset) and (ii) whether the LLC is financially viable. Petitioner and his counsel also continue to twist and misuse concepts like "deadlock" and to draw non-existent lines between the management of the LLC (a single asset entity) and the management of that asset. Petitioner and his counsel do this – and completely avoid citation to any relevant legal authority on dissolution – because there is absolutely no legal support for their

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1 Since the filing of the Motion to Dismiss by the Class B Members, additional Class B Member Hans Utsch, who holds an additional 2.04% of the equity in the LLC, has returned from abroad and appears and joins in the Motion to Dismiss. Utsch is hereinafter included in the definition of "Class B Members."

position. As detailed below, in every comparable instance, where a LLC continues to function and function profitably – *and there is no dispute that this is the case herein* – dissolution has been *denied* by New York courts.

Regardless of the existence of disputes between the Class A Members and regardless of the merits of those disputes, no legal basis exists for dissolution herein. *On the facts alleged by Petitioner,* New York law is clear that there is no "deadlock" here that would prevent it from being "reasonably practicable" for the LLC to continue and that the dissolution request is therefore unavailable, as a matter of law. The Operating Agreement likewise demonstrates that any purported dispute between the Class A Members over whether to sell the LLC's Property is not a deadlock thereunder but simply a non-event, because absent an agreement to sell the Property by both Class A Members, the LLC simply continues its business of profitably operating the Property. The Operating Agreement also demonstrates that the day-to-day operation of the Property rests with the LLC's Managing Agent, not Pikus, and that the LLC's operations therefore indisputably continue unabated, despite Pikus' alleged "exclusion" from management for the past nine (9) months. This is dispositive of the dissolution issue.

In sum, whatever Pikus' grievances are and whatever the merits of those grievances are – and the Class B Members submit they are meritless – dissolution of the LLC is simply not an available remedy under well-established New York law on Pikus' allegations and the terms of the Operating Agreement and Petitioner offers no authority to the contrary.

STATEMENT OF FACTS

The Court is respectfully referred to the Class B Members' moving Memorandum of Law and the moving Affidavit of Luis Andreotti for a more complete statement of the facts herein. The Court is further referred to the accompanying Andreotti Reply Aff. and Geller Reply Aff. with respect to those Class B Members' personal knowledge of the facts and circumstances herein and,

specifically, the meritless allegations Petitioner makes about the rental of certain units at the LLC's property at purported "below-market" rents.[2]

ARGUMENT

THE OPERATING AGREEMENT AND NEW YORK LAW PROHIBIT DISSOLUTION UNDER THE CIRCUMSTANCES FOUND HEREIN

Dismissal of the Petition is required pursuant to CPLR 404(a) and 3211(a)(7) because the allegations fail, as a matter of law, to state a claim for dissolution under the Operating Agreement and New York law. In addition, as noted above, dismissal is likewise required under CPLR 3211(a)(1), as well CPLR 409(b), based on the documentary evidence – the LLC's Operating Agreement – which, *inter alia*, refutes any claim of "deadlock" in management of the LLC.

Pursuant to New York's Limited Liability Company Law ("LLCL"), Section 701, a court first looks to the Operating Agreement to determine whether dissolution is proper. Matter of 1545 Ocean Avenue, LLC, 72 A.D.3d 121, 129, 893 N.Y.S.2d 590 (2d Dep't 2010). Here, again, *Pikus does not even argue that the Operating Agreement provides a basis for dissolution.* Instead, Pikus' argument is apparently premised on the claim that it is no longer "reasonably practicable" for the LLC to carry on its business under LLCL 702 because of the purported "deadlock" among the Class A Members[3] and the alleged "self-dealing" with respect to the Goldstein Units.

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2 The Class B Members dispute that the Goldstein Units are rented at below-market values. As noted herein, however, whether or not these handful of units are rented at market rates or something less and/or whether that rental is a "breach of fiduciary duty" by respondent Stuart Goldstein is, again, entirely irrelevant to the issue of whether the LLC may be dissolved.

3 Pikus' counter-intuitive "deadlock" argument ignores that SDG runs the day-to-day operations of the Property pursuant to the Operating Agreement and that those operations have concededly continued for the past nine (9) months without involvement from Pikus. To the extent Pikus' "deadlock" theory is predicated on an "oral modification" of the Operating Agreement that gives him joint (or sole) management authority, Section 11.5 of that Operating Agreement provides it cannot be modified absent a signed writing by all the Members and that claim

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First, the Operating Agreement makes clear no "deadlock" exists. Petitioner claims that he wants to sell the LLC's asset and the other Class A Member does not – therefore, they are in "deadlock." However, the Operating Agreement makes clear that the sale of the asset is not the LLC's sole purpose, as Pikus misleadingly alleges. Petetioner's Opp. Memo of Law at p. 11. A sale is just one thing the LLC is empowered to do with the Property , along with the power to "acquire, own, hold, expand, renovate, lease, manage and operate" the Property. Operating Agreement, ¶ 2.3. Moreover, the Operating Agreement makes clear that *both* Class A Members have to agree in order to sell the asset. Operating Agreement ¶ 5.1. A failure to agree is not a "deadlock." It simply means that, absent such agreement by the Class A Members, the LLC will continue until December 31, 2079, unless some other event of termination under the Operating Agreement occurs. Id.[4]

Nor does Pikus' claimed exclusion from the LLC's management constitute "deadlock." Indeed, dissolution motions have routinely been *denied* by courts, and petitions dismissed, under circumstances comparable (or worse) to what Pikus alleges in support of his "reasonably practicable" argument:

- Doyle v. Icon, LLC, 103 A.D.3d 440, 959 N.Y.S.2d 200 (1st Dep't 2013), despite allegations that an LLC member had been "systematically excluded" from the operations and affairs of the LLC, the First Department dismissed the Petition, where the "allegations do not show that 'the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" and "the allegations show that the company has been able to carry on its business since the alleged expulsion of plaintiff . . .";

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therefore fails as a matter of law. See e.g. Ashwood Capital, Inc. v. OTG Mgmt, Inc., 99 A.D.3d 1, 948 N.Y.S.2d 292 (1st Dep't 2012); Vision Dev. Grp. of Broward Cnty, LLC, v. Chelsey Funding, LLC, 43 A.D.3d 373, 841 N.Y.S.2d 272 (1st Dep't 2007).

