SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of

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, D-WIN PROPERTIES LLC, HOMES R BEAUTIFUL RE LLC, and PARK 50 WEST PROPERTIES LLC,

Petitioner,

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.

Index No.:

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HER VERIFIED PETITION FOR DISSOLUTION AND OTHER RELIEF

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Petitioner, RENA PACHTER ("Petitioner"), in her representative capacity as Administrator of the ESTATE OF JUDITH LINDENBERG ("Estate"), 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 (collectively, the "Companies"), by and through her attorneys, Goldberg Weprin Finkel Goldstein LLP, respectfully submits this memorandum of law in support of her Verified Petition for dissolution of the Companies and other relief. As explained herein, summary disposition should be granted pursuant to CPLR 409(b) on the First, Second, Third, and Fourth Causes of Action of the Verified Petition.

I. PRELIMINARY STATEMENT

This is a proceeding for dissolution of four limited liability companies holding title to seven real properties in Brooklyn, New York. The Estate is successor to the rights of Judith Lindenberg ("Ms. Lindenberg"), who, at her death, was a 50% member of each of the Companies. Respondents, DAVID WINIARSKI, ESTHER WINIARSKI, and MYRON WINIARSKY (collectively, "Respondents"), are united in interest as the Companies' other 50% members.

Dissolution is warranted based the misappropriation, forgery, perjury, fraud, self-dealing, extortion, spoliation of records, and other gross malfeasance committed by Respondents in their role as the Companies' management.

Following Ms. Lindenberg's death, Respondents usurped control over the Companies and excluded her Estate from the Companies' affairs. Respondents rejected the Estate's membership rights, lied about the Estate's interests, forged Ms. Lindenberg's signature, and refused to furnish basic information regarding the Companies' finances. When the Estate exerted its rights to

documents and information, Respondents lied under oath, disregarded process and court orders, provided false and falsified information, and even intentionally spoliated all of the Companies' rent ledgers.

It is now clear what Respondents have been so desperate to hide. As shown by the affidavit of forensic accountant, Glenn S. Liebman, CPA, Respondents misappropriated over $6 million from the Companies by looting over $1 million of the Companies' rental income and transferring nearly $5 million to themselves in the form of interest-free "loans."

Respondents' looting of the Companies is just the beginning. Perhaps even more outrageously, Respondents have engaged in a persistent campaign of harassing and extortionate conduct towards the Estate's representatives—including making illicit threats and commencing vexatious lawsuits—in a desperate effort to avoid disclosure of the Companies' financial records and to keep the Companies for themselves.

Under the doctrine of equitable dissolution, dissolution of the Companies is necessary and proper due to Respondents' egregious misconduct. Dissolution is also warranted by statute based on managerial dysfunction and Respondents' inability to further the interests of the Companies. Upon dissolution, the Estate is entitled to the fair value of its membership interests. As explained herein, dissolution should be granted to ensure the Estate realizes the reasonable economic expectations of its interests and to condemn Respondent' misbehavior.

II. FACTS

The facts summarized here are fully set forth in the Verified Petition and the Affidavit of expert forensic accountant Glenn S. Liebman, CPA, submitted herewith.

The Companies hold title to several multi-family residential properties in Brooklyn, New York (the "Properties"). Ms. Lindenberg, on her death, was a 50% member of each of the

Companies. *See* Exhibit B.[1] Respondents are the Companies' other members and control the Companies and Properties as part of their broad real estate portfolio.

While in control of the Properties, Respondents misappropriated over $1 million by siphoning the Companies' cash rental income to themselves. Respondents also engaged in self-dealing by having the Companies transfer nearly $5 million to their own benefit without any legitimate business purpose.

Further, under Respondents' management, the Properties have received numerous building code violations and tenant complaints, including for indications of infestation, mold, lack of heat and hot water, and other safety issues. *See* Exhibit GG. Respondents have also refused to further the interests of one of the Companies by unjustifiably halting construction of a new development, thus leaving that Company dormant without income. *See* Exhibits EE and FF.

After Ms. Lindenberg's death, Respondents wholly excluded her Estate from participation in the Companies' affairs. In the days and months following Ms. Lindenberg's death, Respondents forged her signature to maintain unilateral control over the Companies. *See* Exhibit O. When the Estate sought to understand and claim its rights as Ms. Lindenberg's successor, Respondents lied about the Estate's interests. *See* Exhibits P and Q.

Even though the Estate has a right to an accounting of the Companies' income and expenditures, as well as a right to obtain documents regarding the Companies (including pursuant to SCPA § 2103), Respondents outright refused to provide an accounting or pertinent documents. Indeed, respondents refused to cooperate with disclosure, *see* Exhibits S through X, including by simply leaving in the middle of a deposition, *see* Exhibit Z and AA. Instead, Respondents provided false and falsified disclosure and spoliated all of the Companies' rent records. *See* Exhibit Y.

[1] Exhibits cited to herein refer to those annexed to the Verified Petition.

