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

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Application of JEFFREY PIKUS, owner of 50% of all the outstanding Class A membership interests 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,

-against-

STUART D. GOLDSTEIN, the other 50% owner of all the outstanding Class A membership interests in TEN SHERIDAN ASSOCIATES, LLC, et al.,

Respondents.

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Index No. 653201/2014
(Hon. Charles E. Ramos)

Motion Sequence No. 1

MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION TO DISMISS AND IN OPPOSITION TO PETITION AND ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of respondents Stuart D. Goldstein ("Goldstein"), Edward M. Fox ("Fox"), Darin S. Goldstein ("Darin Goldstein"), Darin Goldstein Trust, and Danielle Goldstein Trust (collectively, the "SDG Respondents"), in opposition to the Order to Show Cause and the Verified Petition for Judicial Dissolution of Ten Sheridan Associates, LLC, dated October 20, 2014 (the "Petition"), of petitioner Jeffrey Pikus ("Petitioner" or "Pikus")—a co-managing member, and a 25% minority interestholder, in Ten Sheridan Associates, LLC ("Ten Sheridan" or the "Company"). The Petition and Order to Show Cause seek an Order: (a) "dissolving" Ten Sheridan; (b) "voiding" any leases between Ten Sheridan and either Goldstein, Darin Goldstein, or Danielle Goldstein; (c) "restraining" Ten Sheridan and its Members from taking virtually any action with respect to the Company and its property; and (d) appointing a receiver to "supervise [Ten Sheridan's] management and liquidation."

This Memorandum is also submitted in support of the SDG Respondents' Cross-Motion, for an Order, among other things: (a) pursuant to CPLR § 404(a), R. 3211(a)(1) and (4), and/or R. 409(b), dismissing the Petition, based upon documentary evidence, and upon the pendency of a prior action in which Petitioner has raised the very same claims; or, (b) in the alternative, pursuant to CPLR R. 409(b) and Limited Liability Company Law ("LLCL") § 702, granting the SDG Respondents, and any other respondents who appear herein, the right to purchase Petitioner's 25% minority interest in the Company at a price to be determined at a hearing.

The current bid to "dissolve" Ten Sheridan confirms what has been apparent since the start of this dispute: Pikus will stop at nothing in his unilateral attempt to force Ten Sheridan to sell its sole asset: a mixed-use, multi-family building located at 10 Sheridan Square, New York,

New York (the "Property"). For more than a year, Pikus has been trying to "cash-in" on his 25% minority interest in Ten Sheridan, in defiance of both Goldstein (a managing member, whose consent is required to sell [or refinance] the Property or to dissolve the Company), and the substantial majority of the membership interest—who do not have any desire to sell the Property or wind down the business.[1] The overwhelming majority of Ten Sheridan's members are so opposed to Pikus "hijacking" their investment, that twenty-three (23) of Ten Sheridan's Members (representing 65.9% of its equity) are expected to seek the Petition's dismissal and oppose the dissolution of the Company.

This is not the first time that Pikus has selfishly put his own interests ahead of those of Ten Sheridan's investors. In fact, this dispute arose when Pikus—who possesses veto rights solely with respect to major decisions concerning Ten Sheridan, but no other rights under the governing Operating Agreement to participate in the day-to-day management or operation of this single-asset entity—suggested, out of the blue, that Ten Sheridan should market and sell the Property. After Goldstein rejected that overture, explaining that selling the Property would deviate from the long-term investment strategy upon which his investors had relied for many years, it became evident that Pikus, who was then serving as SDG's management consultant, and his alter-ego company, Bluestar Management Corp. d/b/a Bluestar Properties, Inc. ("Bluestar"), had embarked on a clandestine campaign to artificially increase the value of Pikus's minority interest (for which he made no initial investment). In the utmost bad faith, Pikus had also taken to making frivolous litigation threats (both on his own behalf and through counsel), and falsely claiming that his "consent" to virtually every transaction undertaken by the company was

[1] Though Pikus has pretended, at various times, to be a "majority owner" of Ten Sheridan, Pikus actually holds 50% of the Class A membership interest (not a majority, by definition). That interest correlates to a 25% stake in the Company, as the Class B Members own one-half of Ten Sheridan's equity.

"required" based upon documents that had been expressly superseded by Ten Sheridan's Operating Agreement many years earlier. The intent, both then and now, was self-evident: Pikus wanted, and wants, to be "bought out," but only at an extortionate price.

That misconduct led to the termination of Pikus's consultancy on April 18, 2014, and the commencement of the related action, entitled Goldstein et al. v. Pikus, et al., Index No. 651209/2014 (the "Prior Action"), now pending before this Court (Ramos, J.), and seeking, among other things, a declaration that: (a) SDG, as designated managing agent, has sole authority to manage the day-to-day affairs of the Property and, thus, Ten Sheridan; and (b) any role that Pikus had once played in that day-to-day management derived solely from his capacity as an at-will consultant to SDG, and, as a result, he could be (and was) terminated in SDG's discretion.

