SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of,

Index No. 502779/2020

RENA PACHTER, in her representative capacity as Administrator of the ESTATE of JUDITH LINDENBERG, deceased, individually and derivatively on behalf of 3046 WEST 22 ST. PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC

Petitioner,

-against-

For the Dissolution of 3046 WEST 22 ST PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC, and other relief,

-against-

DAVID WINIARSKI, ESTHER WINIARSKI, and MYRON WINIARSKY,

Respondents,

-and-

3046 WEST 22 ST. PROPERTIES LLC, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC and PARK 50 WEST PROPERTIES LLC,

Nominal Respondents.

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Respondents' Memorandum Of Law In Opposition to the Motion for Receivership and In Support Of The Cross-Motion To Dismiss

MYRON WINIARSKY
1030 Ocean Avenue, Suite 1E
Brooklyn, New York 11226
718 421 0758
Attorney for Respondents

Respondents David Winiarski, Esther Winiarski, 3046 West 22 St. Properties LLC, D-Win Properties LLC, Homes R beautiful RE LLC, Park 50 West Properties LLC and myself, *pro se* (collectively and/or individually "**Respondents**") submit this memorandum of law (a) in support of their cross-motion seeking an Order pursuant to CPLR 3211(a) dismissing with prejudice the first four causes of action of the petition of Rena Pachter (the "**Administrator**") in her representative capacity as administrator of the Estate of Judith Lindenberg, deceased, individually and derivatively on behalf of 3046 West 22 St. Properties LLC, D-Win Properties LLC, Homes R Beautiful RE LLC, and Park 50 West Properties LLC (the "**LLCs**") and (b) in opposition to the Administrator's motion for receivership (the " **Motion**").[1]

Preliminary Statement

A. The Motion Should Be Denied Because The Administrator Cannot Satisfy Any Of The Requirements Set Forth In CPLR 6401

The Motion pursuant to CPLR 6401 seeks the appointment of a receivership for the LLCs without providing any cognizable basis for such relief. CPLR 6401 provides in relevant part that a temporary receiver of property "which is the subject of an action in the supreme or a county court" may be appointed "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." Here, the Motion is completely devoid of any such accusations. **In fact by letter dated**

[1] Citations in the form "Ex. __ refer to exhibits attached to the Affirmation of Myron Winiarsky. Citations in the form "Petition Ex. ___" refer to the exhibits attached to the underlying petition (the "**Petition**"). Citations in the form " Petition Para.__" refer to paragraphs of the Petition annexed to the Motion as Exhibit A. Citations in the form "Kuperman Mem. p. ___" refer to the pages set forth in the memorandum of law in support of the Motion.

August 21, 2019, the Administrator's Counsel advised the Queens County Surrogate's Court that it "intends to move for appointment of a receiver". Ex. I. If there was a danger to the subject properties the Administrator would not have waited over **six months** to make such an application. In fact, there is no such danger. Over the course of the last six months, as demonstrated below, all the subject buildings (the "**Buildings**") have been exceptionally maintained. The Buildings consist of 7 multi family residential buildings with over 90 mostly regulated apartments. Respondents are current with all their mortgage obligations. Ex. P. There is a zero balance with respect to the property taxes, mortgage obligations and utility charges. *Id.* Respondents collection of rent is also impeccable. **Out of the 92 apartments there are only 8 with rent balances over 2 months and with respect to those tenants, legal proceedings have commenced.** Ex. R. Moreover, all the regulated apartments are properly registered with the Division of Housing and Community Renewal. Exhibit N. **There has not been one rent over charge complaint alleged with respect to any of these apartments**.

Equally impressive is Respondents' maintenance of the Buildings. With respect to the largest subject building - 50 Westminster Road, Brooklyn ("**50 Westminster**") - built in **1940** with 64 residential apartments - there has been 13 tenant complaints in the last 12 months. Petitioner Mem. P. 12. That is approximately one complaint per month for 64 apartments. I challenge the Administrator to find another **80 year old building** with a better record than that. The pictures in Ex. L were taken this month demonstrate that 50 Westminster is superbly maintained. **Respondents invite the Court and/or the Administrator to inspect any of the Buildings at any time without any notice.** Respondents are confident that that the Court and the Administrator would agree that the

Buildings are in excellent condition and the appointment of an Administrator is entirely unnecessary and would only harm the LLCs.

Not only are Respondents properly maintaining the Buildings but also they are using the rental income from 50 Westminster to finance the construction of a six family building located at 263 East 9th Street, Brooklyn (the "**East 9th Street Project**") to grow the LLCs real estate portfolio.[2] This project consists of demolishing the once existing dilapidated single family home and developing a six family building. Notwithstanding, the baseless allegation that "Respondents caused HOMES R BEAUTIFUL RE LLC to stop all construction and development" of the East 9th Street Project (see Kuperman Mem. P. 25) - a quick drive by of this location reveals that this is an active construction project. As demonstrated by the pictures annexed to Ex. M, the superstructure, electric, plumbing, sprinklers, windows, sidewalk, driveway, balconies, heating, ventilation and cooling systems and internal framing have been completed. Respondents are now in the process of installing the intercom system and sheet rocking the walls. The building is expected to be complete by the upcoming fall.

Based upon Respondents exceptional management of the Buildings, the Administrator cannot demonstrate pursuant to CPLR 6401 that a receiver should be appointed because there is danger that the property will be removed from the state, or loss, materially injured or destroyed. Consequently, the Motion should be denied.

