

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

X=====X

In the matter of,

ADVANCED 23, LLC and DAVID SHUSTERMAN,

Index Number 650025-2016

Petitioners,

-and-

AMENDED  
VERIFIED RESPONSE  
WITH COUNTERCLAIMS

CHAMBERS HOUSE PARTNERS, LLC,  
ANITA MARGRILL and HERBERT MARGRILL,

Respondents,

For Dissolution of Chambers House Partners LLC  
pursuant to Limited Liability Company Law §702.

X=====X

Respondents Anita Margrill and Herbert Margrill hereby amend the prior Verified Response with Counterclaims by their attorney Maurice A. Reichman pursuant to CPLR Rule 3025 as follows:

**Responding to Paragraphs 1-4 of the Petition-Nature of Claim**

1. Admit Advanced 23, LLC (Advanced) and David Shusterman (Shusterman) are seeking dissolution of Chambers House Partners LLC (CHP) and sale of the building located at 154 Chambers Street, New York, N.Y. (Building) owned by it and deny that it is not reasonably practicable to carry on the business of CHP in conformity with its articles of organization or its operating agreement and further assert that Shusterman’s conduct is intentionally contrary to the operating agreement and is part of his plan to gain control of the Building.<sup>1</sup>

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<sup>1</sup> Respondents who are moving to dismiss the Petition are filing this response in order to facilitate their claims by counterclaim against Shusterman and Advanced 23, LLC instead of initiating a separate action. Accordingly the respondents are responding to the multiple allegations in many paragraphs of the Petition rather than make a motion for the petitioners to replead those improperly pleaded allegations.

2. Admit the Petitioners further seek an order for equitable and injunctive relief as alleged therein and deny that petitioners are entitled to such relief.

3. Deny that petitioners are entitled to the relief requested in Paragraph 3<sup>2</sup>.

4. Admit the allegations of Paragraph 4.

**Responding to Paragraphs 5-9 of the Petition-*The Parties***

5. Admit that Shusterman filed articles of organization for Advanced with the address specified in Paragraph 5 which acquired a fifty percent membership interest from a prior member of CHP, and further alleges that such filing was incomplete because Shusterman did not file proof of publication as required by the New York State Limited Liability Company Law (LLC Law) § 206 which prevented Advanced from being eligible to file this Petition on the date it was filed with the Court.

6. Deny sufficient knowledge or information concerning the ownership of Advanced, but otherwise Admit the remainder of Paragraph 6.

7. Admit

8. Admit

9. Admit

**Responding to Paragraphs 10-42 of the Petition-*Allegations***

10. Admit

11. Admit

12. Admit

13. Admit that any and all powers of a CHP Manager are derived solely pursuant to the CHP Amended and Restated Operating Agreement (Operating Agreement).

14. Admit

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<sup>2</sup> Unless otherwise specified, references to “Paragraph” are references to Paragraphs of the Petition.

15. Deny the allegations in Paragraph 15 except admit: that since February 1, 2013, Shusterman's actions as a manager of the Building were: (1) negotiation of lease to the Fourth Floor; (2) presented house rules which by their content were appropriate for the Building and were not adopted; and (3) co-signed checks which were presented to him by Herbert.

16. Deny and allege that Herbert was the Building manager since February 1, 2013.

17. Admit

18. Admit

19. Admit so much of Paragraph 19 as claims that Herbert insisted on use of paper checks as provided by Article 8.1 of the Operating Agreement requiring two signatures; Deny sufficient knowledge to form a belief of Shusterman's comfort level after Shusterman signed the Operating Agreement containing Article 8.1; and Deny the remaining allegations of Paragraph 19.

20. Admit that Shusterman occupies an apartment on the Fifth Floor of the Building and can continue to occupy such apartment until the Third Floor apartment of the Building becomes vacant pursuant to Article 11(a)(ii) of the Operating Agreement and otherwise Deny the remaining allegations in Paragraph 20.