Outrageously, Respondents have even engaged in a sustained campaign of harassment, extortion, and vexatious conduct against the Estate and its representatives. First, one of the Respondents, as attorney for the other Respondents, contacted the Petitioner and the Estate's representative over 25 times (at one point 9 times in a day) even after he was asked to desist, in direct violation of Rule 4.2 of the New York Rules of Professional Conduct—which prohibits attorneys from communicating with a represented party. *See* Exhibit BB. Second, even though Respondents are not beneficiaries under Ms. Lindenberg's will, or in any way interested in the Estate, Respondents proffered a fraudulent affidavit to the Surrogate's Court (based on improper conversations with the Estate's former attorney) in an attempt to upend administration of the Estate by challenging Ms. Lindenberg's will. *See* Exhibit CC. One of the Respondents, as attorney for the other Respondents, then pressed the supposed criminal implications of their accusations in an effort to curtail the Estate's civil efforts. Finally, Respondents have commenced baseless proceedings claiming injury from the probating of Ms. Lindenberg's will, including claims against the Estate's beneficiaries and the notary who notarized the will.

Respondents' conduct evinces a gross disregard of their heightened duties as fiduciaries to the Companies and as partners to the Estate. Without robust judicial intervention, the Estate will be wholly deprived of the economic value of its membership interests, and so the relief sought in the Verified Petition should be granted.

ARGUMENT

I. STANDARD ON A PETITION FOR DISSOLUTION

This is a hybrid special proceeding and action for dissolution and other relief. *See Toledano v. Eliyahu*, 102 A.D.3d 879, 879 (2d Dep't 2013).[2] Petitioner seeks summary disposition pursuant to CPLR 409(b) on the Verified Petition's First, Second, Third, and Fourth Causes of Action with respect to dissolution of the Companies, withdrawal, and entitlement to equitable buyout of the Estate's membership interest in the Companies.

In a special proceeding, such as one for the judicial dissolution of an LLC, this Court is authorized under CPLR 409(b) to "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." *TNT Petroleum, Inc. v. Sea Petroleum, Inc*., 72 A.D.3d 694, 695 (2d Dep't 2010). Summary disposition under CPLR 409(b) is therefore "analogous" to summary judgment under CPLR 3212. *People ex rel. Robertson v. New York State Div. of Parole*, 67 N.Y.2d 197, 203 (1986). Like on a motion for summary judgment, the petitioner has the initial burden of demonstrating entitlement to relief. Once the petitioner states a prima facie case, the burden shifts to the respondent to raise an issue of fact. If triable issues of fact are raised, then "an evidentiary hearing must be held." *Hernandez v. Motor Vehicle Acc. Indemnification Corp*., 120 A.D.3d 1347, 1349 (2d Dep't 2014). If the petitioner satisfies its prima facie burden, and, in opposition, the respondent fails to raise a triable issue of fact, summary disposition should be granted in favor of the petitioner. *See TNT Petroleum, supra*, 72 A.D.3d at 695.

Under this standard, summary disposition should be granted decreeing dissolution of the Companies and the Estate's entitlement to withdrawal and equitable buyout. The Court should

[2] Joinder of a special proceeding with an action for damages is proper under CPLR 601(a). *See In re Loukoumi, Inc*., 285 A.D.2d 595, 595 (2d Dep't 2001); *see also* CPLR 103(c).

then set a hearing to determine the fair value of the Companies in order to assess the amount due to the Estate.

II. THE ESTATE IS A MEMBER OF THE COMPANIES

Ms. Lindenberg was, at the time of her death, a 50% member of each of the Companies. Upon her death, the Estate succeeded to her interests by operation of LLCL § 608. *See Crabapple Corp. v. Elberg*, 153 A.D.3d 434 (1st Dep't 2017).

First, the operating agreements for PARK 50 WEST PROPERTIES LLC and D-WIN PROPERTIES LLC confirm that Ms. Lindenberg was a member of those Companies. *See* Exhibits J and K.

Second, Respondents have admitted and acknowledged that Ms. Lindenberg, at the time of her death, was member of the Companies. In a sworn statement, Respondents, David and Esther Winiarski, admitted that Ms. Lindenberg was, at the time of her death, a 50% member of each of the Companies. *See* Exhibit B. Such a statement in a prior action constitutes a binding judicial admission. *See New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16, 25 (1st Dep't 2016); *Morgenthow & Latham v. Bank of New York Co., Inc*., 305 A.D.2d 74, 78 (1st Dep't 2003); *Clifton Country Rd. Assocs. v. Vinciguerra*, 252 A.D.2d 792, 793 (3d Dep't 1998).

Third, Respondent Myron Winiarsky (acting as attorney for the Companies) wrote in a judicial filing, "there is no dispute that the Estate is a 50% member of the Companies." *See* Exhibit C. Such a statement constitutes a judicial admission conclusively binding upon Respondents. *See Rosario v. Montalvo & Son Auto Repair Ctr., Ltd*., 149 A.D.3d 885, 886 (2d Dep't 2017) ("a fact conceded by Montalvo's counsel in a statement…constituted a judicial admission"); *DiCamillo v. City of New York*, 245 A.D.2d 332, 333 (2d Dep't 1997) ("statement

in the letter from the plaintiffs' attorney…was an admission…against the plaintiffs for the truth of the matter asserted therein"); *Pok Rye Kim v. Mars Cup Co*., 102 A.D.2d 812 (2d Dep't 1984).