After their characteristically groundless pre-answer dismissal motion was denied from the bench, Pikus and his counsel, realizing that this Court would not "enforce" expressly superseded writings, dishonestly changed their position, mid-dispute, and concocted an entirely new claim that, on an unspecified date, at an unspecified time, and in an unspecified manner, Ten Sheridan's Operating Agreement had somehow been "orally modified," by some unidentified members, to include unspecified terms from two (2) provisional agreements that had been expressly superseded seventeen (17) years earlier.[2] The SDG Respondents promptly moved for summary judgment dismissing those fanciful and fictitious claims (and others).

[2] Before that time, both Pikus and his counsel had repeatedly and unequivocally attempted to "enforce" superseded writings, and not the wholly fictitious "oral modification" of the Operating Agreement. In fact, as borne out by the transcript of the June 25, 2014 oral argument in the Prior Action, Pikus's counsel, Kevin Fritz, Esq., repeatedly referred to a written "side agreement," which he admitted predated the Operating Agreement and which he claimed should be enforced because "no one ever said that that agreement had been superseded." See Exhibit 9.

Evidently recognizing that the blatantly fabricated "oral modification" could not withstand summary judgment in the Prior Action (notwithstanding a frantic cross-motion for summary judgment), Pikus and his counsel have now tried to "up the ante" by seeking to "dissolve" Ten Sheridan, based upon equally fabricated claims that Ten Sheridan is allegedly "deadlocked" or that "self-dealing" has occurred. While neither of those claims is recognized as a basis for dissolving an LLC, Pikus's "dissolution" application must be dismissed, because Pikus's "deadlock" and "self-dealing" claims are based upon blatant falsehoods that were previously raised, and moved upon, in the Prior Action.

As a fundamental matter, dissolution is unavailable when, as here, the company is profitable and functioning just as it is intended to function under its governing operating agreement. Indeed, with day-to-day management vested in SDG, Ten Sheridan—which, as Pikus cannot dispute, has always been profitable—is fully capable of operating, and will continue to operate, until such time that both Pikus and Goldstein mutually agree that the time is right to sell the Property or dissolve the Company, as the Members intended and agreed.

Pikus's "self-dealing" claims are also untrue. As the documentary evidence submitted with this cross-motion confirms, the leases between Ten Sheridan and Darin Goldstein and Danielle Goldstein, which Pikus falsely claims "harmed" the Company, have, in fact, produced substantially more income for Ten Sheridan than the same units on other floors at the Property since those leases commenced. Thus, none of Pikus's false claims about the leases can serve as a predicate to "dissolving" the fully functional, financially viable Company, especially when the vast majority of the Members want exactly the opposite.

As dissolution cannot be granted under these circumstances (which requires the denial of the balance of Pikus's motion), the only available and equitable remedy, if the Court were to

grant any relief (apart from dismissing the Petition), would be to direct a buyout of Pikus's 25% minority interest in Ten Sheridan at a price to be determined at a hearing. Unlike dissolution, such remedy would be fair and equitable to all of the parties. Pikus would receive "fair value" for his interest in Ten Sheridan, which is exactly what he has requested in this proceeding (but which could not even be obtained through a forced sale in a distorted market in which the value of the Property would be diminished).

On the other hand, the SDG Respondents, and those respondents joining in the SDG Respondents' cross-motion (together, more than 20 individual members and about two-thirds of the ownership interest), would be to able continue to operate Ten Sheridan, as they wish to do. Such an outcome would be far more equitable than dissolution, which would unjustly reward Pikus for his misrepresentations and bad faith to the detriment of the very Members to whom he owes a fiduciary duty.

STATEMENT OF FACTS

For the facts pertinent to the SDG Respondents' cross-motion, the Court is respectfully referred to the accompanying Affidavit of Stuart D. Goldstein, sworn to November 12, 2014 (the "Goldstein Affidavit").[3]

[3] Capitalized terms have the same definitions set forth in Goldstein Affidavit.

ARGUMENT

I.

PIKUS'S UNAUTHORIZED PETITION TO DISSOLVE TEN SHERIDAN IS LEGALLY AND FACTUALLY GROUNDLESS, AND SHOULD BE DISMISSED

A. Applicable Standard for Dismissal

CPLR § 404(a) permits a respondent in a special proceeding, such as this, to move to dismiss upon "an objection in point of law." Under CPLR R. 3211(a)(1) and (4), a party may seek dismissal of a cause of action based upon, respectively, a defense founded upon documentary evidence, or the pendency of a prior action for the same cause of action. When, as here, a party moves for dismissal based upon documentary evidence, the "criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one (internal citation and quotation omitted). . . ." Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). Notably, factual claims, that are "inherently incredible or flatly contradicted by documentary evidence" (like all of Pikus's baseless claims), are not entitled to the favorable inferences normally afforded to a pleading (or to an affidavit of pleading's proponent) on a motion to dismiss. Caniglia v. Chicago Tribune-New York News Syndicate, 204 A.D.2d 233, 612 N.Y.S.2d 146 (1st Dept. 1994).