B. Respondents' cross-motion for Dismissal Of the Petition Should be Granted

(i) First Cause of Action – Common Law Dissolution

[2] Judith Lindenberg was a 50% member of 50 West Properties LLC and a 50% member of Homes R Beautiful RE LLC. Petition Para. 28.

The Administrator has utterly failed to advance any legal basis for the extraordinary relief of the dissolution of the LLCs. The first cause of action of the Petition should fail because as will be demonstrated more fully below, assuming *arguendo* that such relief is applicable to limited liability companies, the Estate of Judith Lindenberg (the "**Estate**") is not entitled to such relief because this remedy is available only to **minority shareholders** who accuse the majority shareholders and/or or the corporate officers or directors of looting the corporation and violating their fiduciary duty. Here, there is no dispute that the Estate is a 50% member of the LLC (Petition at Para. 22) and thus is not a minority shareholder. Consequently common law dissolution is inapplicable. Moreover, as demonstrated above and in more detail below, Respondents are not looting the LLCs - in fact they are creating value.

(ii) Second Cause of Action – Statutory Dissolution

The Petition alleges that the LLCs should be dissolved pursuant to New York Limited Liability Company Law ("**LLCL**") Sec. 702 without providing any legal basis. LLCL Sec. 702 provides that an LLC may be dissolved only when "it is not reasonably practicable [for the LLC] to carry on the business in conformity with the articles of organization or operating agreement." This drastic remedy has been found to be appropriate in just two scenarios: (i) where the LLC's managers are unable or unwilling to promote the stated purpose of the LLC; or (ii) where the LLC's continuing existence is financially unfeasible. Neither is present here.

The Administrator pays no more than lip service to this substantial burden. In conclusory statements to support this cause of action, the Administrator alleges that Respondent's management of the LLCs is dysfunctional and that Respondents are not promoting the stated purpose of the LLC. Petition Para. 178-79. This is the entire basis for dissolution under LLCL sec. 702. Obviously these statements by themselves cannot support dissolution but also, these statements cannot be further from the truth.

The operating agreements with respect to Park 50 West Properties LLC and D-Win Properties LLC (the "**Operating Agreements**"[3]) both provide that the purpose is to engage in any lawful act or activity for which limited liability companies may be formed. From the creation of these LLCs, these companies were engaged in real estate management. In fact, the allegations set forth in the Petition show that the LLCs have been able to carry on its business and that the Buildings jointly generate yearly income over $1,000,000. The Administrator's allegation that Respondents failed to award the Estate distributions demonstrate that the LLCs are financially feasible.

There are also no allegations in the Petition that LLCs are not capable of sustaining itself financially. In fact, the documents annexed hereto, demonstrate that Respondents are current with all the Buildings' expenses (i.e. mortgage, taxes, utility charges) and Respondents are using the profits generated from the LLCs to finance the East 9th Street Project. Ex. P.

Consequently, Petitioner has failed to state a cognizable claim for dissolution under Limited Liability Company Law Sec. 702.

(iii) Third Cause of Action – Equitable Buyout

From the outset it should be noted that the Estate under Queens County Surrogate's Court File No. 2018-2952/C previously moved the Queens County Surrogate's Court for an equitable buyout (Ex. H). However, after the petition for an

[3] Respondents can only locate the operating agreements for Park 50 West Properties LLC and D-Win Properties LLC.

equitable buyout was fully briefed, the Surrogate advised the Administrator's Counsel during oral augment that such argument was ill conceived because equitable buyouts do not apply to real property. Consequently, the Administrator's counsel withdrew its application for an equitable buyout (Ex. G) and now seeks the same relief from this Court.

This Court like the Surrogate's Court should reject the Administrator's cause of action for an equitable buyout. As set forth in more detail below, the Appellate Division, Second Department held that if there is no basis an LLC to be dissolved then there is no basis to invoke an equitable buyout. As demonstrated above, the Administrator has not made a proper claim for dissolution. Thus, there is no basis to invoke an equitable buyout.

(iv) Fourth Cause of Action - Withdrawal

Under LLCL Sec. 606(a) a member may withdraw from a limited liability company only as provided in its operating agreement. If the operating agreement is silent a member may not withdraw prior to the dissolution of the company. The subject operating agreements both provide that a "Member may withdraw from the Company in accordance with the [LLCL]". Petition Exs. J and K. Thus, the Estate may not withdraw prior to the dissolution of the LLCs. As there is no basis for the dissolution of the LLCs, the Estate may not withdraw as a member of the LLC.

Based upon the foregoing, the Motion for a receivership should be denied and the cross-motion to dismiss the first four causes of action of the Petition should be granted.

Statement of Facts

(A) The Relationship Of Judith Lindenberg, Esther Winiarski And David Winiarski

For over 35 years Judith Lindenberg ("**Judy**"), Esther Winiarski and David Winiarski were members of various limited liability companies and were engaged in the business of real estate investments. Specifically, David Winiarski and Judy were both 50% members of 3046 West 22 St. Properties LLC and Park 50 West Properties LLC. Petition Para. 22. Judy and Esther Winiarski were both 50% members of D-Win Properties LLC and Homes R Beautiful RE LLC. *Id.*

The operating agreements for D-Win Properties LLC and Park 50 West Properties LLC are virtually identical. Petition Exs. J and K. The written purpose of these companies is to engage in any lawful act or activity for which limited liability companies may be formed. *Id.*