21. Admit

22. Admit

23. Admit

24. Admit

25. Admit

26. Admit, Herbert established TD Bank account # 4316547368; *Anita and Herbert Margrill Trustees Chambers House Partners LLC* (Account) at TD Bank; and further alleges

that all such funds transferred into said account, except for payments made prior to December 9, 2015 have been restored to Capital One Bank in accordance with a stipulation and court order entered into on February 10, 2016 (Stipulation).

27. Admit

28. Admit

29. Admit

30. Distributions from the Account required by Article 7.1 of the Operating Agreement in the sum of \$3,000.00, as established by the Co-Managers since February 1, 2013, were offered Advanced as the Letter and Check to Advanced set forth in the Petitioner's Exhibit F of the Petition in November, 2015 and such check was not deposited.

31. Deny and further allege that Article 7.1 of the Operating Agreement limits the authority of individual Managers to authorize distributions by requiring distributions of Net Cash Flow monthly and at the end of the year.

32. Deny

33. Admit and states such sum was returned on February 18<sup>th</sup>, 2016.

34. Deny

35. Admit

36. Admit and state that such deposits were the legal action of the CHP Managers.

37. Deny

38. Deny knowledge or information sufficient to form a belief about the allegations of what Shusterman learned alleged in Paragraph 38, and Deny the remaining allegations in Paragraph 38.

39. Deny

40. Deny

41. Admit and instead state that a non-payment summary proceeding may be initiated against her if she does not pay her rent.

42. Admit

**Response to First Cause of Action—*Dissolution***

43. Repeats Paragraphs 1 through 42 of this Response.

44. Deny

45. Admit

46. Admit

47. Deny

48. Deny

**Response to Second Cause of Action—*Accounting***

49. Repeats and realleges Paragraphs 1 through 48 of this Response.

50. Deny and state (1) the TD Bank account is closed per Stipulation of the parties:

(2) All funds have been returned to Capital One Bank

51. Deny.

**Response to Third Cause of Action—*Injunctive Relief***

52. Repeats and realleges Paragraphs 1 through 51 of this Response.

53. Deny and states Petitioners have received complete relief sought in this cause of action by Stipulation of the parties dated February 10, 2016 and the order of the Court dated February 11, 2016 and filed thereon on February 16, 2016.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

54. All three causes of action in the Petition fail to state claims upon which relief can be granted.

## **SECOND AFFIRMATIVE DEFENSE**

55. Judicial dissolution pursuant to LLC Law §702 is not available to petitioners because the CHP Net Cash Flow and the Stipulation with court order entered thereon establish that it is reasonably practicable to carry on the business in conformity with the Operating Agreement, thereby the Petition does not meet the terms of the LLC Law §702 entitling petitions to obtain judicial dissolution of CHP.

## **THIRD AFFIRMATIVE DEFENSE**

56. The First Cause of Action must be dismissed in that a petition for dissolution pursuant to LLC Law §702 by Advanced contravenes the Agreement it made with the Margrills in Article 10.1 of the Operating Agreement which was guaranteed by Shusterman.

## **FOURTH AFFIRMATIVE DEFENSE**

57. Petitioners have wrongfully manufactured the basis of their claims in order to qualify for dissolution pursuant to LLC Law §702.

## **FIFTH AFFIRMATIVE DEFENSE**

58. Petitioners do not have the legal capacity to sue for dissolution under LLC Law §702 in that Advanced was prohibited from bringing a judicial proceeding of any kind including a judicial proceeding for dissolution pursuant to LLC Law § 702 at the time it filed its Petition and as of the date of this Amended Response and Shusterman not being a member of CHP was not a person entitled to bring a proceeding under LLC Law § 702.

## **SIXTH AFFIRMATIVE DEFENSE**

59. The First Cause of Action in the Petition to dissolve CHP pursuant to LLC Law §702 violates the provision of the Operating Agreement that CHP's Business Purposes is to own and operate the Building and conduct any lawful business which the

facts show that CHP was doing in accord with its Operating Agreement when the Petition was filed and is continuing to do at the time of this Amended Response.

