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,

Index No. 653201/14

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.

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PETITIONER'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION FOR DISSOLUTION AND IN OPPOSITION TO THE CROSS-MOTIONS TO DISMISS AND FOR OTHER RELIEF

Meister Seelig & Fein LLP
125 Park Avenue
New York, NY 10017
(212) 655-3500
Attorneys for Petitioner

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Petitioner Jeffrey Pikus respectfully submits this memorandum of law: (a) in further support of his Verified Petition pursuant to Limited Liability Company Law ("LLC Law") § 702 for an Order affecting the judicial dissolution of Ten Sheridan Associates, LLC (the "Company") and for related relief; and (b) in opposition to the cross-motions to dismiss and for other relief filed by various respondents.[1]

PRELIMINARY STATEMENT

Although the majority of the SDG Respondents' papers focus on the day-to-day management of the Property, at the TRO hearing, the Court properly focused on *management of the Company*, not day-to-day management of the Property, and stated: "day-to-day – who runs the building is not my concern here." (Pikus Aff., Exh. A at 18:6 – 7). The Court directed the SDG Respondents' counsel to Section 5.1 of the Operating Agreement, which provides: "All decisions affecting the Company, its policy and management shall be made by the Managers, including but not limited to, the purchase, sale, mortgage, lease of any real estate or personal property of the Company…." (Id. at 21:8 – 14).

The Court properly recognized that the Company has "a deadlock in management" (id. at 18:2 – 3), or fundamental disagreement among the Managers, that is preventing the Company from realizing or achieving its stated purpose.[2] One of the Managers, Petitioner, seeks to maximize the Company's value by converting the Property to a condominium or by refinancing and then converting to a condominium. The other Manager, Stuart Goldstein, purports to desire

[1] The cross-motions were filed by: (a) respondents Stuart D. Goldstein, Edward M. Fox, Darin S. Goldstein, Darin Goldstein Trust, and Danielle Goldstein Trust (the "SDG Respondents") and (b) respondent Luis Andreotti, purportedly on behalf of other respondents as well (collectively with the SDG Respondents, the "Moving Respondents").

[2] Although the SDG Respondents argue that the Petition does not allege that Section 2.3 of the Operating Agreement, which pertains to the Company's purpose, has been violated, the Petition alleges just that in paragraph 7. (Petition ¶ 7).

to maintain the Property as a rental building[3] (but, in actuality, is waiting to buy Petitioner's interest on the cheap before commencing the conversion process). The Court's accurate impression was "that you guys need a divorce." (Id. at 14:19 – 20).

The Court further appreciated that the Goldsteins' self-dealing was "to the detriment of the business. If Mr. Goldstein is renting an apartment that otherwise ... would go for $4,500 a month for $2,500 a month for his daughter, it's a problem." (Id. at 19:18 – 22). Tellingly, the SDG Respondents ignore their written admission that they are improperly "reserving" apartments for themselves (and will continue to reserve even more) so that they (and not the Company) are enriched upon a sale or conversion to condominium. In a January 28, 2013 email, Darin Goldstein admitted that his intention is to combine Unit 14C (leased to, but not occupied by, Danielle Goldstein) with his Unit 14DEF to create what he referred to as "the Goldstein units." In that same email, Darin demanded that he "have the right to purchase *at the insider price*, apartments 14CDEF, *as well as any other units which I may subsequently rent in the future*." (Petition, Exh. L). Tellingly, the SDG Respondents' lengthy opposition papers completely ignore this incriminating and dispositive email. They cannot justify its contents.

[3] At the hearing, Mr. Goldstein's counsel stated: "We don't want to do a conversion." (Id. at 13:25).

