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 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.	Index No. 653201/2014 (Hon. Charles E. Ramos) Motion Sequence No. 1

MEMORANDUM OF LAW IN FURTHER SUPPORT
OF CROSS-MOTION TO DISMISS PETITION

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PRELIMINARY STATEMENT

This Reply 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 further support of the SDG Respondents' Cross-Motion. The Cross-Motion seeks an Order, among other things: (a) pursuant to CPLR § 404(a), R 3211(a)(1) and (4), and/or R 409(b), dismissing the Verified Petition for Judicial Dissolution of Ten Sheridan Associates, LLC, dated October 20, 2014 (the "Petition"), of petitioner Jeffrey Pikus ("Petitioner" or "Pikus"), based upon documentary evidence, and upon the pendency of a prior action, entitled Goldstein et al. v. Pikus, et al., Index No. 651209/2014 (the "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 § 702, granting the SDG Respondents, and any other respondents who appear herein, the right to purchase Petitioner's 25% minority interest in Ten Sheridan Associates, LLC ("Ten Sheridan" or the "Company") at a price to be determined at a hearing.

Like his wholly discredited claims in the Prior Action, Pikus's "dissolution" Petition, accompanying Order to Show Cause, and opposition to the dismissal cross-motions made by both the SDG Respondents and twenty (20) other Members of Ten Sheridan, rely entirely upon dissemblance and "buzzwords" that are intended to cover up the fact that Pikus is the only wrongdoer in this dispute. Cutting through that "smokescreen," the undisputed facts are simple: Pikus openly and admittedly wants to "cash in" on his 25% minority interest in the Ten Sheridan (for which he made no capital investment), but cannot do so without Goldstein's express consent. Dissatisfied with his limited powers under the Company's controlling Operating Agreement,

Pikus is now trying to dissolve the Company and force a sale of its sole asset (the property located at 10 Sheridan Square, New York, New York [the "Property"]), notwithstanding that such courses of action are opposed not only by Goldstein, but also by the vast majority of the Company's equity holders (more than two-thirds of the equity interest).[1] As more fully set forth below, the bad faith and frivolousness of Pikus's "dissolution" bid cannot be legitimately disputed, as neither the Petition, nor Pikus's current opposition, remotely establishes, or even alleges, any recognized grounds that would permit this Court to dissolve a fully functional and highly profitable LLC. In fact, the only grounds alleged—that Ten Sheridan's management is "deadlocked" and that "self-dealing" occurred—have been conclusively disproved by documentary evidence (including the governing Operating Agreement, the Property's rent records, and multiple unrefuted affidavits). Even if those false claims were true (which they are not), such allegations do not give rise to dissolution of an LLC, under numerous controlling authorities that Pikus and his counsel disingenuously ignore.

STATEMENT OF FACTS

For the facts pertinent to the SDG Respondents' cross-motion, the Court is respectfully referred to the Affidavit of Stuart D. Goldstein, sworn to November 12, 2014 (the "Goldstein Affidavit") and the accompanying Reply Affidavit of Stuart D. Goldstein, sworn to December 5, 2014 (the "Reply Affidavit").[2]

[1] Both the SDG Respondents (holding 35.52% Ten Sheridan's equity) and twenty (20) Class B Members (holding 32.42% of the equity) are seeking dismissal of Pikus's Petition.

[2] Capitalized terms have the same definitions set forth in the Goldstein Affidavit and Reply Affidavit.

I.

AS TEN SHERIDAN IS ADMITTEDLY FULLY-FUNCTIONAL AND PROFITABLE, JUDICIAL DISSOLUTION IS FLATLY PROHIBITED

As a threshold matter, a review of both Pikus's Petition and his current opposition papers confirms that Pikus cannot establish any recognized basis for Ten Sheridan's judicial dissolution. For one, Pikus has not alleged that dissolution is required, or authorized, by the governing Operating Agreement, which is the starting point for determining whether judicial dissolution of an LLC is warranted. See Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2d Dept. 2010). Nor has Pikus established (or even alleged) that Ten Sheridan's continued operation is financially unfeasible—another recognized basis for dissolution—as Ten Sheridan has always been, and continues to be, highly profitable. See id.