III. COMMON LAW DISSOLUTION IS WARRANTED BECAUSE OF RESPONDENTS' EGREGIOUS MALFEASANCE

a. Overview of Common Law Dissolution

Common law dissolution, also known as equitable dissolution, is a well-settled doctrine entitling members of LLCs to dissolution when the LLC's management has engaged in certain "egregious conduct" towards the LLC or other members. *See Lemle v. Lemle*, 92 A.D.3d 494, 500 (1st Dep't 2012).

Courts have recognized three categories of conduct as warranting common law dissolution, all of which are applicable here. First, common law dissolution is warranted where management has engaged in looting or other wrongful self-enrichment. *See Leibert v. Clapp*, 13 N.Y.2d 313 (1963) (looting); *Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dep't 2012) (looting); *Lemle*, *supra*, 92 A.D.3d 494 (payment of excessive compensation, reimbursement for personal expenses, and cancellation of personal debts); *Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) ("dissipation" of corporate assets).

Second, common law dissolution is warranted when the managers or directors of an entity are continuing the entity for the sole benefit of those in control, for example, by engaging in oppression or freezing out of minority shareholders. *See Leibert, supra,* 13 N.Y.2d 313; *Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540 (1st Dep't 2013) (freeze out); *Ferolito, supra,* 99 A.D.3d 19 (minority oppression); *Leight v. 551 Fifth Ave., Inc*., 18 A.D.2d 982, 982 (1st Dep't 1963) ("managing and controlling stockholders are exploiting the corporation for their private benefit"); *Gaines v. Adler*, 15 A.D.2d 743, 743 (1st Dep't 1962) (corporation was "being exploited exclusively for the private benefit of its managing and controlling stockholders").

Third, common law dissolution will be granted in cases of other egregious misconduct violative of management's fiduciary duties. *See Yu v. Yu*, Index No. 656611/2016, 2018 WL 3928392, *4-5 (Sup Ct. N.Y. Co. Aug. 16, 2018); *Cortes v. 3A N. Park Ave Rest Corp*., 46 Misc. 3d 670, 699 (Sup. Ct. Kings Co. 2014) (*quoting Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63 (1984)).

The twin aims of common law dissolution are conduct-regulation and compensation. The former, punitive rationale is directed at "curing the misconduct" and "preventing further misuse" by errant fiduciaries. *Leibert, supra*, 13 N.Y.2d at 315–16; *Lewis v. Jones*, 107 A.D.2d 931, 932 (3d Dep't 1985). The compensatory rational is directed at realizing the economic expectations of aggrieved shareholders. *See Leibert, supra*, 13 N.Y.2d at 315–16 (curing directors' misconduct is insufficient without also addressing compensatory inequity); *Lewis, supra*, 107 A.D.2d at 932 ("remedy which will assure the recovery of his personal investment in defendant corporations and prevent further misuse by the individual defendants who now have exclusive control and management of the corporations").

Courts have applied equitable dissolution as necessary to ensure that the strictures of statutory dissolution and the inadequacies of the derivative action do not leave a shareholder "without an adequate remedy" to obtaining the economic expectations of its shares—"a circumstance abhorrent to the common law." *Lewis, supa*, 107 A.D.2d 931; *see also Leibert, supra*, 13 N.Y.2d at 317 ("it would be inadequate and, therefore, inappropriate to remit the minority shareholders to the exclusive remedy of a derivative suit.").

Here, as explained below, Respondents have engaged in egregious conduct unfairly devaluing the Estate's membership in the Companies. Dissolution is warranted both to ensure the Estate is not deprived of the economic expectations of its membership, and to rebuke

Respondents' misbehavior.

b. Respondents' Looting, Misconduct, and Oppression Warrant Dissolution

i. Looting

Management's campaign of systemic embezzlement provides the archetypal situation warranting common law dissolution. *See Leibert*, *supra*, 13 N.Y.2d 313; *Ferolito*, *supra*, 99 A.D.3d 19; *Lemle*, *supra*, 92 A.D.3d 494; *Cortes*, *supra*, 46 Misc. 3d at 699-700. As shown in the affidavit of forensic accountant Glenn S. Liebman, CPA, Respondents looted the Companies out of over $1 million and transferred nearly $5 million to their benefit in the form of undocumented interest-free "loans." The remedy for Respondents' misappropriation is dissolution.

ii. Oppression and Freeze-Out

Oppression and freeze out here are clear. Respondents have usurped management, excluded the Estate from involvement in the Companies' affairs, failed to notify the Estate of any meetings or votes of members, denied the Estate access to the books and records of the Companies, and refused to provide an accounting of the Companies' income and expenditures. *See* LLCL §§ 402 (voting rights), 403 (meetings of members), 405 (notice of meetings), 1102(b) (access to records); *Mullin v. WL Ross & Co. LLC*, 173 A.D.3d 520, 522 (1st Dep't 2019) (accounting). Furthermore, Respondents have engaged in harassing, extortionate, and vexatious conduct in order to oust the Estate and pressure the Estate to compromise its rights. All of these acts constitute freezing out sufficient to warrant dissolution. *See Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540, 540 (1st Dep't 2013); *Matter of Piazza v. Gioia*, Index No. 5786/2015, 2016 WL 4000625, *10-11 (Sup. Ct. Kings Co. Jul. 26, 2016). Further, Respondents have completely excluded the Estate from participation in the Companies' profit-sharing—while continuing to

reap benefits from the Companies for themselves. Nonpayment of distributions warrants dissolution. *See Gjuraj, supra*, 110 A.D.3d at 540; *Ferolito, supra*, 99 A.D.3d at 23.