ARGUMENT

I. THE CROSS-MOTIONS TO DISMISS SHOULD BE DENIED

A. Standard for Dismissal Pursuant to CPLR § 3211(a)(1)

The Moving Respondents seek dismissal of the Petition pursuant to CPLR 3211(a)(1) and (a)(7). (Notices of Cross-Motion). A motion under CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 94 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). A defense grounded on documentary evidence must be a complete one, leaving no genuine triable issues of fact. *Wiener v. Spahn*, 60 A.D.3d 586, 876 N.Y.S.2d 380 (1st Dep't 2009).

"It is well settled that a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." "The court must accept as true the facts alleged in the pleading and submissions in opposition to the motion, and accord the plaintiff the benefit of every possible favorable inference." *New York City Health & Hosp. Corp. v. Wellcare of N.Y., Inc.*, 2001 WL 7053818 (N.Y. Co. Dec. 15, 2011)(Singh, J.)(internal quotations omitted). "In the context of a CPLR 3211 motion to dismiss, [the question is] whether the plaintiff has stated a claim, not whether he has one ..." *Wall St. Assoc. v. Brodsky,* 257 A.D.2d 526, 526-27, 684 N.Y.S.2d 244 (1st Dep't 1999).

B. The Court Must Disregard the Affidavits of Stuart Goldstein and Luis Andreotti

The SDG Respondents rely upon a 25-page, 23-exhibit Affidavit of Stuart D. Goldstein in support of their motion to dismiss pursuant to CPLR 3211(a)(1). (Goldstein Aff.). Similarly, respondent Luis Andreotti submits a 12-page affidavit in support of his motion to dismiss.

(Andreotti Aff.). However, "[i]n order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable. Neither affidavits, deposition testimony, nor letters are considered 'documentary evidence' within the intendment of CPLR 3211(a)(1)." *Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 996 – 97 (2nd Dep't 2010)(internal citation omitted).

None of the exhibits attached to the Goldstein Affidavit, except for perhaps the Operating Agreement and certified DHCR Rent Roll, qualify as "documentary evidence." Particularly inadmissible are the "charts" that were *not* created in the ordinary course of the Company's business, but rather recently by Stuart Goldstein in an attempt to defend the Petition's allegations that he improperly rented several apartments to his children for an amount significantly below market rate. (Goldstein Aff., Exhs. 13, 14, 16, 17, 19).

The Goldstein Affidavit and the Andreotti Affidavit merely "assert the inaccuracy of [Petitioner's] allegations," and therefore the affidavits "may not be considered, in the context of [the] motion to dismiss, for the purpose of determining whether there is evidentiary support for the [Petition]." *Tsimerman v. Janoff*, 40 A.D.3d 242, 835 N.Y.S.2d 146 (1st Dep't 2007).

Furthermore, the Andreotti Affidavit does not demonstrate how Mr. Andreotti has personal knowledge of his allegations pertaining to the oral modification of the Operating Agreement or the management of the Company or the Property. Rather, Mr. Andreotti merely alleges that he is a Class B Member. (Andreotti Aff. ¶ 1). However, pursuant to the Operating Agreement, Class B Members have no role in the management of the Company (Petition, Exh. E, § 5.1), and even respondent Stuart Goldstein himself describes Class B Members such as Mr. Andreotti as passive investors. (Goldstein Aff., Exh. 10, ¶¶ 12 – 15). Hence, even assuming that an affidavit could support a CPLR 3211(a)(1) motion, which it cannot, the Andreotti Affidavit

fails to demonstrate that Mr. Andreotti has personal knowledge of its contents. *See Acevedo v. Williams Scotsman, Inc.*, 116 A.D.3d 416, 983 N.Y.S.2d 505 (1st Dep't 2014).

Accordingly, the Court should disregard the Goldstein Affidavit and the Andreotti Affidavit in their entireties. Because the Moving Respondents are left without any true documentary evidence, let alone documentary evidence that utterly refutes Petitioner's factual allegations, the cross-motions to dismiss pursuant to CPLR 3211(a)(1) must be denied.