Under CPLR R. 409(b), in turn, the court in a special proceeding is authorized to make any Order "permitted on a motion for summary judgment" based on the papers before it, to the extent that no triable issues are raised. When a party seeking to dissolve an LLC fails to meet the strict standard for dissolution under LLCL § 702(b), dismissal of the petition under CPLR R. 409(b) is required. See Matter of Horning v. Horning Construction, LLC, 12 Misc.3d 402, 816

N.Y.S.2d 877 (Sup. Ct., Monroe Co. 2006) (dismissing dissolution petition where, as here, a disenchanted member was looking for an "exit-strategy" and a "buy out" of his interest).

As more fully set forth below, the Goldstein Affidavit and the documentary evidence submitted therewith conclusively establish that Pikus's "dissolution" Petition is groundless, and based upon the same fabricated "self-dealing" and "oral modification" claims that were already asserted, and moved upon, in the Prior Action. These circumstances mandate that the Petition be dismissed under CPLR § 404(a), CPLR R. 3211(a)(1) and (4), and/or CPLR R. 409(b).

B. Pikus Cannot Meet the Strict Requirements Necessary to Obtain Judicial Dissolution of Ten Sheridan

Under LLCL § 702, a court "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 (emphasis added)." As Pikus's memorandum of law freely concedes, to meet the governing statute's "not reasonably practicable standard," a petitioner must establish that: "(1) 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 (2) continuing the entity is financially unfeasible," citing Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131, 893 N.Y.S.2d 590 (2d Dep't 2010) for that proposition. Not only has Pikus failed to establish either of these grounds, but the very authority upon which Pikus relies—Matter of 1545 Ocean Ave.—requires the dismissal of his own Petition.

In Matter of 1545 Ocean Ave., the Second Department made it abundantly clear that, "[g]iven its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly . . ." (citation omitted) (emphasis added), and went on to explain that the requirements for dissolution of an LLC—like Ten Sheridan—are more stringent than for dissolution of a corporation or partnership, and are largely governed by the terms of the LLC's operating

agreement. Id. The Court also noted that the dissolution statute grants courts discretion as to whether such drastic remedy should be granted, even if the standard has been satisfied.

The analytical starting point, then, is Ten Sheridan's Operating Agreement, which, provides, at Section 2.3, that Ten Sheridan's "business and purpose . . . is to acquire, own, hold, expand, renovate, lease, manage, sell, operate the [Property] and such other business activities and operations that are reasonably related thereto, subject to the conditions hereinafter obtained."

A review of the Petition herein shows that Pikus has not submitted any evidence to prove, and has not even alleged, that this governing operational provision has been violated in any way. Rather, Pikus alleges that Ten Sheridan should be dissolved because management is supposedly "deadlocked," and because "self-dealing" has allegedly occurred. Yet, those conclusory claims, aside from being untrue (as explored below), are not even grounds for dissolution under LLCL § 702. See Matter of 1545 Ocean Ave. Pikus still must prove that Ten Sheridan is incapable of achieving its purpose, or is financially unviable—neither of which have, or can be, established.

C. Like the Fictitious "Oral Modification," Pikus's "Deadlock" Claims Are Wholly Fabricated

To begin, Pikus's "deadlock" claim is insufficient to support "dissolution" because no "deadlock" exists. To the contrary, Ten Sheridan is functioning exactly as the Operating Agreement intends. To illustrate, by entering into the Operating Agreement in March 1997, all of the Company's Members (more than thirty [30] individuals) expressly agreed that Ten Sheridan would continue until December 31, 2079, unless, among other events, both Goldstein and Pikus agreed to sell the Property or to dissolve the Company.[4] Day-to-day management of Ten Sheridan—a single asset entity—does not require such mutual "consent," however, as Section 5.2 Operating Agreement unequivocally vests such authority over the Property (and thus

[4] See Exhibit 2, §§ 3.2, 5.1(a), and 5.6(b).

Ten Sheridan) with SDG, and expressly charges SDG with carrying out Ten Sheridan's fundamental objectives (as set forth in Section 2.3).[5] That delegation, in turn, establishes that any role that Pikus may have once played in Ten Sheridan's day-to-day management was through his long-acknowledged consultancy with SDG, and was therefore terminable in SDG's discretion, like any unwritten at-will engagement (which, by nature, is not subject to any statute of frauds [see Cron v. Hargro Fabrics, 91 N.Y.2d 362, 670 N.Y.S.2d 973 (1998)]).

Critically, Pikus does not dispute that Ten Sheridan's Operating Agreement delegates all authority over day-to-day management to SDG, without reserving any such authority for him. Instead, Pikus falsely claims, just as he has in the Prior Action, that his "authority" was "expanded" by an "oral modification" of the Operating Agreement, that somehow incorporated unspecified terms from two (2) expressly superseded provisional agreements (which were entered into before the Operating Agreement in connection with the initial investment syndication). Pikus claims that this amorphous "oral modification" granted him "powers" in leasing and other matters that had been delegated to SDG, and now forms the sole basis for his latest claim that Ten Sheridan is purportedly "deadlocked."[6]

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[5] See Exhibit 2, § 5.2. As the Goldstein Affidavit explains, the Operating Agreement included that express delegation, because Goldstein, his family and investors had funded more than $2 million of Ten Sheridan's initial $2.45 million capital investment, and sought to ensure that control of the Company and operation of the Property would be controlled by SDG, which had, and has, a long history of successfully managing mixed-use, multifamily buildings, like the Property. No such authority was reserved for Pikus—then a 28-year-old neophyte "property manager"—as Goldstein and his investors were uncomfortable with an unknown outsider having such responsibility.