4 Petitioner offers no explanation as to why the LLC would *have to* sell the Property, the only scenario in which a disagreement over whether to sell could even plausibly be construed as "deadlock."

- 1545 Ocean Avenue, supra, 72 A.D.2d at 123, the Second Department dismissed the dissolution petition, despite the exclusion of one of the two members and the unilateral acts of the other in performing construction services, where the LLC was formed to purchase a property, rehabilitate an existing building and to build a second building for commercial rental. The court concluded that "disagreements between the partners . . . are insufficient to warrant dissolution" and that petitioner had not demonstrated that the company was "unable to function as intended or that it is failing financially" despite his exclusion from decisions by the other member. Id. at 128-31;

- Matter of Eight of Swords, LLC, 96 A.D.3d 839, 840, 946 N.Y.S.2d 248 (2d Dep't 2012), the Appellate Division affirmed the denial of the petition to dissolve LLC where the "purpose of the LLC was being achieved and . . . the LLC remained financially feasible;"

- Artigas v. Renewal Arts Realty Corp., 22 A.D.3d 327, 327, 803 N.Y.S.2d 12 (1st Dep't 2005) the First Department affirmed the dismissal of petition where the petitioner "did not plead the requisite grounds for dissolution of a limited liability company";

- Matter of Horning v. Horning Constr., LLC, 12 Misc.3d 402, 405, 412, 816 N.Y.S.2d 877 (Sup. Ct. Monroe Co. 2006), the court dismissed the Petition seeking dissolution despite allegations of breach of fiduciary duty and that Petitioner was "frozen at" out of LLC he started, where LLC "continues to thrive;"

- Schindler v. Niche Media Holdings, LLC, 1 Misc.3d, 713, 717, 772 N.Y.S.2d 781 (Sup. Ct. N.Y. Co. 2003), abrogated on other grounds by Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008), the court found that the petitioner had no likelihood of success on dissolution claim premised on allegations of exclusion, misuse of funds and plaintiff's inability to get an adequate return on his investment where LLC was admittedly "quite profitable" and operating "in comformity with [its] articles of organization . . ."

The Court should take note that Petitioner makes no effort to distinguish, or even discuss Respondents' above-authority, presumably because there is no rational basis to distinguish them.

Moreover, none of Pikus' cases offered in the initial memo of law - and then ignored by Pikus in opposition to the Motions to Dismiss - offer support for dissolution under the circumstances alleged herein. In Matter of Natanel v. Cohen, 43 Misc.3d 1217(A), 2014 WL 1671557, 988 N.Y.S.2d 524 (Sup. Ct. Kings Co. 2014), dissolution was ordered where the court determined, in the absence of any operating agreement, that the purpose of the limited liability company was to be a holding company for the real property which housed another entity *which*

had since dissolved and therefore the company's "purpose no longer exists and dissolution is mandated." Id., 2014 WL 1671557 at *3.[5] In both Scibelli v. Beacon Building Group, LLC, 991 N.Y.S.2d 726 (Sup. Ct. Queens Co. 2014)[6] and Matter of Salata LLC, No. 116405/09, 2010 WL 1954125 (Sup. Ct. N.Y. Cnty., March 26, 2010)[7], cited by Pikus, dissolution was ordered where the limited liability companies were no longer economically viable, a fact not even alleged herein. In Scibelli, the company was no longer doing business. In Salata, the company's heavy debt made it impossible to continue in operation. Put simply, through multiple rounds of briefing, Pikus has still not identified even a single New York case in which dissolution has been ordered on allegations even remotely resembling those made here. There is no dispute here that the LLC is both operating as intended and very profitable.

Furthermore, as noted above, Pikus also fails to demonstrate how his allegations of "self-dealing" and breach of fiduciary duty are in any way relevant to the issue of whether dissolution is required. An allegation that the majority members breached their fiduciary duty to defendants and engaged in unlawful and oppressive conduct does not plead the requisite grounds for dissolution of a limited liability company. Widewaters Herkinar Co., LLC v. Aiello, 28 A.D.3d 1107, 1108, 817 N.Y.S.2d 790 (4th Dep't 2006). See also 1545 Ocean Avenue, 72 A.D.2d at 132 ("truly aggrieved" LLC member has remedy of derivative action, although allegations of disputes and exclusion did not state a basis for dissolution). Whether the LLC obtained market rates (which it did), or sub-market rates, for less than a handful of apartments at the Property is

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5 The Natanel court nonetheless observed that the members' "on-going hostility" towards one another did *not* justify dissolution. Id. at *2.

6 This case was, again, actually withdrawn by the Court. Id.

7 The case name is actually Matter of Selcuk v. Yuran.

not a question that speaks to whether the LLC can function as intended or is failing financially and is therefore irrelevant to the issue of dissolution.

CONCLUSION

For the foregoing reasons, Pikus' Petition for Dissolution of the LLC and the appointment of a Receiver in connection therewith should be denied in its entirety and the action dismissed, along with such other and further relief as the court deems just, proper and equitable.

Dated: New York, New York
December 5, 2014

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