All of Respondents' actions constitute oppression and total exclusion of the Estate from the Companies. Because Respondents are continuing the Companies "solely for their own benefit," *Leibert, supra*, 13 N.Y.2d at 316, equitable dissolution is warranted.

iii. Gross Misconduct

Dissolution is warranted where the managers of an entity "have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified" from conducting business in the corporate form. *See Leibert, supra*, 13 N.Y.2d at 317. Common law dissolution is then justified because equity "should act to fill the decisional vacuum created by this disqualification" of the offending directors. *Id*.; *see also Dow v. Beals*, 149 Misc. 631, 632 (Sup. Ct. N.Y. Co. 1933).

Respondents have engaged in gross misconduct towards the Estate and the Companies, thereby disqualifying them from serving as fiduciaries and thus warranting equitable dissolution. *See May v. Flowers*, 106 A.D.2d 873 (4th Dep't 1984); *Kroger v. Jaburg*, 231 A.D. 641 (1st Dep't 1931) (citing acts and threats "directly injurious" to shareholder); *Cortes, supra*, 46 Misc. 3d at 699 (violations of fiduciary duty); *Dow, supra*, 149 Misc. at 632 (violation of "every canon of fair play toward a partner").

Respondents lied to the Estate about the Estate's percent membership interest in the Companies. Respondents refused to provide the Estate an accounting or access to the Companies' books. Respondents even provided false and falsified documents to the Estate, and spoliated the Companies' records. Finally, Respondents have injured the Estate though harassing and extortionate conduct. This behavior, as a whole, constitutes "egregious" misconduct

warranting equitable dissolution.

IV. COMMON LAW DISSOLUTION IS AVAILABLE IN THE LLC CONTEXT IRRESPECTIVE OF STATUTORY DISSOLUTION

a. Overview

Common law dissolution is a well-established equitable remedy available to LLC members irrespective of any statute. *See In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015).[3] As explained more fully below, the Court of Appeals in *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008) ruled that all well-established equitable doctrines for redressing harms by corporate fiduciaries are available in the LLC context unless clearly contravened by the LLC Law. Here, common law dissolution is a well-established equitable remedy and nothing in the LLC Law abrogates an LLC member's right to common law dissolution. Therefore, common law dissolution should be applied in this case.

b. Common Law Dissolution is Long-Established and Widely-Applied

Common law dissolution is a long-recognized, well-established, and widely-applied nonstatutory basis for dissolution of corporate entities. *See Gilbert v. Hamilton*, 29 N.Y.2d 842 (1971) *aff'g* 35 A.D.2d 715 (1st Dep't 1970); *Leibert v. Clapp*, 13 N.Y.2d 313 (1963); *Berger v. Friedman*, 151 A.D.3d 678, 679 (2d Dep't 2017); *Hellenic Am. Educ. Found. v. Trustees of Athens Coll. in Greece*, 116 A.D.3d 453 (1st Dep't 2014); *Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540, 542 (1st Dep't 2013); *Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dep't 2012); *Lemle v. Lemle*, 92 A.D.3d 494 (1st Dep't 2012); *Collins v. Telcoa Int'l Corp*., 283 A.D.2d 128, 132 (2d Dep't 2001); *Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991); *Lewis v. Jones*, 107 A.D.2d

[3] Delaware law in matters of LLC and corporate issues is highly persuasive in New York courts, especially since Delaware's LLC law is substantially the same as New York's. *See Congel v. Malfitano*, 31 N.Y.3d 272, 304 (2018) (looking to Delaware case law for guidance on dissolution issue); *Park v. Song*, 61 Misc. 3d 1047, 1049 n.4 (Sup. Ct. N.Y. Co. 2018) ("New York courts often look to Delaware law for guidance when there is no binding precedent on an issue of corporate law").

931 (3d Dep't 1985); *Leight v. 551 Fifth Ave., Inc*., 18 A.D.2d 982 (1st Dep't 1963); *Gaines v. Adler*, 15 A.D.2d 743 (1st Dep't 1962); *Kroger v. Jaburg*, 231 A.D. 641 (1st Dep't 1931); *Matter of Piazza v. Gioia*, Index No. 5786/2015, 2016 WL 4000625, *10-11 (Sup. Ct. Kings Co. Jul. 26, 2016); *Cortes v. 3A N. Park Ave Rest Corp*., 46 Misc. 3d 670, 698 (Sup. Ct. Kings Co. 2014); *Schlossberg v. Schwartz*, Index No. 14491/2011, 2013 WL 10342914, *10 (Sup. Ct. Nassau Co. Apr. 5, 2013); *Pankin v. Perlongo*, 39 Misc. 3d 1210(A) (Sup. Ct. Kings Co. 2012).