C. <u>The Request for Dismissal Pursuant to CPLR 409(b) is Procedurally Improper</u>

According to the SDG Respondents' Notice of Cross-Motion, they request dismissal of the Petition pursuant to CPLR 409(b). However, summary determinations pursuant to CPLR 409(b) are only available after respondent has answered the petition. *See People v. Trump Enterp. Initiative LLC*, 2014 WL 5241483, at *4 (N.Y. Co. Index No. 451463/13 Oct. 8, 2014)("After providing respondent an opportunity to answer the petition, 'the court shall make a summary determination upon the pleadings....'")(quoting CPLR 409(b)); *see also People v. City Model & Talent Dev.*, 29 Misc.3d 1205 (Sup. Ct. Suffolk Co. 2010)("a special proceeding brought under CPLR article 4 is subject to the same standard of proof as a motion for summary judgment made in an action."). CPLR § 402, entitled "Pleadings," states: "There shall be a petition ... and an answer where there is an adverse party." Because the SDG Respondents have not filed an answer to the Petition, their request for a summary determination is premature and must be denied.

II. THE COMPANY SHOULD BE DISSOLVED

A. The Company's Purpose is Not Being Realized or Achieved

Although the SDG Respondents contend that *Matter of Sieni v. Jamsfab, LLC*, 2013 WL 3713604 (Suffolk Co. Index No. 13-1309 June 20, 2013) is "directly on point," it is actually completely distinguishable. (SDG Br. at 12). In that case, the petition for dissolution was dismissed because "[t]here are no allegations that company purposes have been or will be utterly defeated by the disputes between the petitioner and the respondent nor has it been shown that the strife between them is inimicable to achieving such purposes." (Id. at *6). Here, the Petition alleges, and the SDG Respondents do not deny, that the Goldsteins have stockpiled the Company apartments (so far, four of them for one actual occupant, Darin Goldstein). (Petition ¶ 6). The documentary evidence, namely an email from Darin Goldstein, shows that the Goldsteins are hoarding such apartments with the intent to purchase them at insider prices instead of permitting the Company to sell those future condominium units on the open market. (Petition, Exh. L). Conveniently, the SDG Respondents fail to address that email. The Goldsteins' use of Company assets for their personal benefit and to the Company's detriment is contravening the Company's stated purpose – to generate as much revenue as possible from the leasing and sale of the Property. (Petition, ¶ 7; Petition, Exh. E, § 2.3).

B. The Operating Agreement Does Not Permit Self-Dealing at the Company's Expense

Even more incredible is the SDG Respondents' continued reliance upon Section 5.2 of the Operating Agreement to justify their self-dealing, even *after* the Court rejected such position at the TRO hearing. The SDG Respondents contend that Stuart Goldstein's renting of multiple apartments for below market rate "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

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and 5.2 of the Operating Agreement." (SDG Br. at 13). However, at the hearing, the Court expressly rejected the SDG Respondents' ridiculous interpretation of Section 5.2: "The authority given to the Managing Agent under 5.2 that permits the Managing Agent to enter into contracts with either a member or affiliated – people affiliated with a member *doesn't give him carte blanche*. (Pikus Aff., Exh. A at 19:11 – 15)(emphasis added).

C. The SDG Respondents Cannot Disprove the Sweetheart Leases

The Petition alleges that Stuart Goldstein caused the Company to rent four apartments to his children Darin and Daneille Goldstein for an amount significantly below market rate (the "Sweetheart Leases"). (Petition ¶ 4). The Petition also attached proof that the Sweetheart Leases were below market rate. (Petition, Exh. I, J).