With those shortcomings undisputed, Pikus's dissolution bid relies solely upon the false claim that, as a result of a supposed management "deadlock" between him and Goldstein, and certain alleged "self-dealing" by Goldstein, it is no longer "reasonably practicable" for Ten Sheridan to carry out its purposes under the Operating Agreement, as set forth at Section 2.3 thereof. Those purposes, though repeatedly misstated by Pikus and his counsel, are "to acquire, own, hold, expand, renovate, lease, manage, sell, operate the real property located at 10 Sheridan Square, New York New York [i.e. the Property] and such other business activities and operations that are reasonably related thereto...." Pikus's claim that such purposes are not being achieved is neither true, nor a basis for dissolution of a highly profitable and functional LLC.

A. Any Alleged Differences between Goldstein and Pikus Are Neither an Actual "Deadlock," Nor a Basis for Ten Sheridan's Judicial Dissolution

On the issue of "deadlock," Pikus's opposition papers notably depart from the Petition's allegations, and now claim that Ten Sheridan is incapable of functioning as intended because

Goldstein has "refused" Pikus's overtures to either sell or refinance the Property, or to convert it to a condominium.[3] Even if these newly contrived allegations were true (which they are not), such circumstances cannot support dissolution, because differences of opinion between Ten Sheridan's managers is expressly contemplated by the governing Operating Agreement, and does not interfere, in any way, with the Company's ability to achieve its purposes. Indeed, while Section 5.1 of the Operating Agreement vests authority to manage the Company in Goldstein and Pikus jointly (and requires their mutual consent for the Company to take certain major actions), Section 5.2 delegates their authority over management of the Property—Ten Sheridan's sole asset—to Goldstein's company, SDG, and, in so doing, grants broad management and operational powers that are not subject to Pikus's consent.[4]

The effect of that delegation is twofold. First, those decisions on which Goldstein and Pikus must agree in order for the Company to act under Section 5.1 are limited to only a few drastic and discrete areas, including whether to sell or refinance the Property (see Exhibit A, § 5.1), or whether to dissolve the Company (see Exhibit A, § 5.6). Second, Section 5.2's delegation of management of the sole asset ensures Ten Sheridan's ability to carry out its defined purpose until dissolution is required by the Operating Agreement, because SDG is charged with all operational and management responsibilities concerning the Property. This means that any

[3] Pikus's opposition to the cross-motion is the first instance in which Pikus has ever made any assertion about his supposed "intention" to pursue a condominium conversion, meaning that this "issue" cannot possibly support any "deadlock" claim.

[4] SDG's authority, as managing agent, encompasses, among other things, "the right to enter into, make and perform any and all contracts, leases and other agreements related to the management of the Premises, whether or not such agreements are with persons or entities affiliated with any Member." Cloaked with that broad authority and discretion, SDG is charged with: (a) maintaining the Property in first class condition and maximizing its value; (b) maintaining the Property's books and records; (c) making all required agency filings; and (d) making all repairs. See Exhibit A, § 5.2.

alleged "disagreement" between Goldstein and Pikus about whether to sell, refinance or convert the Property is not a "deadlock" at all, as Ten Sheridan's more than thirty (30) Members expressly agreed that both managing members must consent to such major decisions, and empowered SDG to carry on all other aspects of Ten Sheridan's business until such a Company-altering decision, or the Company's termination, is actually required.[5]

The Operating Agreement's plain terms thus reveal the inherent fallacy of Pikus's "deadlock" claims. For Pikus has never once alleged that any event has occurred that might require Ten Sheridan's termination under Section 3.2 of the Operating Agreement, such as an agreement by the managing members to sell the Property or dissolve the Company, or the expiration of the Company's current term (which runs through December 31, 2079). Nor is Ten Sheridan currently facing any decision on a matter requiring both managers' consent that could conceivably affect Ten Sheridan's ability to operate as intended. In fact, the next decision that might qualify will not arise for another seven (7) years, when Ten Sheridan's mortgage matures on January 1, 2022 (see Cross-Motion, Exhibit 22).[6] Pikus, of course, offers no explanation whatsoever as to why Ten Sheridan must sell or convert the Property now, as there is absolutely no reason that such a drastic action must be undertaken.