Courts have ancient[4] and inherent equitable power to dissolve juridical entities. *See Barclay v. Barrie*, 209 N.Y. 40, 49 (1913); *Van Alstyne v. Cook*, 25 N.Y. 489, 494–95 (1862) ("Courts of equity have an established jurisdiction in cases of partnership to dissolve the copartnership, to close its affairs and settle all matters involved in the liquidation of its affairs"); *Matter of Davis*, *supra*, 174 A.D.2d at 450-1; *Lennan v. Blakeley*, 273 A.D. 767 (1st Dep't 1947); *Kroger*, *supra*, 231 A.D. 641 (equity may compel dissolution where directors' refusal to dissolve a company amounts to a breach of fiduciary duty); *see also Levant v. Kowal*, 350 Mich. 232, 241 (1957) ("a court of equity has inherent power to decree the dissolution of a corporation").[5] This Court's equitable power of dissolution is derived from the equity jurisdiction vested by the New York Constitution, *see Matter of Schwartzreich*, 136 A.D.2d 642, 643 (2d Dep't 1988) (*citing* N.Y. Const., Art. VI, § 7),[6] as well as the special fiduciary duties

[4] Courts' dissolution powers find a genesis in the ancient common law writs of *scire facias* and *quo warranto*, which were originally intended to challenge dubious royal investitures, and were later applied to dissolve corporate charters and other franchises. *See* Holdsworth, W.S., *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 401-403 (1922); *see also State v. Cortelle Corp*., 38 N.Y.2d 83, 87-9 (1975) (explaining common law origins of dissolution); *Herring v. New York, Lake Erie & W. R. Co*., 105 N.Y. 340, 388 (1887) ("there was nothing in [newly enacted code] which took away from the court of equity the general power which it had always possessed…for the dissolution of corporations…").

[5] This Court's equitable, nonstatutory power to dissolve corporate entities is consonant with its similar equitable power to both disregard a corporate form in veil piercing, *see Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 47 (2018), and to create a corporate form under the *de facto* corporation doctrine, *see Lehlev Betar, LLC v. Soto Dev. Grp., Inc*., 131 A.D.3d 513, 514 (2d Dep't 2015) (despite not meeting statutory requirements under the LLC Law, *de facto* corporation doctrine applied to create LLC).

[6] Inasmuch as this Court's dissolution powers are vested by the New York Constitution, it is questionable whether the legislature could ever divest or supplant the courts' power to dissolve an LLC. *See In re Carlisle Etcetera LLC*,

inherent in corporate associations, *see Kroger*, *supra*, 231 A.D. 641. The unique relationship between the state and juridical persons also gives courts special prerogative in dissolution because, while LLCs are partly creatures of contract, their most essential elements—personhood, separateness, and perpetual life—are invested by the state. *See Levant*, *supra*, 350 Mich. at 241; *In re Carlisle Etcetera LLC*, 114 A.3d 592, 605-6 (Del. Ch. 2015) ("Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity [calling] for preserving the ability of the sovereign's courts to oversee and, if necessary, dissolve the entity.").[7]

Common law (*i.e.* non-statutory) dissolution has been widely applied to all types of partnerships, limited partnerships, joint-stock associations, corporations, and LLCs. *See Leibert*, *supra*, 13 N.Y.2d 313 (corporation); *May*, *supra*, 106 A.D.2d at 875 (partnership); *Dow v. Beals*, 238 A.D. 810 (1st Dep't 1933) (partnership); *Carlisle Etcetera*, *supra*, 114 A.3d 592 (LLC); *Snyder v. Lindsey*, 36 N.Y.S. 1037, 1037 (Gen. Term 4th Dep't 1895), *aff'd* 157 N.Y. 616 (1899) (joint-stock association). Indeed, the courts have never encountered a juridical creature impervious to equitable dissolution. *See Hellenic Am. Educ. Found.*, *supra*, 116 A.D.3d 453 (equitable dissolution is available to end parties' *sui generis* relationship).

c. Common Law Dissolution is Distinct from Statutory Dissolution

Equitable dissolution applies separately from statutory dissolution, and thus the rules and limitations of statutory dissolution are inapplicable to and do not preclude equitable dissolution. *See Leibert*, *supra*, 13 N.Y.2d at 315; *Ferolito*, *supra*, 99 A.D.3d at 28 (dissolution statute

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114 A.3d 592, 602 (Del. Ch. 2015) ("If Section 18–802 did purport to establish an exclusive means to obtain dissolution and override a significant portion of this court's traditional equitable jurisdiction, then the validity of that aspect of the provision would raise serious constitutional questions.").

[7] Thus dissolution cannot be wholly abrogated by contract. *See Schimel v. Berkun*, 264 A.D.2d 725, 728 (2d Dep't 1999) (adopting *Matter of Validation Review Assocs., Inc*., 223 A.D.2d 13 (2d Dep't 1996) to hold that a "provision in a shareholders agreement which purports to prohibit judicial dissolution of a corporation violates public policy" as expressed in, *inter alia*, common law dissolution, and is thus void and unenforceable).