#### **SEVENTH AFFIRMATIVE DEFENSE**

60. Petitioners' claims in their Petition are barred by the equitable doctrines of unclean hands, waiver and estoppel.

#### **EIGHTH AFFIRMATIVE DEFENSE**

61.. Petitioners have failed to act in good faith.

#### **NINTH AFFIRMATIVE DEFENSE**

62. Petitioners are barred from proceeding for dissolution of CHP because Shusterman obtained the membership interest of Advanced in CHP and his interest as a Co-Manager of CHP by fraud and deceit in that his actions show he never intended to comply with the terms of the CHP Operating Agreement or the terms of his personal guaranty to the respondents.

#### **TENTH AFFIRMATIVE DEFENSE**

63. Petitioners' claims are barred by Shusterman's breach of the covenant of good faith and fair dealing.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

64. The Second and Third Causes of Action in the Petition have been nullified by the Stipulation dated February 10, 2016 and the order entered on February 16, 2016.

#### **TWELFTH AFFIRMATIVE DEFENSE**

65. Shusterman has wrongfully created the basis for this proceeding in retaliation for respondents not permitting Shusterman to recoup his investment in CHP by obtaining a \$4,000,000 mortgage.

## **MARGRILL RESPONDENTS' FACTUAL ALLEGATIONS**

66. The purpose for which CHP was organized and is operated is to own and operate the Building and to conduct any lawful business.

67. CHP has owned and operated the Building successfully since November 7, 2008 when it acquired the deed to the Building to the present; and it has conducted the business of renting three units in the Building productively to the present day..

68.1. As a result of the operation of its business, CHP now has as of the date of this Amended Response an undistributed Net Cash Flow of \$159,253.89.

68.2 If every current bill and past debt for loans made during the period when the TD Bank account was frozen, CHP would have a balance of \$64,020.74 cash in its bank account which is enough for a year end distribution of \$25,000 to Advanced and \$25,000 to Herbert and a reserve of \$14,020.79.

69. On January 1, 2013 the Margrill respondents owned a combined 50% membership interest in CHP and had the right under the CHP Operating Agreement to accept or reject any replacement for the 50% membership interest in CHP owned by Epriam and Hisako Resnick.

70. The Resnicks presented Shusterman as the person to whom they wanted to sell their 50 % membership interest.

71. Shusterman requested that the Margrills accept Advanced as the purchaser of the Resnick 50% membership interest and accept him as a Co-Manager of CHP upon his promise to guaranty their performance of the terms in the Operating Agreement.

72. Shusterman's attorney and the Margrills attorney negotiated the terms



included in the Operating Agreement set forth as Exhibit A of the Petition prior to February 1<sup>st</sup>, 2013,.

73. On January 31, 2013, Shusterman tendered the Margrills the signed and acknowledged guaranty set forth as **Exhibit 1**, of this Amended Response.

74. **Exhibit 1** attached to this Amended Response is a true and complete copy of the guaranty Shusterman gave to the respondents on January 31, 2013.

75. The Margrill respondents would not have accepted Advanced as the purchaser of a 50% membership interest in CHP or Shusterman as a Co-Manager of CHP without such guaranty.

76. On February 1, 2013, Shusterman on behalf of himself and Advanced and the Margrill respondents signed the Operating Agreement.

77. If Shusterman did not sign the Operating Agreement the Margrill respondents would not have agreed to permit him to acquire the Resnick's 50% membership interest in CHP.

78. The Operating Agreement set forth as **Exhibit A** of the Petition contains all of the terms in CHP's Operating Agreement.

79. Shusterman told the Margrill respondents that he had an individual at Chase Bank who he was using to find a mortgage on the Building.

80. Shusterman swore in an affidavit (Affidavit) he filed in the case brought in this Court bearing Index Number 150453/2016 that he was seeking a \$4,000,000 mortgage on the Building.