Consistent with such purpose the LLCs own real estate located in Brooklyn. Park 50 West Properties LLC owns the largest property located at 50 Westminster Road. Petition Para. 28. This building has 64 mostly rent regulated apartments. 3046 West 22 St Properties LLC owns (a) 2805-09 West 16th Street which has 4 apartments; (b) 2837-39 West 20th Street which has 4 apartments; and (c) 3046-50 West 22nd Street which has 13 apartments. *Id.* D-Win Properties LLC owns: (a) 201 Ditmas Avenue which has4 retail stores and 1apartment; (b) 3135 Coney Island Avenue which has a 1 retail store and 6 apartments. *Id.* Homes R Beautiful RE LLC owns 263 East 9th Street and a six unit building is currently being developed at this location. *Id.*

Throughout the ownership and development of these properties, David Winiarski managed and maintained the Buildings. Judy assisted with obtaining mortgages and financing for 50 Westminster. Judy also supervised, reviewed and approved the LLCs' tax returns with the LLCs' accountant, Robert Lubin. During this 35 year period in which Judy, Esther Winiarski and David Winiarski were members of the LLCs they were able to maintain and grow the LLCs' real estate portfolio without having any disputes. Unfortunately all this changed upon Judy's sudden death.

(B) Surrogate Court Discovery Proceeding

In connection with Judy's death, Adiv Pachter ("**Adiv**"), the son of the Administrator, commenced a probate proceeding in Surrogate's Court Queens County. Adiv admitted into probate Judy's purported will (the "**Will**"). On July 17, 2018, based upon the Will, the Surrogate's Court issued Letters Testamentary appointing Adiv Pachter (the "**Executor**") as the Executor of the Estate. Under Surrogate's Court Queens County File No. 2018-2952/A the Estate commenced a discovery proceeding seeking to "discover, account for, and/or marshal the property of the [Estate] and/or proceeds or value thereof..." Ex. B.

(C) Surrogate Court Partition Proceeding

On May 30, 2019 the Executor, represented by the Administrator's counsel, under Queens County Surrogate's Court File No. 2018-2952/B commenced a partition proceeding for two properties that are not owned by the LLCs (the "**Partition Proceeding**"; Ex. D). The Administrator's counsel alleged the following in paragraph 8 of the petition in connection with the Partition Proceeding (the "**Partition Petition**"):

> [The Surrogate's Court] has jurisdiction under SCPA Sec. 201. **Petitioner *specifically* invokes [the Surrogate's Court] full and complete general jurisdiction in law and in equity to administer justice *in all* matters relating to estates and the affairs of [Judith Lindenberg]**. [emphasis supplied]

By decision and order dated July 17, 2019 the Surrogate's Court denied the Partition Petition. Ex. E.

(E) The Supreme Court Accounting Proceeding

Notwithstanding that the Estate in the Surrogate Court Partition Proceedings "**specifically invoked the [Surrogate's Court" full and complete general jurisdiction in law and in equity to administer justice in all affairs relating to estates and the affairs of [Judy]**" [emphasis cited; Ex. D] on the same date thereof, the Estate served upon Respondents a complaint seeking an accounting with respect to the LLCs.

By an Order of this Court dated March 5, 2020, this Court granted the Estate's request for an accounting. Ex. K.

(F) The Surrogate Court Turnover Proceeding

A month after the Administrator commenced the Supreme Court Accounting Action and the Surrogate Court Partition Proceedings, the Administrator under Queens County Surrogate's Court File No. 2018-2952/C commenced a Surrogate Court proceeding to turnover to the Estate by David Winiarski, the LLCs of the "value of the estate's membership interest" in said companies and, further the distributions owned by them to the Estate (the "**Turnover Proceeding**"; Ex. H). In support of the Turnover Proceeding, the Administrators counsel submitted a memorandum of law (the "**Turnover Memorandum of Law**"; Ex. F) and argued:

> According to SPA Sec. 201(3), this Surrogate's Court shall 'exercise full and complete general jurisdiction in law and in equity to administer justice in **all matters** relating to estates and the affairs of decedents.'
>
> * * *
>
> Accordingly, **[the Surrogate's Court] should order a turnover of the value of the Estate's membership shares in the Respondent Entities to effectuate a complete disposition of the property of the Estate** as well as a turnover of unpaid distributions those Entities owe to the Estate … [emphasis supplied]

During oral argument of the Turnover Proceeding on August 14, 2019, the Surrogate advised the Administrator's counsel that its application was ill conceived and it was inclined to deny the petition. Accordingly, the Administrator's counsel withdrew its Turnover Proceeding Application. Ex. G. Moreover, by letter dated August 21, 2019 the Administrator's counsel advised the **Surrogate's Court** that it "**intends to move for appointment of a receiver**" Ex. I.

(G) Supreme Court Partition Actions

Four days after the Surrogate's Court held oral argument with respect to the turnover petition, the Administrator on August 18, 2019, commenced two separate partition proceedings against companies affiliated with the Winiarski family under Kings County Supreme Court Index Nos. 518318/2019 and 518321/2019. The Winiarski family moved to dismiss one partition complaint and such motion will be heard in May 2020. With respect to the other partition action, the Administrator has moved for summary judgment.

(H) Surrogate Court's Revocation of the Will of Judith Lindenberg

After the Administrator's son commenced three Surrogate's Court Proceedings and three Supreme Court Actions against Respondents and/or the Winiarski family, on September 9, 2019, pursuant to SCPA Secs. 202 and 719(10) I brought to the Queens County Surrogate's Court's attention that the Will is inauthentic (the "**SCPA 710 Notice**"). The SCPA 710 Notice demonstrated that the Will was notarized May 1, 2018 notwithstanding that the will was created on May 8, 2018 (the date of Judy's death) and the Will as initially drafted name Carmi Lindenberg as executor of the Estate instead of Adiv Pachter.