"supplemented" but did not supplant "equitable dissolution" thus the statute is not the "exclusive remedy for aggrieved shareholders…and the courts continue to recognize the common-law cause of action"); *Lewis, supra*, 107 A.D.2d at 932-3; *see also Carlisle Etcetera, supra*, 114 A.3d at 601 (Delaware equivalent of LLCL § 702 provides an alternative and non-exclusive basis for dissolution, and thus equitable dissolution of LLCs are separately available).

d. Nothing in the Operating Agreements Precludes Common Law Dissolution

There is no contractual impediment here to equitable dissolution. For two of the Companies (3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC), no operating agreement exists. For the other two Companies (D-WIN PROPERTIES LLC and PARK 50 WEST PROPERTIES LLC), the operating agreements do not preclude common law dissolution.

e. The LLC Law Does Not Abrogate Common Law Dissolution

In enacting the LLC Law, the Legislature did not abrogate common law dissolution for LLCs. Rather, LLC Law § 702 provides just one basis for judicial dissolution. That section states, in relevant part, as follows:

> On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

The plain text of the statute does not purport to afford the exclusive remedy for judicial dissolution of LLCs, nor does it limit other nonstatutory bases for dissolution. *See Carlisle Etcetera, supra*, 114 A.3d at 601 (statute substantively identical to LLCL § 702 "does not state that it establishes an exclusive means to obtain dissolution, nor does it contain language overriding this court's equitable authority").

LLC Law § 701 also does not purport to provide an exhaustive list of grounds for dissolution. Nowhere does the statute contain any words of limitation, such as "shall" or "only," or any other indication of exclusivity. Furthermore, the drafters felt it necessary to indicate (at LLCL § 701(b)) several situations which would not result in dissolution—a provision which would be unnecessary if the statute already provided the exclusive bases for dissolution. Courts have reaffirmed the non-exclusivity of LLCL §§ 701 and 702 by decreeing dissolution in contexts not listed in those statutes. *See In re Fassa Corp.*, 31 Misc. 3d 782, 785 (Sup. Ct. Nassau Co. 2011) (dissolution occurred upon rescission of operating agreement).

Without any indication—much less a "clear" indication—otherwise, *see Tzolis v. Wolff*, 10 N.Y.3d 100 (2008), these LLC Law provisions cannot be read to override other well-established equitable bases for dissolution of LLCs.

f. Equitable Dissolution Specifically Applies to LLCs

In *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008), the Court of Appeals held that the LLC Law does not supplant established equitable remedies unless otherwise clearly indicated in the text of the statute. The Court in *Tzolis* held that even though the legislature did not provide for derivative actions for LLC members when it enacted the LLC Law (and, in fact, apparently deleted the derivative suit provision prior to enactment), derivative suits are nonetheless available in the absence of a "clear legislative mandate to the contrary." *Id*. at 109.

In preserving equitable remedies for LLC members, the Court in *Tzolis v. Wolff* expressed particular concern for ensuring that LLC members would "have recourse when those in control of a corporation betrayed their duty." *Id*. at 103. The *Tzolis* Court reasoned that the derivative suit doctrine is a "long-recognized" remedy for redressing harms by corporate fiduciaries, and it would thus be an "an intolerable grievance" if LLC members were left without

this "remedy when corporate fiduciaries use corporate assets to enrich themselves." *Id*. at 103-5. When looking at the text of the LLC Law, the *Tzolis* Court found no provision abrogating the derivative suit for LLC members. *Id*. at 108-9. Thus, the Court of Appeals held, the equitable derivative suit remedy was still available despite the absence of an LLC Law provision so providing. *Id*. at 109.

Expanding on *Tzolis*, the First Department in *Gottlieb v. Northriver Trading Co. LLC*, 58 A.D.3d 550 (1st Dep't 2009) held that LLC members may obtain an equitable accounting even though no provision of the LLC Law provides for one.

Equitable dissolution is analogous to the derivative suit in *Tzolis* and the equitable accounting in *Gottlieb* because it is a well-established equitable doctrine for redressing harms by corporate fiduciaries. *See Leibert, supra*, 13 N.Y.2d at 316 (describing equitable dissolution as necessary to address fiduciary misconduct beyond that "which might be cured by a derivative action for injunctive relief and an accounting"). Thus, in the absence of a clear provision in the LLC Law to the contrary, this doctrine is available in the LLC context. *See Carlisle Etcetera, supra*, 114 A.3d at 601.

Accordingly, courts have repeatedly held that LLC members are entitled to equitable remedies in dissolution even in the absence of an applicable LLC Law provision. *See Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dep't 2013) (error for court to refuse equitable remedy of forced buyout in dissolution of LLC even in the absence of a statutory provision); *Matter of Superior Vending, LLC*, 71 A.D.3d 1153 (2d Dep't 2010) ("Although the Limited Liability Company Law does not expressly authorize a buyout in a dissolution proceeding, the Supreme Court properly determined that the most equitable method of liquidation in this case was" buyout); *Lyons v. Salamone*, 32 A.D.3d 757 (1st Dep't 2006) ("Absence of a provision in the Limited Liability

Company Law expressly authorizing a buyout in a dissolution proceeding" did not divest court of equitable power to order buyout).