81. Shusterman never mentioned to he Margrill respondents that he was seeking a

\$4,000,000 mortgage on the Building.

82. Shusterman swore in the Affidavit that he was seeking the \$4,000,000 to allow him to recover his investment in CHP.

83. Recovery of the initial investment or any investment in CHP by a member of CHP is not a purpose of CHP as articulated in the Articles of Organization or the Operating Agreement.

84. The following is a true and complete copy of the definition of Net Cash Flow in Article 1 of the Operating Agreement:

"Net Cash Flow" shall mean, with respect to any fiscal period of the Company, all revenues of the Company during that period decreased by (a) cash expenditures for operating expenses, (b) capital expenditures to the extent not made from reserves, (c) reserves for contingencies and working capital and other anticipated obligations of the Company, established in such amounts as the Managers determine in their sole discretion, (d) repayment of principal on any financing and (e) taxes.

85. The following is a true and complete copy of Article 2.3 of the Operating Agreement setting forth the Business Purposes of CHP:

2.3 Business Purposes. The purposes of the Company shall be to own and operate the building known and located at 154 Chambers Street, New York, NY 10013 (the "Building"); to provide a residence for its Members; and to conduct any lawful business as the Members may from time to time determine. The land and the Building are referred to herein collectively as the "Property".

86. The following is a true and complete copy of Article 2.4 of the Operating Agreement setting forth the Term of CHP:

2.4 Term. The term of the Company commenced on and as of December 8, 1998, and shall continue until dissolved and liquidated in accordance with Article 10.

87. The following is a true and complete copy of Article 10.1 of the Operating Agreement:

10.1 Dissolution. The Company will be dissolved only upon the unanimous determination of the Members to dissolve.

88. The following is a true and complete copy of Article 7.1 of the Operating Agreement:

7.1 Distributions. The amount and timing of distributions by the Company shall be at the reasonable discretion of the Managers and their determination shall be conclusive and binding upon the Members, provided that (i) the Managers shall not make any distributions other than Net Cash Flow distributions without the consent of the Members and (ii) the Managers shall, as soon as practicable, but not less often than monthly, distribute Net Cash Flow (less agreed upon reserve, if any). There shall also be a year end distribution (less agreed upon reserve, if any). At the time of any distribution, such distribution shall be made to each Member in the proportion that the Interest held by such Member at the time of distribution bear to the aggregate Interest held by all the Members.

89. Distributions of Net Cash Flow pursuant to Article 7.1 have been made since CHP was formed.

90. Regular monthly distributions of \$3,000.00 were made to Shusterman and Herbert each pursuant to Article 7.1 of the Operating Agreement starting on February 1, 2013.

91. Advanced failed to deposit its check for the regular monthly distribution for November, 2015.

92. TD bank froze all distributions after the distribution of November, 2015.

93. All funds in TD Bank were transferred to the CHP Capital One Bank Account on February 16, 2016.

94. On February 16, 2016, Shusterman stated through his attorney that he will no longer sign distribution checks thereby preventing CHP from following Article 7.1 of the Operating Agreement by making monthly distributions and a year-end distribution of Net Cash Flow.

95. Neither Margrill respondent agreed to dissolve CHP.

## COUNTERCLAIMS

### First Counterclaim-Specific Performance of the Operating Agreement

96. Repeats and realleges all prior allegations in this Amended Response.

97. That the refusal of Shusterman to countersign distribution checks works an unauthorized and impermissible alteration of Article 7.1 of the Operating Agreement and deprives the Margrill respondents of the Operating Agreement for which they contracted.

98. That by reason of the actions of Shusterman in failing and refusing to perform his duty imposed on the Managers of CHP by Article 7.1 of the Operating Agreement, the Margrill respondents will be irreparably damaged thereby.