[6] Such claim, however, has never made any sense. For instance, Pikus's assertion that he must "consent" to all leases and other contracts is not contained in the superseded Syndication Agreement that Pikus claims was incorporated in the alleged "oral modification." Rather, Pikus relies upon the superseded Management Agreement for that "power," yet dishonestly conceals that Sections 2.4 and 7.3 of that agreement actually conferred leasing and contracting authority solely upon Goldstein and Fox—with no authority left for Pikus. See Petitioner's OSC, Exs. C & D. In other words, Pikus and his counsel cannot even "get their story straight."

As established in the pending summary judgment motion in the Prior Action, Pikus's "oral modification" claim must fail, as a matter of controlling law, because, among other things: (a) "oral modification" of the fully merged and integrated Operating Agreement is flatly prohibited;[7] (b) Goldstein has attested and established that no "oral modification" ever occurred, which alone is fatal to his claim;[8] (c) Pikus has failed to allege or prove when, how, by whom, or why, the supposed "oral modification" of the fully integrated and merged Operating Agreement was made (all of which would be required to prove "reliance" upon any alleged "representations");[9] (c) Pikus has failed to present a writing signed by all of the Members, as would be required to "modify" under Section 11.5 of the Operating Agreement (which controls, as Pikus is alleging that the Operating Agreement was "modified," not just "amended"—two [2] contract terms that have distinct meanings, both in general and under the Operating Agreement [see Exhibit 2, §§ 5.6 and 11.5); and (d) documentary evidence, including Pikus's and his

[7] This conclusion cannot be legitimately disputed. See N.Y. G.O.L. § 15-301; Ashwood Capital, Inc. v. OTG Mgt., Inc., 99 A.D.3d 1, 948 N.Y.S.2d 292 (1st Dept. 2012) ("the agreement contains both a no-oral-modification clause and a broad merger clause, which as a matter of law bars any claim based on an alleged intent that the parties failed to express in writing"); Vision Dev. Group of Broward County, LLC v. Chelsey Funding, LLC, 43 A.D.3d 373, 841 N.Y.S.2d 272 (1st Dept. 2007) (noting that when, as here, an "agreement contains a merger clause and a 'no oral modification' clause, the court should not resort to extrinsic evidence in construing the language of the agreement [internal citation omitted]").

[8] Pikus and his counsel have never bothered to attempt to distinguish controlling authorities on this point. See Fleet Bank v. Pine Knoll Corp., 290 A.D.2d 792, 736 N.Y.S.2d 737 (3d Dept. 2002); Dzek v. Desco Vitroglaze of Schenectady Inc., 285 A.D.2d 926, 727 N.Y.S.2d 814 (3d Dept. 2001).

[9] Nor have Pikus and his counsel ever explained how a wholly nonspecific and ever-shifting "oral modification" could possibly form the basis for what constitutes a "fraudulent inducement" claim. See Gregor v. Rossi, 120 A.D.3d 447, 992 N.Y.S.2d 17 (1st Dept. 2014); Riverbay Corp. v. Thyssenkrupp N. El. Corp., 116 A.D.3d 487, 984 N.Y.S.2d 14 (1st Dept. 2014).

counsel's previous admissions and correspondence, unequivocally establish that they recently fabricated the "oral modification" during, and for specifically purposes, of the Prior Action.[10]

Regardless, Pikus still cannot meet, and has not met, the exceedingly high burden of proof necessary to enforce the fabricated "oral modification." Rather, substantial documentary evidence submitted in the Prior Action wholly contradicts Pikus's claims, and includes, among other evidence: (a) the express terms of the Operating Agreement itself; (b) "consulting fee" checks paid by SDG to Pikus, covering the lifespan of Ten Sheridan, all of which Pikus accepted, endorsed, and deposited; (c) Pikus's written requests for payment of "consulting fees"; (d) SDG's issuance of IRS Form 1099 statements to Pikus, which establish that Pikus was engaged by SDG on an at-will basis; and (e) Pikus's and his counsel's many inconsistent and contradictory representations. With those documents and express admissions in play, Pikus cannot establish that the parties' conduct was "unequivocally referable" to the made-up "oral modification," which abject failing is fatal to his invented claim, under binding precedents that Pikus and his counsel have not even attempted to distinguish. See, e.g., Eujoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 981 N.Y.S.2d 326 (2013); Scher v. Stendhal Gallery, Inc., 117 A.D.3d 146, 983 N.Y.S.2d 219 (1st Dept. 2014); Royal Warwick S.A. v. Hotel Representative, Inc., 106 A.D.3d 451, 965 N.Y.S.2d 409 (1st Dept. 2013); Bank of Smithtown v. 264 W. 124 LLC, 105 A.D.3d 468, 963 N.Y.S.2d 176 (1st Dept. 2013); Nassau Beekman, LLC v. Ann/Nassau Realty, LLC, 105 A.D.3d 33, 960 N.Y.S.2d 70 (1st Dept. 2013); Josephson, supra; Harlem Suites, LLC v. 231 Norman Ave., LLC, 88 A.D.3d 532, 930 N.Y.S.2d

[10] Most troublingly, alleging that fully integrated contracts have been "orally modified" seems to be a tactic that Pikus's counsel regularly and unsuccessfully employs. See Josephson LLC v. Column Fin., Inc., 94 A.D.3d 479, 941 N.Y.S.2d 495 (1st Dept. 2012); RXR WWP Owner LLC v. WWP Sponsor, LLC, 44 Misc. 3d 1221(A), 2014 NY Misc. LEXIS 3624 (Sup. Ct. N.Y. Co. 2014).