Notwithstanding that Pikus's "deadlock" claim is a recent invention, such a scenario cannot support dissolution, as a matter of controlling law. Indeed, Courts have consistently held that dissolution is unavailable under circumstances involving more serious disputes between members than that alleged here. For instance, in Doyle v. Icon, LLC, 103 A.D.3d 440, 959 N.Y.S.2d 200 (1st Dept. 2013), the First Department found that a dissolution petition should

[5] This is also borne out by the Operating Agreement's designation of Goldstein as the Company's sole "tax matters member" at Section 7.4.4.

[6] Pikus characteristically ignores both this point and the irrefutable documentary evidence upon which it is based.

have been dismissed, despite a member's allegations that he had been excluded from the company's operations, when—as here—the other members were continuing to operate the company as intended and the company remained financially viable. Likewise, the Second Department rejected the "drastic remedy" of dissolution in Matter of 1545 Ocean Ave., LLC, supra, under facts very similar to those here, finding that a member, who disagreed about the company's management and sought to withdraw, had not demonstrated that the company was "unable to function as intended" or was "failing financially." Id. at 129-31. Dissolution was also found to be unavailable in Matter of Eight of Swords, LLC, 96 A.D.3d 839, 946 N.Y.S.2d 248 (2d Dept. 2012), in which, like here, a minority interestholder's allegations about the members' respective management roles were insufficient to demonstrate that the company could not operate its business as intended. The reason that Pikus's opposition papers fail to address or distinguish the foregoing authorities and others (all of which were cited in the SDG Respondents' previous memorandum of law) is self-evident—each of these controlling holdings requires that the Petition be dismissed.

B. Pikus's Disproved "Self-Dealing" Allegations Cannot Support Ten Sheridan's "Dissolution"

Pikus also continues to claim that dissolution is somehow required because the SDG Respondents supposedly engaged in "self-dealing" to Ten Sheridan's detriment. As to be expected, however, those feckless and unsupported allegations wholly ignore that the SDG Respondents' cross-motion, and the cross-motion of the other moving respondents, established that the very leases that form the primary basis for these "self-dealing" claims: (a) have indisputably benefited Ten Sheridan more than any other tenancies at the Property since those leases commenced; (b) provided for market rent rates; and (c) were otherwise proper in every respect. While Pikus and his counsel pretend that this showing should not be considered on a

motion to dismiss (notwithstanding that CPLR R 409(b) broadly empowers this Court to make any Order "permitted on a motion for summary judgment" based on the papers before it), this disingenuous evasion conspicuously fails to address those authorities confirming that Pikus's disproved "self-dealing" claims, at best, would form the basis for a derivative claim (which, tellingly, was already asserted in the Prior Action), but cannot support dissolution. See Matter of 1545 Ocean Ave., supra; Widewaters Herkinar Company, LLC v. Aiello, 28 A.D.3d 1107, 817 N.Y.S.2d 790 (4th Dept. 2006).

C. Conclusion

In sum, Ten Sheridan is not only highly profitable (as Pikus concedes), but is successfully operating just as intended by the Operating Agreement, notwithstanding any alleged differences between Goldstein and Pikus, or Pikus's false allegations concerning "self-dealing." Those circumstances—which Pikus has not refuted—require the Petition's immediate dismissal, with prejudice, as a matter of law.

II.