99. That the Margrill respondents have no adequate remedy at law.

WHEREFORE, with respect to this First Counterclaim, the Margrill respondents demand judgment against Shusterman as follows:

1. That Shusterman be compelled to specifically perform the obligations imposed on him as a Co-Manager according to Article 7.1 of the Operating Agreement by signing monthly distribution checks to Advanced and Herbert in the sum of \$3,000.00 and a year end distribution to Advanced and Herbert for \$25,000.00

2. That if specific performance of Article 7.1 cannot be had, that the Margrill respondents have a judgment permitting either of them to sign a monthly distribution check in the sum of \$3,000.00 to the Margrills and Advanced and a year end distribution of ½ of the Net Cash Flow remaining on December 31 of each year after deducting expenses for the following January, which for the yea 2015 such year end distribution to Advanced and the Margrill respondents be in the sum of of \$25,000 each plus a reserve for 2016 of \$14,000.

3. Costs and disbursements incurred by the Margrill respondents in this proceeding.

**Second Counterclaim-Specific Performance of Shusterman’s Guaranty**

100. Repeats and realleges all prior allegations in this Amended Response.

101. Shusterman’s guaranty provides in pertinent part:

DAVID SHUSTERMAN \* \* \* \*does hereby guarantee to Anita Margrill, Herbert Margrill and Chambers House Partners LLC ("the Company"), their successors and assigns, (i) the complete performance and observance of all the obligations, responsibilities and agreements to be performed and observed by ADVANCED 23 LLC, a limited liability company organized under the laws of the State of New York ("Advanced"), as a Member of the Company, pursuant to the Amended and Restated Operating Agreement as now in effect or as hereafter amended ("Operating Agreement") \* \* \* \* \*; and (ii) to indemnify and reimburse the Margrills and the Company for any and all costs and expenses which may be incurred by the Margrills or the Company in enforcing the obligations of Advanced or the obligations of Guarantor hereunder (collectively, "the Obligations"). (Exhibit 1—emphasis added.).

102. Shusterman’s guaranty requires Advanced and him to completely perform all of the obligations set forth in the terms of the Operating Agreement.

103. Shusterman has violated the guaranty in many ways one of which was satisfied by the Stipulation; the following violations remain:

1. Failure to co-sign checks Herbert is entitled to for a management fee of 3% since February 1, 2013 pursuant to Article 4.1(b).

2. Shusterman refused to discuss any new mortgage with Herbert because he wanted to obtain a \$4,000,000 mortgage which was not justified by the Building’s rent roll; then Shusterman sabotaged an extension which HSBC was willing to give to allow CHP to seek a realistic mortgage on the Building aall of which interfered with the primary purpose of CHP to own and operate the Building.

3. Shusterman has improperly made an installation in the Fifth Floor unit which, is the most valuable unit in the Building and which he does not own and may only occupy until the Third Floor Unit becomes vacasnt by the express provisions in Article 11(a)(ii) of the Operating Agreement.

4. Shusterman has failed to remove the material he stores on the fire egress stairs leading from 5th floor to roof resulting in fines for such violation which he refuses to pay.

5. Shusterman has improperly installed an air conditioning unit on the roof of the Building without the knowledge or consent of Herbert thereby weakening the roof and causing leaks in the roof.

104. That by reason of the actions of Shusterman in failing and refusing to perform his duty imposed on him by the guaranty he used to induce the Margrill respondents to accept Advanced's acquisition of a 50% membership interest in CHP and him aas a Co-Manager of CHP, the Margrill respondents will be irreparably damaged thereby.

105. The Margrill respondents have no adequate remedy at law.

WHEREFORE, with respect to this Second Counterclaim, the Margrill respondents demand judgment against Shusterman as follows:

1. That Shusterman be compelled to specifically perform the obligations imposed on him by the terms of his unconditional guaranty for the complete performance and observance of all the obligations, responsibilities and agreements to be performed and observed by Advanced and him.