582 (1st Dept. 2011); Citibank, N.A. v. Silverman, 85 A.D.3d 463, 925 N.Y.S.2d 442 (1st Dept. 2011).

Thus, as the "oral modification" is a recent and unadulterated fabrication, Pikus's allegations of a "deadlock" cannot support dissolution of the Company. Indeed, Pikus's mere "disagreement" with the manner in which the SDG Respondents or SDG are operating Ten Sheridan is woefully insufficient to trigger the drastic remedy of dissolution. See Matter of Sieni v. JAMSFAB, LLC, 2013 Misc. LEXIS 2900, 2013 NY Slip Op 31473(U) (Sup. Ct., Suffolk Co. 2013). Significantly, in Matter of Sieni, the Court held that, when—as here—neither the company's articles of organization nor the operating agreement provided for dissolution on the grounds alleged, the petitioner could not satisfy the "not reasonably practicable" standard of LLC § 702:

> Disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that is operate[d] in a manner within the contemplation of its purposes and objectives as defined in its articles of organization and/or operating agreement. It is only where discord and disputes by and among the members are shown to be inimical to achieving the purposes of the LLC will dissolution under the "not reasonably practicable" standard imposed by LLCL 702 be considered by the court to be an available remedy to the petitioner [citation omitted]. Where the purposes for which the LLC was formed are being achieved and its finances remain feasible, dissolution pursuant to LLCL 702 should be denied (see In re Eight of Swords, LLC, 96 AD3d 839, 946 NYS2d 248) (emphasis added).

In short, Matter of Sieni is directly on point. With day-to-day management vested in SDG, and with only "major-level" decisions requiring the managing members' mutual consent, Ten Sheridan is fully capable of functioning as intended, until such time as both Goldstein and Pikus mutually agree that it would be in the best interests of the Company and its Members to sell the Property. Under these undisputed circumstances, a claim for dissolution cannot lie.

D. Pikus's Claims of "Self-Dealing," "Oppression," or "Wrongdoing" Are Based upon Blatant Falsehoods

Like the fabricated "oral modification" and "deadlock" claims, Pikus's allegations of "wrongdoing" are insufficient to show that Ten Sheridan is incapable of functioning in accordance with its Operating Agreement. Such allegations are also easily disproved and refuted by documentary evidence.

Pikus's primary accusation (which, too, was raised in the Prior Action), is that Goldstein allegedly arranged for his children, Darin and Danielle Goldstein (who are both investor members of Ten Sheridan), to lease four (4) of the Property's 73 apartments for "below market" rent rates. Yet, as a threshold matter, this claim cannot support dissolution of the Company, because leasing apartments, even to related parties, is one of Ten Sheridan's express purposes under Sections 2.3 and 5.2 of the Operating Agreement. See Doyle v. Icon, LLC, 103 A.D.3d 440, 959 N.Y.S.2d 200 (1st Dept. 2013) (denying petition for dissolution where petitioner failed to show that it was no longer "reasonably practicable" for the company to carry on its business); Matter of Eight of Swords, LLC, 96 A.D.3d 839, 946 N.Y.S.2d 248 (2d Dept. 2012) (denying petition to dissolve the company, holding that the primary purpose of the Company was to operate a tattoo parlor, which was being achieved in that such business was in operation and the company remained financially viable).

Facial insufficiency of the "self-dealing" claims aside, the leases that Pikus belatedly contests were, in fact, substantially beneficial to Ten Sheridan and its Members. As the Goldstein Affidavit and accompanying documentary evidence confirm: (a) both Darin Goldstein's and Danielle Goldstein's tenancies at the Property have resulted in more income than Ten Sheridan would have otherwise received for those units; and (b) Darin Goldstein and Danielle Goldstein have always paid market rents, despite being Members of Ten Sheridan, and

provided substantial value to the company as "risk-free" tenants (and, in Darin's case, by providing for a $140,000 luxury renovation of his current apartment). Likewise, Pikus's claim that Danielle Goldstein's rent is below the "legal regulated rent" for her, and another apartment, is utterly deceptive, as a rent-stabilized apartment's legal regulated rent is not the same as the apartment's market rent and the "legal regulated rents" for many apartments at the Property are far greater than the corresponding collected rents.[11]

Pikus's remaining "self-dealing" allegations are similarly untrue. For one, Goldstein did not, and could not have, "improperly" arranged for Darin Goldstein's and Danielle Goldstein's leases to be registered as rent-stabilized, as all residential leases at the Property are subject to rent stabilization by virtue of the J-51 tax abatement. See Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 890 N.Y.S.2d 388 (2009). In short, Darin Goldstein's and Danielle Goldstein's leases cannot legally be registered as "owner occupied," because paying tenants, who have written leases and are not entitled to collect rent, cannot be considered "owners" under applicable rent stabilization provisions. See, e.g., 9 NYCRR §§ 2520.6(d) & (i).