Thus, for all of the foregoing reasons, equitable dissolution applies to LLCs and should be granted to Petitioner in this case.

V. MANAGERIAL DYSFUNCTION MERITS STATUTORY DISSOLUTION

a. Dysfunction is Demonstrated by Respondents' Malfeasance

Management's dysfunctionality and inability to promote the interests of the Companies mandates judicial dissolution under LLC Law § 702.

Dissolution is appropriate under LLC Law § 702 when "the LLC's management has become so dysfunctional…that it is no longer practicable to operate the business." *Fakiris v. Gusmar Enterprises, LLC*, 53 Misc. 3d 1215(A) (Sup. Ct. Queens Co. 2016).

Dissolution under LLC Law § 702 is also warranted when "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." *Advanced 23, LLC v. Chambers House Partners, LLC*, Index No. 650025/2016, 2017 WL 6549787, at *3 (Sup. Ct. N.Y. Co. Dec. 22, 2017).

In this case, Respondents' dysfunction and unwillingness to advance the Companies' interests are amply shown by their repeated inability to operate the Companies in adherence to their duties. Their behavior shows they are promoting only their own interests, and are unwilling to promote the interest of the Companies. Respondents' pervasive looting, fraud, and breaches of fiduciary duty, as explained above, are paradigms of dysfunction warranting dissolution under LLC § 702. *See Magee v. Magee*, Index No. 031414/2015, 2017 WL 8773123 (Sup. Ct. Rockland Co. Mar. 8, 2017) ("litany of misdeeds, including self-dealing and diverting funds"); *Advanced 23, supra*, 2017 WL 6549787 at *4-5 (looting allegation requires denial of motion to

dismiss claim for dissolution).

b. Unjustified Halt of Construction

Dissolution of HOMES R BEAUTIFUL RE LLC is warranted under LLC § 702 because Respondents are unwilling to promote the purpose of that Company. Specifically, Respondents have unjustifiably halted construction at 263 East 9th Street, Brooklyn, New York—the only Property owned by HOMES R BEAUTIFUL RE LLC. Accordingly, that Company is not generating income and Respondents have simply stopped furthering its purpose.

In or about 2017 or early 2018, HOMES R BEAUTIFUL RE LLC began to redevelop its property at 263 East 9th Street by undertaking construction of a new 4 to 6-story, multiple-occupancy residential development. *See* Exhibit EE.

However, after Ms. Lindenberg's death, Respondents inexplicably caused the Company to stop all construction and development of this project in or about late 2018 or early 2019. According to Respondent, David Winiarski, the reason construction was halted was simply because the Estate commenced a discovery proceeding in Surrogate's Court to obtain information about Ms. Lindenberg's membership interests in the Companies. *See* Exhibit FF.

There is no legitimate justification for the total halt of business with respect to HOMES R BEAUTIFUL RE LLC or the Property it owns. This property is the sole asset of the Company which is thus no longer generating income. Management's inability or unwillingness to further this Company's purpose is a central basis for dissolution under LLCL § 702, and thus dissolution should be granted.

c. Usurpation of Control

i. <u>D-WIN PROPERTIES LLC</u>

The Operating Agreement for D-WIN PROPERTIES LLC names Ms. Lindenberg as that

Company's managing member. Pursuant to LLCL § 608, management authority inured to the Estate upon Ms. Lindenberg's passing, not to Respondents. *See Crabapple Corp. v. Elberg*, 153 A.D.3d 434 (1st Dep't 2017) (management authority of deceased managing member inured to decedent's estate per LLCL § 608). Accordingly, Respondents' continued control of D-WIN PROPERTIES LLC is in violation of that Company's Operating Agreement. This ongoing violation of the LLC's operating agreement provides a direct basis for dissolution of that Company under LLCL § 702. *See In the Matter of Shure*, 35 Misc. 3d 1218(A) (Sup. Ct. Nassau Co. 2012) (dissolution warranted due to member's exclusion of other member from co-management); *see also Dow v. Beals*, 238 A.D. 810, 811 (1st Dep't 1933) (right to dissolution "springs from" violation of the partnership agreement).

ii. 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC

Where there is no operating agreement—as is the case for 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC—the default provisions of LLCL §§ 401 and 402 provide that managerial authority is vested in the members, who conduct such management by vote of their proportional shares. *See Out of the Box Promotions LLC v. Koschitzki*, 15 Misc. 3d 1134(a) (Sup. Ct. Kings Co. 2007).

Respondents have usurped unilateral control of 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC, even though the law requires the affairs of these Companies to be conducted jointly by vote of the members. Thus, Respondents' unilateral control over these Companies is in violation of the LLC Law, and so dissolution of these Companies is warranted.

d. Deadlock

Joint control presents an insurmountable deadlock warranting dissolution of 3046 WEST

22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC.