On a motion to dismiss, a Court may consider facts alleged in an affidavit as a supplement to the pleading. *Ackerman v. 305 E. 40th Owners Corp.*, 189 A.D.2d 665, 592 N.Y.S.2d 365, 366 (1st Dep't 1993); *Staten Island Bus, Inc. v. Bd. of Educ. of the City Sch. Dist. of N.Y.C.*, 2014 WL 338821 (N.Y. Co. Index No. 100798/13 Jan. 16, 2014). Petitioner submits affidavits from two real estate professionals, Robert Williams and Lyon Porter, who affirm that: (a) Darin Goldstein's three-unit combination, Unit 14DEF, could be rented for an aggregate of $15,000 per month instead of the $10,500 per month that he is paying and (b) Danielle Goldstein's Unit 14C (though she actually lives in Florida) could be rented for at least $4,000 per month instead of the $2,750 per month that she is paying. (Pikus Aff., Exh. B, C).

The SDG Respondents do not offer any affidavits from real estate professionals disputing that Stuart Goldstein's children benefit from rents significantly below market. Instead, Stuart Goldstein apparently created some "charts" that are unsupported by Company documents (or at least any that were submitted to the Court) and that are inadmissible. Even if the Court considers

the "charts," they are meaningless. Based upon the "charts," the SDG Respondents contend that Darin and Danielle Goldstein have paid hundreds of thousands of dollars in rent over the course of several years. (Goldstein Aff. ¶¶ 16 – 17, 21). However, the issue is not how much rent Darin and Danielle have paid, but *how much more rent* the Company would have obtained from a market rate tenant but for the Goldsteins' self-dealing.

With respect to the SDG Respondents' attempt to justify Danielle Goldstein's $2,750 per month rent for Unit 14C by comparing it to other "C" line units: (a) those other units are rent-stabilized (thereby preventing the Company from obtaining market rate), and Danielle's unit should not have been rent-stabilized especially given that she does not even occupy the unit (she lives in Florida); (b) Unit 14C is on the highest floor; (c) between 2009 and 2013, Stuart Goldstein caused the Company to only raise his daughter's rent by a paltry $50 per month, from $2,400 to $2,450; and (d) two real estate professionals have opined that the market rate for Unit 14C is at least $4,000. (Goldstein Aff. ¶ 23 n.15; Pikus Aff., Exh. B, C).

III. IN THE EVENT THE COURT DETERMINES THAT THE DOCUMENTARY EVIDENCE IS INSUFFICIENT TO SUPPORT THE PETITON, PETITIONER REQUESTS AN EVIDENTIARY HEARING

The Goldsteins' use of the Company's assets for their personal benefit and to the Company's detriment is supported by the documentary evidence attached to the Petition, including Darin Goldstein's January 28, 2013 email which he demanded that he "have the right to purchase *at the insider price*, apartments 14CDEF, *as well as any other units which I may subsequently rent in the future*." (Petition, Exh. L). In the unlikely event that the Court determines that the documentary eviedence is insufficient to support dissolution, then Petitioner respectfully requests an evidentiary hearing on the merits.

IV. RESPONDENTS' REQUEST FOR THE COURT TO DETERMINE THE "FAIR VALUE" OF PETITIONER'S INTEREST SHOULD BE DENIED

In the alternative to dissolution, the SDG Respondents seek, purportedly pursuant to CPLR 409(b) and LLC Law § 702, "the right to purchase Petitioner's 25% minority interest in Ten Sheridan Associates, LLC, at a price to be determined at a hearing." (Notice of Cross-Motion). Initially, it is noted that neither CPLR 409(b) nor LLC Law § 702 refer to any such buyout procedure.

A. <u>Only the Market Can Determine the Market Price of the Property</u>

In any event, the SDG Respondents' request for a hearing to determine the value of Petitioner's interest demonstrates that the true value of the Property lies in the condominium conversion and that they are trying to buy Petitioner's interest on the cheap while they pretend

that conversion is not an option.[4] By requesting a hearing on value, the SDG Respondents intend on hiring a biased real estate appraiser that will value the Property at the lowest possible price.