Another falsehood is Pikus's accusation that Goldstein, Darin Goldstein, and Danielle Goldstein, are "stockpiling" rent-stabilized units at the Property in anticipation of a "condominium conversion." To make that claim, Pikus (together with his counsel), once again, deliberately misreads various emails that he and Darin Goldstein exchanged two (2) years ago in which Pikus—who raised the notion of a hypothetical future sale or "condominium conversion"—was improperly trying to force Darin Goldstein to relinquish his rights as a rent-

[11] See Exhibits 18 & 19; Goldstein Aff. Troublingly, Pikus and his counsel appear to have been aware of the falsity of their "legal regulated rent" argument, given that the Division of Housing and Community Renewal (DHCR) "rent roll" included with their Petition (see Petitioner's OSC, Ex. M) selectively excludes the pages that show the many apartments at the Property that have far greater legal regulated rents than collected rents.

stabilized tenant with respect to apartments that Darin had been leasing for four (4) years. Bad faith and historical revisionism notwithstanding, any hypothetical condominium conversion of the fully-tenanted, rent-regulated Property would take years even to begin, and many millions of dollars to bring to fruition, and would require that Ten Sheridan adhere to all laws, including those relating to "warehousing" and unit pricing. Hence, Pikus's allegation about a "condominium conversion scheme" is, at best, the product of his own delusions.

With Pikus's "self-dealing" and "wrongdoing" accusations wholly disproved, his "retaliation" and "freeze-out" claims must fall as well. As established in the Prior Action, when Pikus's at-will consultancy with SDG was properly terminated, for abundant cause, any "right" that he may have once had to participate in Ten Sheridan's day-to-day management was terminated as well. Regardless, Pikus's assertion of all of these false and fabricated "grievances" as derivative claims in the Prior Action unequivocally acknowledges that Pikus and his counsel were and are aware that these false "self-dealing" claims cannot, and do not, support dissolution. See Matter of 1545 Ocean Ave., supra, citing Tzolis v. Wolff, 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008).

E. Pikus Was Neither "Refused" Any Records, Nor Denied "Discovery" or an "Accounting"

Pikus also repeats the false claims asserted in the Prior Action, that Goldstein improperly "refused" to provide Pikus with access to Ten Sheridan's books of account, denied him discovery, and rejected an "accounting" request. Yet again, those claims are demonstrably false: (a) neither Goldstein, nor his attorneys, ever "refused" to make any records available to Pikus; (b) Pikus's discovery "grievances" are pretextual and a sham, given that the SDG Respondents have fully complied with any and all disclosure directives and obligations, by the very dates to which Pikus's counsel stipulated, in open court, while Pikus himself has willfully obstructed

discovery and violated standard disclosure procedures;[12] and (c) an "accounting" is unnecessary and inappropriate, when, as here, Pikus has himself engaged in substantial misconduct, and, nevertheless, has already been provided with all of Ten Sheridan's available books of account and tax returns.

In sum, Pikus's backhanded attempt to "dissolve" Ten Sheridan is based entirely upon the false and fabricated claims of a bitter minority interestholder, who has repeatedly announced his undisguised desire to "cash in" on an interest for which he did not risk a single dollar of his own. Thus, Pikus's Petition and accompanying motion are an improper and desperate bid to hijack a profitable business that the overwhelming majority of the Members wish to continue. Such a legally and factually unjustifiable ploy must be dismissed outright.[13]

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[12] For instance, Pikus has improperly refused to produce his or Bluestar's tax returns, even though those documents are inarguably and critically relevant to multiple issues of this dispute, including Pikus's use of Bluestar as his corporate alter ego, his acknowledged status as SDG's former consultant, and the manner in which he reported any income received from Ten Sheridan or SDG. The reason for this deliberate concealment of indisputably relevant information is apparent: parties are flatly prohibited from asserting positions contrary to their tax returns. See, e.g., Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 881 N.Y.S.2d 369 (2009). Though Pikus's counsel has admittedly never reviewed the requested returns, evidently believing that such "willful ignorance" might somehow legitimize the concealment, Pikus's failure to submit the returns to the Court to oppose summary judgment in the Prior Action confirms that those documents are damning to his case.