Based upon the factual allegations set forth in the SCPA 710 Notice, the Queens County Surrogates Court on October 1, 2019 issued an Order suspending the Letters Testamentary issued to the Administrator's son. Ex. C. On November 13, 2019, the Surrogate's Court issued an Order vacating the decree granting probate and revoked the letters testamentary issued to the Administrator's son. Ex. A.

(I) <u>Surrogate Court Appointment of an Administrator</u>

Subsequent to the Administrator's son getting caught probating a fraudulent will, the Administrator moved the Surrogates Court under File No. 2018-2952/D to appoint her as the Administrator of the Estate. In support of such application the Administrator provided an affidavit swearing that:

> [t]hat the value of **all** personal property, wheresover situated, of which the said decent died possessed amounts to $6,000,000 and consists of
>
> 50% member of 3046 West 22 St. Properties LLC
> 50% member of D-Win Properties LLC
> 50% member of Homes R Beautiful RE LLC
> 50% member of Park 50 West Properties LLC
> ½ interest in 811-815 Ocean Avenue, Brooklyn, New York
> 1/3 interest in 2169 Coney Island Avenue
> THE MARKET value of which is $0.00, **subject to mortgages in the amount of $0.00**, and the **estimated gross rentals for 18 months total NONE**;
>
> * * *
>
> **That there are no Federal or State Income or Estate Taxes payable by the estate**.
> [emphasis supplied]

Ex. J.

On December 9, 2019, the Surrogate's Court granted Letters of Administration to the Administrator (Petition Ex. A).

POINT I

ADMINISTRATOR DOES NOT SATISFY THE REQUIREMENTS FOR THE APPOINTMENT FOR A TEMPORARY RECEIVER PURSUANT TO CPLR 6401

CPLR 6401 provides in relevant part that a temporary receiver of property "which is the subject of an action in the supreme or a county court" may be appointed "**where there is danger that the property will be removed from the state, or lost, materially injured or destroyed**" [emphasis supplied]. These stringent requirements have been narrowly construed by the courts. *See, e.g.,* Trepper v. Goldbetter, 205 A.D.2d 363, 613 N.Y.S.2d 599 (1st Dept. 1994). A party seeking the appointment of a receiver must provide "clear proof of the danger of irreparable loss or damage, and proof that a receiver is necessary for the protection of the parties to the action and their interests. *Groh v. Halloran*, 86 A.D.2d 30 (1st Dep't 1982); LeBoyer v. Steinleger, 141 N.Y.S.2d 847, 849-50 (Sup. Ct. N.Y. Co. 1954) (when plaintiff seeks the appointment of a receiver, "[t]he proof must be clear and convincing before such a drastic remedy is applied in advance of trial"). In general, "courts of equity exercise extreme caution in appointing receivers *pendent lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits." *See* Groh at 33.

In *B'hidur v 13th Ave. Seforim ONC.*, 2018 N.Y. Misc. LEXIS 3386, 2018 NY Slip Op 31916(U) (Sup. Ct. Kings Co. 2018), this Court denied a motion for the appointment of a temporary receiver and held:

> Courts do proceed with "extreme caution" in determining whether to appoint a temporary receiver because of the drastic incursion it imposes on the defendant's interests prior to determination of the underlying action on the merits. *Hahn v. Garay, 1976, 54 AD2d 629, 387 NYS2d 430 (1st Dep't).* The appointment must be "necessary" to protect the property from waste, dissipation or disappearance. *In re Armienti, 2003, 309 AD2d 659, 661, 767 NYS2d 2, 4 (1st Dep't); Nelson v. Nelson, 99 AD2d 917, 918, 473 NYS2d 40, 41 (3d Dep't).* Thus, courts require clear and convincing evidence of the danger of irreparable loss or damage. *See, e.g., McBrien v. Murphy, 1989, 156 AD2d 140, 548 NYS2d 186 (1st Dep't).* **They [*3] are particularly hesitant to appoint a receiver with respect to a profitable, ongoing business.** See, e.g., Martin v. Donghia Associates, Inc., 1980, 73 AD2d 898, 424 NYS2d 222 (1st Dep't). [emphasis supplied]

In Aaron v. Krauss, 23 Misc.3d 1115(A), 885 N.Y.S.2d 710 (Sup. Ct. Nassau Co. 2009) the Court declined a members' application for the appointment of a receiver regarding an LLC engaged in real estate management and held:

> CPLR §6401 provides that, upon motion of a person having an apparent interest in property which is the subject of the action, a [***12] temporary receiver may be appointed "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed". The law is well-settled that appointment of a receiver is a drastic remedy. *Secured Capital Corp. of NY v Dansker*, 263 AD2d 503, 694 NYS2d 409 (2nd Dept. 1999). **There must be a clear and convincing showing that the property in question is in danger of being lost**. *Secured Capital Corp. of NY v Dansker, supra.* In the absence of showing that properties and assets are in danger of dissipation, there is no basis to appoint a receiver. *Cf., Hahn v Garay, 54 AD2d 629, 387 NYS2d 430* (1st Dept. 1976). The remedy can only be invoked where the moving party has made a "clear evidentiary showing of the necessity for conservation of the property and protection of the interests of the movant". *DaSilva v DaSilva, 225 AD2d 513, 638 NYS2d 771 (2nd Dept. 1996)*; *Lee v 183 Port Richmond Ave. Realty Inc., 303 AD2d 379, 755 NYS2d 664 (2nd Dept 2003).* In the case at bar, plaintiff only submits the affirmation of counsel, with no personal knowledge of