There is no need for the parties to waste tens of thousands of dollars on appraisers, and to waste a week of the Court's time listening to a "battle of the experts," when there is an exact and cheaper mechanism for ascertaining the market value – the market itself. By making the Property available to the market, the fair value will be obtained. And, there is nothing preventing the SDG Respondents, or any other members of the Company, from bidding on the Property at a market sale.

Recognizing that a market sale of the Property will result in the SDG Respondents having to actually pay the market price if they want to retain ownership of the Property, the SDG Respondents meekly argue that a market sale would "create a distorted market, in which the Property's value would be diminished by" the Court's alleged inability to "wait out" the highest price. (SDG Br. at 18). Petitioner is confident that the Court has the expertise to direct an appropriate market sale. And, courts "wait out" the parties' dispute resolution mechanisms all the time, including by staying proceedings pending mediation. Moreover, the only price that will be "distorted" is the depressed price that the SDG Respondents will seek at a hearing based upon the testimony of an "expert" paid significant fees by them.

B. <u>The Class B Members Lack Power to Determine When the Property Should be Sold</u>

The SDG Respondents and Luis Andreotti contend that a dissolution of the Company and sale of the Property will result in "unanticipated and adverse financial and tax consequences upon the Members." (SDG Br. at 19; Andreotti Aff. ¶ 24). Putting aside that tax consequences are inherent in all real estate investments, the notion that such consequence is "unanticipated" is

[4] For instance, Stuart Goldstein claims that a condominium conversion is a "hypothetical." (Goldstein Aff. ¶ 31).

refuted by the Operating Agreement. Section 2.3 of the Operating Agreement specifically provides that the Company's business is to "sell" the Property. (Petition, Exh. E, § 2.3). Furthermore, the Class B Members have always known that the Property may be sold without their consent, as Section 5.1 of the Operating Agreement both: (a) authorizes the Managers to sell the Property and (b) states that the Class B Members shall not take part in the management of the Company. (Id. § 5.1). Moreover, the Operating Agreement states that the Company was formed pursuant to the LLC Law, (id. § 2.1), and the LLC Law provides for a judicial dissolution of a LLC and the sale of its assets. (LLC Law § 702). Thus, any tax consequence of a sale of the Property is far from unanticipated.

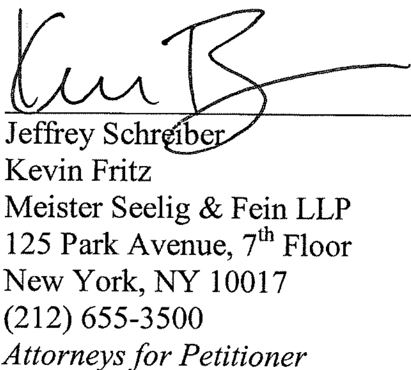
In any event, the Members can avoid a tax consequence by purchasing the Property at the aforementioned market sale. And, assuming that the Members do not have the highest bid, they can avoid the taxes that they so desperately want to evade by acquiring a like-kind property pursuant to IRS Code Section 1031. Indeed, Class B Member Luis Andreotti admits that many of the Class B Members have participated in other real estate investments with Stuart Goldstein. (Andreotti Aff. ¶ 26). Thus, those Class B Members are well-versed in real estate investing.

Lastly, given the significant value of the Property, including the value associated with the right to convert the Property to a condominium, a market sale will result in a considerable profit to the Members even after taxes are paid.

CONCLUSION

For the reasons set forth herein and in the Verified Petition, the cross-motions to dismiss should be denied, and the Company should be dissolved. If the Court determines that dissolution is inappropriate, then the Property should be offered for sale to the market so that those who want to disengage themselves from the Goldsteins' looting of the Company can obtain the market value for their interests in the Company.

Dated: November 20, 2014
New York, NY



Jeffrey Schreiber
Kevin Fritz
Meister Seelig & Fein LLP
125 Park Avenue, 7th Floor
New York, NY 10017
(212) 655-3500
Attorneys for Petitioner