2. That if specific performance of of his unconditional guaranty for the complete performance and observance of all the obligations, responsibilities and agreements to

be performed and observed by Advanced and him cannot be had, that the Margrill respondents have a judgment removing Shusterman as a Co-Manager of CHP and directing Shusterman to sell the 50% membership interest in CHP,

3. Costs and disbursements incurred by the Margrill respondents in this proceeding.

### **Third Counterclaim- Declaratory Judgment**

106 Repeats and realleges all prior allegations in this Amended Response.

107. The Operating Agreement deals expressly with Shusterman's occupancy in the Building in Article 11.1(a)(ii) as follows:

(ii) Occupancy by Shusterman. Until the lease (the Third Floor Lease") for the third floor (the "Third Floor") of the Building expires, Shusterman shall have the exclusive right and obligation to occupy the fifth floor (the "Fifth Floor") of the Building, at an annual rent of Twenty-Four Thousand (\$24,000.00) Dollars per annum. Upon the expiration of the Third Floor Lease or delivery of possession by the tenant of the Third Floor, and for the duration of the Company's ownership of the Building, and subject to the provisions of this Agreement, Shusterman shall have exclusive right and obligation to occupy the Third Floor, and his exclusive right to occupy the Fifth Floor shall be terminated and extinguished. The Members acknowledge that the initial annual rent to be paid by Shusterman upon occupancy of the Third Floor shall be Twenty-Four Thousand (\$24,000.00) Dollars per annum. In this regard, upon taking occupancy of the Third Floor, Shusterman shall participate in and cooperate with the efforts of the Company to re-rent the Fifth Floor, to insure that there is as little interruption in the rental income as possible. In the event that there is a loss of rental income between the date when Shusterman vacates the Fifth Floor and the date when the Fifth Floor is occupied by a new tenant, Shusterman will reimburse the Company for the loss of any rental income during such period. Notwithstanding the provisions of this subparagraph (ii), any cost of renovations of the Fifth Floor undertaken by the Company after Shusterman vacates the Fifth Floor, if any, shall be borne solely by the Company. Any renovations of the Third Floor or Fifth Floor to be undertaken by Shusterman during his occupancy of either Unit, shall be subject to the consent of the Company which consent shall not be unreasonably withheld or delayed and shall be at the sole cost and expense of Advanced.

Dated: New York, New York108. There exists a dispute between Shusterman and the Margrill respondents concerning whether or not Shusterman will vacate the Fifth Floor upon a vacancy of the Third Floor Unit.

WHEREFORE, with respect to the Third Counterclaim, the Margrill respondents demand judgment against Shusterman as follows:

1. A judgment from this Court declaring that Shusterman is required by his guaranty he signed and acknowledged and the Operating Agreement he signed to follow the provisions Article 11.1(a)(ii) at the expiration of the lease of the tenant of the Third Floor of the Building that Shusterman be directed to remove from the Fifth Floor upon the vacancy in the Third Floor and be directed to go into occupancy of the Third Floor.

2. Costs and disbursements incurred by the Margrill respondents in this proceeding.

ON ALL COUNTERCLAIMS, such other and further relief as this Court deems just and proper.

Dated: New York, N.Y.  
February 23<sup>rd</sup>, 2016

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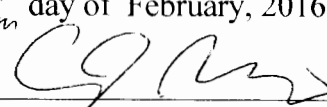


**VERIFICATION OF AMENDED RESPONSE**

STATE OF NEW YORK )  
 : ss.:  
COUNTY OF NEW YORK )

**HERBERT MARGRILL**, being duly sworn, deposes and says :I am a respondent in this proceeding, a Co-Manager of CHAMBERS HOUSE PARTNERS LLC and also hold a 25% membership interest in CHAMBERS HOUSE PARTNERS LLC, a co-respondent in this proceeding. I have read the foregoing Amended Response to the Petition and know the contents thereof to be true of my own knowledge except as to those allegations alleged upon information and belief and as to those matters I believe it to be true.

  
**HERBERT MARGRILL**

Sworn to before me this  
<sup>25<sup>th</sup></sup> day of February, 2016  
<sup>14<sup>th</sup></sup>  
  
Notary Public-State of New York