> the facts, that contains no allegations of any "irreparable loss" or "material injury" to the properties owned ... **There are no allegations that expenses are not being paid or that the properties are in jeopardy**. In essence, plaintiff complains that the defendants are continuing to do business and that he is being denied information and participation in the decision making process, but his conclusory statements that the assets are being "diverted and wasted" has not been demonstrated to the Court. [emphasis supplied]

The Estate has not come close to establishing a "danger of irreparable loss or damage" or that a receiver is necessary to prevent such loss or damage, let alone provided clear proof of the same. Similarly to Aaron v. Krauss, there are no allegation's that expenses are not being paid or that the properties are in jeopardy. The allegations in the Petition questioning certain rentals and loans are of a nature that can be determined and settled through an accounting that this Court granted (Ex. K). The Petition does not allege that the LLCs are in legal, financial, or physical danger, nor does it allege any action being taken by the LLCs that would result in imminent and irreparable harm. Moreover, since the Administrator first threatened the appointment of a receiver on August 21, 2019 (Ex. I), Respondents have more that adequately managed and maintained the Buildings. To this extent, the LLCs are current with their mortgage and tax obligations. Ex. P. The LLCs have paid all the utility bills in connection with the Buildings – for the thirty years there has not been one lien placed against any of the Buildings Ex. Q. Respondents have properly registered and enforced the collection of the rents. Exs. N and R. **The LLCs own 92 apartments and only 8 have rent balance of over two months**. Ex. R. Moreover, the apartments are properly maintained. There have only been 21 complaints and 3 HPD violations in the last 12 months. Ex. O. In fact this is impeccable as the **average age of the Buildings is approximately 80 years old**.

The Respondents are also growing the LLC real estate portfolio by using the profits from 50 Westminster Road to finance the 263 East 9th Street Project.

Accordingly, the Motion does not satisfy the requirements for the appointment for a temporary receiver pursuant to CPLR 6401, and thus the Administrator's application for such relief should be denied.

RESPONDENTS' CROSS-MOTION TO DISMISS
THE PETITION SHOULD BE GRANTED

The Petition fails to state a claim for dissolution and the ancillary relief that it seeks with respect to the LLCs. Accordingly, the Court should dismiss the Petition pursuant to CPLR 3211(a)(1) and CPLR 321(a)(7) with prejudice.

Although a motion to dismiss is generally decided on the allegations of the petition, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." Caniglia v. Chi. Tribune-N.Y. News Syndicate, 204 A.D.2d 233, 233-34 (1st De't 1994). "Factual allegations presumed to be true on a motion pursuant to CPLR 3222 may properly be negated by affidavits and documentary evidence." Wilhelmina Models, Inc. v. Fleisher, 19 A.D.2d 267, 269 (1st Dep't 2005). When a defendant submits evidence, a motion to dims under CPLR 3211(a)(1) "should be granted where the essential facts have been negated beyond substantial questions by the affidavits and evidentiary matter submitted." Biondi v. Beekhman Hill House Apt. Corp. 257 A.d2d 76, 81 (1st Dep't 1999). Similarly, a motion to dismiss should be granted under CPLR 3211(a)(7) where "the plaintiff has not stated a claim cognizable at law" or where "a well-pleaded cognizable claim is flatly rejected by the documentary evidence." Basis

Yield Alpha Fund (Mater) v. Goldman Sachs Grp. Inc. 115 A.D.3d 128, 134-35 (1st Dep't 2014).

POINT I

THE ESTATES' 50% MEMBERSHIP OF THE LLC PRECLUDES AN AWARD OF COMMON LAW DISSOLUTION

The Administrator's first cause of action for common law dissolution should be summarily dismissed because the Estate is not a minority member of any of the LLCs. "The remedy of common law dissolution is available only to minority shareholder who accuse the majority shareholders and/or the corporate officers or directors of looting the corporation and violating their fiduciary duty." Stenberg v. Osma, 181 A.D.2d 897, 897-897-898, 582 N.Y.S.2d 206 (2nd Dep't 1992), *appeal dismissed* 80 N.Y.2d 892, 587 N.Y.S.2d 902 (1992). Similarly to the Estate's membership interest in all the LLCs, the petitioner in Stenberg, had a 50% interest in the subject corporation and requested an equitable dissolution. The Appellate Division affirmed the Supreme Court's holding denying such relief and held:

> **the remedy of common-law dissolution is available only to minority shareholders** who accuse the majority shareholders and/or the corporate officers or directors of looting the corporation and violating their fiduciary duty. **Here, both Osman and Sternberg are each 50% shareholders, and they constitute all of the officers and directors of Long Island Paneling Centers, Inc., with the result that neither is qualified to request common-law dissolution**. (emphasis supplied) *Id.* at 898.

Inasmuch as there is no dispute that the LLCs are 50% members of the LLCs (Petition Para. 22) and are not minority members of the LLCs - the Estate is not "qualified to request common-law dissolution." In any event, Respondents are not looting the LLCs. As demonstrated above Respondents are collecting rent and using it to pay all the Buildings' expenses. To the extent there is a profit they are causing it to finance the construction of the 263 East 9th Street Project. With respect to the questioning of certain rentals and loans – that can be determined and settled through an accounting that was granted by this Court (Ex. K). The Administrator may also seek to challenge certain transactions made by the Respondents under LLCL § 411. This law allows an LLC to void contracts entered into between it and an interested manager, or another limited liability company in which a manager has a substantial financial interest, unless the manager can prove the contract was fair and reasonable. However such allegations do not support dissolution under LLCL § 411. *See* In Matter of 1545 Ocean Ave., LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2nd Dep't 2010).