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

Pikus also fails to legitimately oppose the SDG Respondents' alternative request for an Order granting the right to purchase Pikus's 25% minority interest in Ten Sheridan at a price to be determined at a hearing. As the SDG Respondents' cross-motion papers set forth, even when grounds for dissolving an LLC have been established (unlike here), the majority opposing dissolution is entitled to purchase the minority's interest at a price to be determined by the Court before dissolution can be directed. See Mizrahi v. Cohen, 104 A.D.3d 917, 961 N.Y.S.2d 538 (2d Dept. 2013); Matter of Superior Vending, LLC, 71 A.D.3d 1153, 898 N.Y.S.2d 191 (2d

Dept. 2010). See also See Chiu v. Chiu, (Sup. Ct., Queens Co.) (Index No. 21905/2007) (Aug. 30, 2012); 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). As usual, Pikus and his counsel simply ignore these precedents.

Rather than address these authorities, Pikus frivolously argues that requesting such alternative relief somehow "admits" that a condominium conversion is intended, and that the value of Pikus's minority interest can only be determined by offering the Property to the market. As ever, these claims are grossly misrepresentative. To begin, as set forth in both the Goldstein Affidavit and Reply Affidavit, no such "condominium conversion" is, or has ever been, "intended" (nor has this claim been asserted until now). The reason that Pikus continues to shift positions and make up new claims is self-evident: he is trying to force the SDG Respondents to purchase his unmarketable, minority interest at an extortionate price.

Equally false is Pikus's pretense that his unilateral and legally groundless demand to sell the Property on the market must trump the majority's right to purchase his minority interest, if dissolution were to be granted. Tellingly, not one authority has been offered to justify this pronouncement, that the drastic remedy of dissolution should be employed and Ten Sheridan's sole asset liquidated, when the Company is highly profitable and functioning in accordance with the governing Operating Agreement, and when the overwhelming majority of the Company's Members wish to continue to do just that. That failure is not surprising, as no such authority exists.

Pikus also dishonestly downplays the burdens that a forced sale would impose on the Court and the Company's Members. For one, the cost of retaining experts to establish the value of Pikus's interest at a hearing would not be "cheaper" than the substantial transactional costs

that a market offering would entail (including brokerage commissions, taxes, attorneys' fees, and the like). Such a sale would also impose more of a burden on the Court than a brief hearing (again, contrary to Pikus's unsupported claims), as the Court would be forced to administer and oversee a lengthy and open-ended sale process. Pikus also blithely skirts over the fact that an unwanted dissolution and sale would deprive the Members of the opportunity for their estates to benefit from the "step-up" in basis that many have factored into their estate plans. Contrary to Pikus's claims, the Members would also not be able to defer tax consequences through a 1031 tax-free exchange in the context of a forced sale, because Ten Sheridan, the owner of the Property, could not serve as the vehicle for another acquisition following its dissolution.

Lastly, Pikus's desperate plea for a "sale to the market" ignores a critical and fundamental reality: Pikus is not authorized to unilaterally force a sale of the Property, as such a sale, without Goldstein's express consent, would violate the plain language of the Operating Agreement (see Exhibit A, § 5.1), and would defy the contractual intent of all of Ten Sheridan's Members (and the undisputed desire of the twenty-four [24] Members actively opposing dissolution). Nor can Pikus sell his interest in Ten Sheridan without Goldstein's consent (see e.g. Exhibit A, § 9.3). Those realities, which Pikus and his counsel all-too-conveniently ignore, establish that the market value of Pikus's piece of the Company is separate and distinct from that of the Property, and would properly be determined in a judicial context, especially considering that dissolution is legally unavailable. Thus, the only conclusion to be drawn from Pikus's opposition to a judicially directed buyout—which would grant Pikus exactly what he claims to want (i.e. market value for his interest in the Company)—is that Pikus continues to place his own self-interest before the interests of Ten Sheridan's investors, in violation of his duties as a fiduciary.

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 be dismissed and the 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.

Dated: New York, New York
December 5, 2014

Respectfully submitted,

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