[13] In characteristic fashion, each of the authorities cited to support Pikus's "dissolution" demand is inapposite, or worse. Thus, in Scibelli v. Beacon Building Group, LLC, 2014 N.Y. Misc. LEXIS 3255 (Sup. Ct., Queens Co. 2014) (decision withdrawn), dissolution was found to be appropriate, when, unlike here, and under undisputed facts, the company was no longer conducting business and was in the process of winding up. Similarly distinguishable and inapposite is Matter of Selcuk v. Yuran, 2010 N.Y. Misc. LEXIS 2044, 2010 NY Slip Op 31226(U) (Sup. Ct., N.Y. Co. 2010), in which the significant factor was not that the partners were "deadlocked" or unable to resolve their differences, but, rather, that the company, unlike here, was so heavily in debt that it would have been financially unfeasible for it to continue to operate. Also inapplicable is Matter of Natanel v. Cohen, 43 Misc.3d 1217(A), 2014 N.Y. Misc. LEXIS 1901 (Sup. Ct., Kings Co. 2013), as that court granted a dissolution petition, because the company (which did not have an operating agreement) was no longer existing or functioning as a business (and not because, as Pikus's counsel asserts, the partners were bickering and were not on speaking terms). In short, Pikus's "dissolution" request is legally deficient and unjustifiable.

II.

IF THE PETITION IS NOT DISMISSED, RESPONDENTS SHOULD BE GRANTED THE RIGHT TO PURCHASE PIKUS'S MINORITY INTEREST IN TEN SHERIDAN AT A PRICE TO BE DETERMINED AT A HEARING

If the Court were to grant any relief in this proceeding (as "dissolution" is unavailable to Pikus), the SDG Respondents (and any other respondents, who/which appear and wish to participate) should be granted the right to purchase Pikus's 25% minority interest in Ten Sheridan at a price to be determined at a hearing. Indeed, under controlling authority, the Court may, in its discretion, direct a "buy out" of Pikus's minority interest, as opposed to the "dissolution" of the Company. See, e.g., Mizrahi v. Cohen, 104 A.D.3d 917, 961 N.Y.S.2d 538 (2d Dept. 2013) (affirming Order granting dissolution, but holding, critically, that the lower court erred by failing to authorize plaintiff to "buy out" defendant's minority interest in the company); Matter of Superior Vending, LLC, 71 A.D.3d 1153, 898 N.Y.S.2d 191 (2d Dept. 2010) (holding that even though the LLCL does not expressly authorize a "buy out" in a dissolution proceeding, the Supreme Court properly determined that, as here, the most equitable method of liquidation of the property was to provide the member who wanted to continue to operate the business the right to purchase the other's interest at a price set by the Court).

Thus, in the unlikely event that the Court finds that Pikus has met the strict standard for dissolution of the Company (which he has not come close to satisfying), rather than dissolving Ten Sheridan, the Court should grant the SDG Respondents (and any other respondents who appear) the right to purchase Pikus's 25% minority interest in Ten Sheridan. To that end, the Court may, and should, conduct a hearing to determine the "fair value" of Pikus's minority interest, and, thereupon, grant the SDG Respondents (and those other Members who oppose the Petition) a reasonable time-period in which to purchase his minority interest. Only if the SDG

Respondents do not purchase Pikus's interest within the time provided, should the Court then direct the "dissolution" of Ten Sheridan and the orderly sale of its assets. See Chiu v. Chiu, (Sup. Ct., Queens Co.) (Index No. 21905/2007) (Aug. 30, 2012) (decision after trial, granting the majority member the right to purchase the minority member's interest at a price set by the court within 90 days or the company would be dissolved and its assets sold to pay the "buy out" amount due to the minority member); Cortes v. 3A N. Park Ave Rest Corp., 2014 N.Y. Misc. LEXIS 4693, 2014 NY Slip Op 24329 (Sup., Ct., Kings Co.) (Oct. 28, 2014) (Court ordered a "forced buyout" of plaintiff's interest rather than a dissolution of the company, where defendants, as here, indicated an interest in buying plaintiff's shares to avoid dissolution).

Such a buyout directive and hearing would be far more equitable than the drastic remedy of a forced judicial dissolution, where, as here, no circumstances supporting dissolution are present, and the overwhelming majority of the Company's Members (more than 65% of the membership interest, and 23 individuals) unequivocally oppose dissolution. Indeed, Pikus cannot legitimately or honestly claim that a buyout of his interest, at a judicially determined amount, would be unfair or inequitable, as he will receive what he claims that he wants—fair value for his piece of Ten Sheridan.[14]

Conversely, the SDG Respondents and the other Members will be able to continue to operate Ten Sheridan, which has always been intended to be a long-term, multigenerational investment vehicle that could be factored into the Members' estate plans. "Dissolving" the

[14] Any claim that the Court somehow cannot determine the value of his interest, and that the Property must be "offered to the market" to do so, is both insulting to the Court and inaccurate. In reality, a judicial determination would be better for all of the Members, including Pikus, as a forced sale would create a distorted market, in which the Property's value would be diminished by, among other things: (a) inevitable misperceptions about the asset's financial viability; (b) a "ticking clock," resulting from the fact that the Court cannot be expected to "wait out" for the best and highest price; and (c) substantial transactional costs.

Company now, solely at the whim of an unhappy and dishonest Member, would denigrate and thwart that long relied-upon intent, and would visit unanticipated and adverse financial and tax consequences upon the Members. As Ten Sheridan's current capital basis is negative by more than $8 million (as a result of the Property having been successfully refinanced several times over the years), the Members would face a significant "recapture tax" upon any sale, without being able to benefit from either the "step-up" in basis that occurs when membership interests pass through an estate, or from an IRS Code Section 1031 like-kind, tax-free exchange (which could be employed after a buyout of Pikus's interest, if Ten Sheridan were to determine that the Property's value had been maximized).