Moreover, common law dissolution is inapplicable to an LLC. In Matter of 1545 Ocean Ave., LLC, court reviewed the legislature history of the LLCL and held:

> The Limited Liability Company Law came into being in 1994. Many of its provisions were amended in 1999 (L 1999, ch 420) to track changes in federal tax code treatment of such entities. Such amendments included changes in how the withdrawal of a member was to be treated (Limited Liability Company Law § 606) and events of dissolution which relate back to the operating agreement (Limited Liability Company Law § 701).
>
> Although various provisions of the Limited Liability Company Law were amended, Limited Liability Company Law § 702 was neither modified nor amended in 1999. In declining to amend Limited Liability Company Law § 702, **the Legislature can only have intended the dissolution standard therein provided to remain the sole basis for judicial dissolution of a limited liability company**. [citations omitted; emphasis supplied]

See also Matter of Jeffrey M. Horning, 12 Misc. 3d 402, 816 N.Y.S.2d 877 (Monroe Co. 2006) ("Dissolution in the absence of an operating agreement can only be had upon satisfaction of the standard of [LLCL] section 702").

As the Appellate Division Second Department held that dissolution standard provided in LLCL § 702 is the "**sole basis** for judicial dissolution of a limited liability company" [emphasis supplied] the doctrine of common law dissolution is not available to the Administrator. Consequently, the first cause of action for common law dissolution should be dismissed.

POINT II

STATUTORY DISSOLUTION OF THE LLCS IS UNWARRANTED

The operating agreements of the LLCs, to the extent that they exist, are silent as to dissolution. Petition Exs. J and K. In the absence of a dissolution provision in an operating agreement, LLCL § 702 is the applicable default provision. See eg. Matter of 1545 Ocean Ave. LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2nd Dep't 2008); Matter of Jeffrey M. Horning v. Horning Constr. LLC, 12 Misc. 3d 402, 816 N.Y.S.2d 877 (Sup Ct. Monroe Co. 2006). LLCL § 702 gives the Court the discretion to order the dissolution of a limited liability company only when "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." Dissolution is a "drastic remedy," one that is rarely justified. In the Matter of Dissolution of 1545 Ave. LLC, 72 A.D.3d 121, 131 (2d Dep't 2010); In the Application of Belardi-Ostroy, Ltd. No. 654327/2015, 2016 N.Y. Misc. LEXIS 1468, at *12-13 (N.Y. Sup. Ct. Apr. 14, 2016); Goldstein v. Pikus, No. 651209/2014, 2015 N.Y. Misc. LEXIS 2849, at *45 (N.Y. Sup. Ct. July 20, 2015).

Courts have interpreted the "not reasonably practicable" standard narrowly "reflecting legislative deference to the parties' contractual agreement to form and operate a limited liability company." Matter of Jeffrey M. Horning v. Horning Constr. LLC *citing* Dunbar Group LLC v. Tignor, 267 Va 361, 367, 593 S.E.2d 216 (2004). In order to state a claim for dissolution, 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) "[that] continuing the entity is financially unfeasible." Doyle v. Icon, LLC, 103 A.D.3d 440 (1st Dep't 2013); 1545 Ocean Ave. 72 A.D.3d at 131. Moreover, the law is clear that allegations of exclusion from management, oppressive actions, or breach of fiduciary duty by the managing members are insufficient to state a claim for the dissolution of an LLC. Matter of Kassab v. Kassab, 137 A.D.3d 1135, 1137 (2d Dep't 2016) (petitioner's "**allegations of oppressive conduct and the respondent's efforts to exclude him for the management of the LLC ...if true, would not establish that the 'management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible.**'") [emphasis supplied]; Doyle, 103 A.D.3d at 440 (plaintiff's allegations that he has been "systematically excluded from the operating and affairs of the company" were insufficient; Widewaters Herkimer Co., LLC v. Aiello, 28 A.D.3d 1107, 1108 (4th Dep't 2006) (petitioners failed to plead a claim for dissolution by alleging "the majority members breached their fiduciary duty to defendants and engaged in unlawful or oppressive conduct towards them"); Goldstein, 2015 Misc. LEXIS 2849, at *47 (breach of fiduciary duty insufficient"); Matter of Marciano, No. 001264/2006, 2007 N.Y. Misc. LEXIS 8962 (Sup. Ct. Monroe Co. 2007) (allegations of a member transferring a company asset to a third party for less than fair value doe not warrant dissolution).

In Kassab v. Kasab, No. 14428/2013, 2014 N.Y. Misc. LEXIS 6449 (Sup. Ct. Queens Co. 2014), a case directly on point to the matter herein, the parties were members of an LLC that was engaged in the management of certain real estate. The operating agreement in Kassab, similarly to the operating agreements herein, stated that the company was "formed for the purpose of engaging in any lawful act or activity for which limited liabilities companies may be formed under the Limited Liability Company Law and engaging in any and all activities necessary or incidental to the foregoing." *Id.* at *10. One of the members of the LLC in Kassab, petitioned for the dissolution of the subject LLC because he alleged "that he has been systematically excluded from operation of [the LLC] by the respondent, and that the respondent has refused to consider selling the real property owned by [the LLC]." *Id.*

The Court granted respondent's motion pursuant to CPLR 3211(a)(7) to dismiss the cause of action for dissolution and held:

> Petitioner's second cause of action seeks judicial dissolution of Mall pursuant to Limited Liability Company Law § 702. To successfully petition for the dissolution of a limited liability company under the "not reasonably practicable" standard imposed by Section 702, the petitioning member must demonstrate, in the context of the terms of the articles of incorporation of the operating agreement, the following: (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 [citations omitted]. **Disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve a limited liability company that is operated in a manner within the contemplation of it purposes and objectives as defined in its articles of organization**

> **and/or operating agreement**. It is only where discord and disputes [*10] by and among the members are shown to be inimicable to achieving the purpose of the limited liability company will dissolution under the 'not reasonably practicable' standard imposed by Section 702 be considered by the court to be an available remedy to the petitioner. **Where the purposes for which the limited liability company was formed are being achieved and its finances remain feasible, dissolution pursuant to Limited Liability Company Law § 702 should be denied**.
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> These allegations do not show that "the management of the entity is [*11] unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" [citations omitted] **Indeed, the allegations show that the company has been able to carry on its business and the allegations that the properties jointly generate income of $1,000,000.00 and that respondent failed to award him distributions equal to 40% of the net income, demonstrates that the company is financially feasible**. As to petitioner's assertion that the company is not capable of sustaining itself financially, this claim is not supported by financial accounts attached to the original petition, and petitioner's evidentiary submissions are admittedly based upon incomplete financial data. In any event, such claims do not rise to the level of financial infeasibility that is required for dissolution under Limited Liability Company Law § 702. [citations omitted; emphasis supplied]

Similarly thereto, in Matter of 1545 Ocean Ave. LLC, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2^{nd} Dep't 2010), a member of an LLC also engaged in real estate, petitioned the Court for dissolution under LLCL Sec. 702. The petitioner alleged that dissolution was warranted because of "the parties' failure to hold regular meetings, failure to achieve quorums, and deadlock". In reversing the trial court's order and dismissing the petition for dissolution the Appellate Division held:

> ...Limited Liability Company Law § 702 is clear that unlike the judicial dissolution standards in the Business

Corporation Law and the Partnership Law, the court must first examine the limited liability company's operating agreement to determine, in light of the circumstances presented, whether it is or is not "reasonably practicable" for the limited liability company to continue to carry on its business in conformity with the operating agreement. Thus, the dissolution of a limited liability company under Limited Liability Company Law §702 is initially a contract-based analysis.

* * *

Where an operating agreement, such as that of 1545 LLC, does not address certain topics, a limited liability company is bound by the default requirements set forth in the Limited Liability Company Law.

* * *

It has been suggested that judicial dissolution is only available when the petitioning member can show that the limited liability company is unable to function as intended or that it is failing financially [citations omitted]. Neither circumstance is demonstrated by the petitioner here. On the contrary, the purpose of 1545 LLC was feasibly and reasonably being met.

The "not reasonably practicable" standard for dissolution of limited liability companies and partnerships has been examined in other jurisdictions. In Delaware, the Chancery Court has observed, "**Given its extreme nature, judicial dissolution is a limited remedy that this court grants sparingly**" (Matter of Arrow Inv. Advisors, LLC, 2009 Del Ch LEXIS 66, *8, 2009 WL 1101682, *2 [2009]). In

* * *

The 1545 LLC operating agreement, however, is silent as to the issue of manager conflicts. **Thus, the only basis for dissolution can be if 1545 LLC cannot effectively operate under the operating agreement to meet and achieve the purpose for which it was created**. In this case, that is the development of the property which purpose, despite the disagreements between the managing members, was being met.

* * *

> After careful examination of the various factors considered in applying the "not reasonably practicable" standard, we hold that for dissolution of a limited liability company pursuant to Limited Liability Company Law § 702, the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, 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.
>
> Dissolution is a drastic remedy [citations omitted] Although the petitioner has failed to meet the standard for dissolution enunciated here, there are numerous other factors which support the conclusion that dissolution of 1545 LLC is inappropriate under the circumstances of this case. First, the dispute between King and Van Houten was not shown to be inimicable to achieving the purpose of 1545 LLC…
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> * * *
>
> Second, there is a remedy available in the Limited Liability Company Law to regulate Van Houten's conduct. Limited Liability Company Limited Liability Company Law § 411 permits a limited liability company to avoid contracts entered into between it and an interested manager, or another limited liability company in which a manager has a substantial financial interest, unless the manager can prove the contract was fair and reasonable. …In any event, a fair reading of Limited Liability Company Law § 702 demonstrates that an application to dissolve 1545 LLC does not flow from a claim under Limited Liability Company Law § 411.

Here, the subject operating agreements are silent as to dissolution. Petition Exs. J and K. Thus, the LLCs are bound by the default dissolution provision set forth in LLCL Sec. 702. *See* <u>Matter of 1545 Ocean Ave. LLC</u> at 129. Pursuant to LLCL Sec. 702 for dissolution of a limited liability company pursuant to Limited Liability Company Law § 702, the Administrator must establish, in the context of the terms of the operating agreement 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. The Administrator has not demonstrated either circumstance.

To the extent the LLCs have operating agreements, the stated purpose of the LLCs in such operating agreements is to engage "in any lawful act or activity for which limited liability companies may be formed under the LLC." To the extent that the LLCs do not have operating agreements, there is no dispute that the LLCs purpose is to engage in the management of real estate. The Respondents have undisputedly continued to realize such purposes. As demonstrated above, Respondents have more than adequately maintained the Buildings and are growing the LLCs real estate portfolio. With respect to the LLCs' financial feasibility, the documents annexed hereto, and even the Administrator's accountant's affidavit annexed to the Motion, demonstrate (1) that the buildings owned by the LLC generate a yearly income of over $1,000,000 , (2) that the LLCs are current with all their debt obligations, and (3) the LLCs are generating enough income to finance a new construction project.