In sum, dissolving Ten Sheridan—a profitable company that is achieving its intended goals—based upon one Member's fabricated "grievances" would needlessly and unjustifiably deprive the Company's many other Members of, among other things: (a) future annual distributions; (b) the benefit of further appreciation of the value of the Property; and (c) the ability to incorporate this venture in their estate plans. As such a result is manifestly unfair, the only equitable and proper solution, if any relief were to be granted by the Court (with dissolution being unavailable), is a buyout of Pikus's 25% minority interest at a price to be determined at a hearing.

III.

PIKUS'S UNSUPPORTED REQUEST FOR THE APPOINTMENT OF A "RECEIVER" TO "LIQUIDATE" TEN SHERIDAN'S ASSETS MUST BE DENIED

The Court should also deny Pikus's unjustified, and wholly unsupported, application for the appointment of a "receiver" to supervise the "management" and "liquidation" of Ten Sheridan's assets. Contrary to Pikus's assertion, the appointment of a receiver is not necessary to "wind up" Ten Sheridan's affairs, as the Company cannot be dissolved under LLCL § 702. See Doyle, supra (denying application for the appointment of a receiver where, as here, the company was able to carry on its business and it was financially viable).

Even if Pikus had established valid grounds for dissolution (which he has not), the more appropriate and equitable remedy would be a "buyout" of Pikus's 25% minority interest at a judicially determined price, which, too, would eliminate any purported "need" for a "receiver." See Mizrahi, supra; Superior Vending, supra.

Nor is the appointment of a receiver necessary to preserve Ten Sheridan's assets, as the Company and Property are being capably and profitably managed by SDG in accordance with the Operating Agreement and the Company's assets are not even remotely at risk. Lest it go unnoticed, Pikus has failed to cite even a single authority to support his absurd contention that a receiver should be appointed to liquidate a fully-functioning and profitable business entity. That failure is not a surprise, as the appointment of a "receiver" is not necessary under these circumstances.

IV.

PIKUS HAS FAILED TO DEMONSTRATE ENTITLEMENT TO DRASTIC AND UNNECESSARY INJUNCTIVE RELIEF

Lastly, the Court must deny Petitioner's application for a drastic and unwarranted injunction, which, among other things, would entail overbroad relief that would usurp powers that were expressly granted to the SDG Respondents and SDG under the Operating Agreement. Of course, in characteristic fashion, Pikus has failed to establish all (or any, for that matter) of the prongs of the traditional three-pronged test for obtaining injunctive relief under CPLR § 6301. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990) (relied upon by Petitioner, wherein the Court of Appeals upheld the denial of an application for an injunction).

Indeed, Pikus has failed to demonstrate, by "clear and convincing evidence" (Reichman v. Reichman, 88 A.D.3d 680, 930 N.Y.S.2d 262 [2d Dep't 2011]), a likelihood of success on the merits, as his Petition for dissolution must be summarily dismissed, as a matter of law. See Schindler v. Niche Media Holdings, LLC, 1 Misc.3d 713, 772 N.Y.S.2d 781 (Sup. Ct., N.Y. Co. 2003) (Kornreich, J.).

Nor can Pikus demonstrate that he would suffer "irreparable harm" without the requested injunction, as Pikus has previously and unequivocally admitted, by asserting plenary and derivative claims in the Prior Action, that each and every one of his fabricated claims can be compensated by money damages. See, e.g., Gama Aviation Inc. v Sandton Capital Partners, L.P., 93 A.D.3d 570, 940 N.Y.S.2d 617 (1st Dept. 2012). Likewise, if the Court were to direct a buyout of Pikus's minority interest, Pikus would achieve the objective that he has been openly coveting since this dispute arose. Moreover, unlike in Scomello v. Pascarella, 33 Misc. 3d 1217(A), 2011 NY Slip Op 51965(U) (Sup. Ct., Suffolk Co. 2011), upon which Pikus

erroneously relies, there is no need for any injunctive relief to preserve the status quo during dissolution proceedings, as no basis for dissolution has been alleged or established.

Lastly, a balancing of the equities also decidedly favors the SDG Respondents, and not Pikus, who filed this petition in bad faith, based upon fabricated grounds, threatening to dissolve Ten Sheridan in order to extort a better "buy out" deal for himself (while contradictorily refusing to name his price), all of which amounts to a breach of his fiduciary duty to Ten Sheridan's Members. On the other hand, the sweeping and unsupported "injunction" that Pikus fecklessly demands would irreparably harm the SDG Respondents and SDG, who/which would be stripped of their respective rights with respect to Ten Sheridan and the Property, based upon nothing more than blatant falsehoods and histrionic grandstanding.

CONCLUSION

For all of the foregoing reasons, the SDG Respondents respectfully request that their cross-motion be granted in its entirety, and that Petitioner's Petition and Order to Show Cause be denied in all respects; and for such other and further relief, in the SDG Respondents favor, as the Court deems just and proper.

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Respectfully submitted,

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