The Administrator argues for dissolution of the LLCs based upon member animosity, disputes, deadlock, fraud, breach of fiduciary duty, and systematic exclusion. None of these allegations warrants the "drastic remedy of dissolution". 1545 Ocean Ave., 72 A.D.3d at 131. These allegations, as demonstrated above do not support dissolution because they do not challenge the LLCs ability to achieve its purpose or their financial feasibility.

Moreover, the Administrator should not complain about the strict requirements of dissolution under the LLCL because it took full advantage of being an LLC by paying

zero taxes with respect to the assets owned by the LLCs. Ex. J. "[T]he limitations imposed by the new default provisions enacted after promulgation in late 1996 of the IRS 'check the box' regulations were intentional and designed for estate and gift tax purpose '[t]o minimize the tax value of an ownership interest' in an LLC to reflect **(1) that the interest is difficult to liquidate, and (2) that purchaser will generally pay less for illiquid positions**. [emphasis supplied]" Horning Constr. LLC at *410. Consistent thereto, the Administrator took advantage of LLC ownership by swearing in her affidavit in support the application for letters of administration that 50% of the Estate's ownership in the LLCs that own 92 apartments in Brooklyn and two other buildings is only valued at $6,000,000 and therefore the Estate does not have any tax obligations with respect to the LLCs. Ex. J.

Accordingly, the Petition does not even come close to satisfying the requirements for the appointment of a temporary receiver pursuant to CPLR 6401, and thus Petitioners' application for such relief should be denied.

POINT III

ADMINISTRATOR IS NOT ENTITLED TO AN EQUITABLE BUYOUT

Pursuant to the governing operating agreements and the Limited Liability Company Law, the Estate is not entitled to an equitable buyout. Kassab v. Kasab, 137 A.D.3d 1138, 27 N.Y.S.3d 680 (2nd Dep't 2016). In Kassab, petitioner and respondent had respectively a 25% and a 75% interest in the subject limited liability company. Petitioner moved, *inter alia*, pursuant to Sec. 702 for the judicial dissolution of the company and an equitable buyout of his interest in the LLC. In denying such relief the Appellate Division held:

> since this Court has determined, in a companion appeal, that the petitioner failed to state a cause of action for the judicial dissolution of the LLC pursuant to Limited Liability Company Law § 702, there is no basis to invoke the equitable remedy of a buyout (see *Matter of Kassab v Kasab*, 137 AD3d 1135, 29 NYS3d 39, 2016 N.Y. App. Div. LEXIS 2086, 2016 NY Slip Op 02089 [2016]]).

As demonstrated above, the Administrator is not entitled to the dissolution of the LLCs. Consequently, the Administrator is not entitled to invoke the equitable remedy of a buyout.

Moreover, in July 2019, the Administrator previously moved the Queens County Surrogates' Court for similar relief under File No. 2018-2952/C. In this proceeding, the Administrator sought leave to file a petition seeking to commence a proceeding for turnover to the Estate by David Winiarski 3046 West 22nd Street Properties LLC, D-Win Properties LLC, Homes R Beautiful RE LLC and Park 50 West Properties LLC of the "value of the estates membership interest" in said companies and further the distributions owed by them to the Estate. Ex. H. Essentially, the Administrator was seeking and equitable buyout. The Administrator's Counsel specifically argued that the Surrogate Court had jurisdiction to entertain such application. Ex. F p. 4.

However, the Surrogate Court during oral argument of this application advised Administrator's counsel that it was inclined not to even entertain such petition. After Respondent's argued and fully briefed the application, on August 21, 2019, the Administrator's counsel withdrew the application and advised the Court that it will move for the appointment of a receiver. Ex. I.

The Administrator is blatantly engaging in forum shopping by now seeking the same relief in this Court after such application was already heard in Surrogate's Court.

Based upon the foregoing, the third cause of action for an equitable buyout should be dismissed.

POINT IV

THE ESTATE MAY NOT UNILATERALLY WITHDRAW FROM THE LLCS

Pursuant to the governing operating agreements and the Limited Liability Company Law, the Estate may not withdraw from the LLCs without Respondents' consent. LLCL Sec. 606(a) provides in permanent part, that:

> [a] member may withdraw as a member of a limited liability company only at the time or happening of events specified in the operating agreement and in accordance with the operating agreement. Notwithstanding anything to the contrary under applicable law, unless an operating agreement provides otherwise, a member may not withdraw from a limited liability company prior to the dissolution and winding up of the limited liability company.

Thus, under the statute, a member may withdraw from a LLC only as provided in its operating agreement. If the operating agreement is silent, a member may not withdraw prior to the dissolution of the company. Kasab at *12. Here, the Operating Agreement provide, "[a] member may withdraw from the Company in accordance with the [LLCL]." Therefore, as there is no dissolution of the LLCs, the Estate is not entitled to withdraw from the LLCs.

CONCLUSION

For the foregoing reasons the Court should deny the Motion and dismiss the first four causes of action set forth in the Petition.

Dated: Brooklyn, New York
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Myron Winiarsky
1030 Ocean Avenue, Suite 1E
Brooklyn, New York 11226
718 421 0758
Ronnywiniarsky@gmail.com
Attorney for Respondents