Deadlock may provide a basis for dissolution under LLC Law § 702 when deadlock causes the LLC's management to become so dysfunctional that it is no longer practicable to operate the business. *See Fakiris v. Gusmar Enterprises, LLC*, 53 Misc. 3d 1215(A) (Sup. Ct. Queens Co. 2016). In the case of 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC, the law mandates that control be exercised jointly by the parties, who are equally divided each with 50% voting rights. When an LLC has equally divided disagreeing members, as in this circumstance, "any attempt to obtain majority approval to act on behalf of the LLC would be impossible." *See Out of the Box*, *supra*, 15 Misc. 3d 1134(a); *see also Ricatto v. Ricatto*, 4 A.D.3d 514, 516 (2d Dep't 2004) (majority vote required to conduct LLC's affairs).

Here, the parties' intense acrimony and equal voting rights makes any chance of functional management hopeless. Although acrimony alone is not sufficient, where acrimony makes functional management no longer practicable, dissolution will be granted. *See Advanced 23, LLC v. Chambers House Partners, LLC*, Index No. 650025/2016, 2017 WL 6549787, at *4 (Sup. Ct. N.Y. Co. Dec. 22, 2017) ("history of disagreements and a contentious relationship between" the parties); *Magee v. Magee*, Index No. 031414/2015, 2017 WL 8773123 (Sup. Ct. Rockland Co. Mar. 8, 2017) ("litany of misdeeds, including self-dealing and diverting funds" as well as "intense acrimony" warranted dissolution); *In re 47th Rd. LLC*, 54 Misc. 3d 1217(A) (Sup. Ct. Queens Co. 2017) (lawsuits between the managers, lack of cooperation, and "violent relationship"); *Fakiris*, *supra*, 53 Misc. 3d 1215(A) (total breakdown of relationship and accusation of "financial misconduct" warranted dissolution); *Matter of Shure*, 35 Misc. 3d 1218(A) ("hostile and abusive" and "intimidating" conduct prevented 50% member from exercising management rights); *see also PFT Technology LLC v. Wieser*, Index No. 8679/2012,

2015 WL 7263150 (Sup Ct. Nassau Co. Feb. 26, 2015). Thus deadlock provides a basis for dissolution of 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC.

For all of these reasons, the Court should decree dissolution of the Companies.

VI. EQUITABLE BUYOUT SHOULD BE GRANTED AS THE MOST APPROPRIATE REMEDY

a. Equitable Buyout Should Be Ordered Upon Dissolution

The most appropriate relief for the Estate's right to dissolution is an equitable buyout of the Estate's membership interests. This Court should order payment to the Estate based on the fair value of the Companies, set a hearing to determine this value, enter a judgment in the Estate's favor based on this determination, and deem the Estate's interests in the Companies to be transferred upon payment of said amount.

Once a substantive entitlement to dissolution is established, courts must grant an appropriate remedy to vindicate the wrong party's rights. *See Cortes v. 3A N. Park Ave Rest Corp*., 46 Misc. 3d 670, 699 (Sup. Ct. Kings Co. 2014) ("Whether it is necessary to actually dissolve the corporation in order to redress plaintiff's grievances is, however, a matter to be considered independently once grounds for dissolution have been established"). While courts have wide discretion in fashioning a remedy to remediate a substantive right to dissolution, the Court of Appeals has directed courts to consider whether another remedy short of ending corporate existence—specifically, equitable buyout—is appropriate under the circumstances. *See Matter of Kemp & Beatley, Inc*., 64 N.Y.2d 63, 73 (1984) ("once oppressive conduct is found, consideration must be given to the totality of circumstances surrounding the current state of corporate affairs and relations to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders"). Indeed, when an equitable

buyout is the most appropriate remedy, it is reversible error for a court not to grant it. *See Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dep't 2013) (error for court to refuse equitable remedy of forced buyout in dissolution of LLC even in the absence of a statutory provision).

Accordingly, courts have time and again approved the remedy of an equitable buyout in dissolution. *See Kemp & Beatley, supra,* 64 N.Y.2d at 73-4 (court has flexibility in equity to order remedy short of dissolution, including forced buyout); *Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540 (1st Dep't 2013) (court should have ordered forced buyout rather than dissolution); *Matter of Clever Innovations, Inc*., 94 A.D.3d 1174 (3d Dep't 2012) (approving forced buyout of estate's shares); *Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) (fairness required forced buyout); *Matter of Wiedy's Furniture Clearance Center Co*., Inc., 108 A.D.2d 81 (3d Dep't 1985); *Cortes, supra*, 46 Misc. 3d at 703 (equitable dissolution and equitable buyout).

In dissolution of LLCs specifically, courts have repeatedly upheld forced buyout of the petitioning member's shares. *See Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dep't 2013) (error for court to refuse equitable remedy of forced buyout in dissolution of LLC even in the absence of a statutory provision); *Matter of Superior Vending, LLC*, 71 A.D.3d 1153 (2d Dep't 2010) ("Although the Limited Liability Company Law does not expressly authorize a buyout in a dissolution proceeding, the Supreme Court properly determined that the most equitable method of liquidation in this case was" buyout); *Lyons v. Salamone*, 32 A.D.3d 757 (1st Dep't 2006) ("Absence of a provision in the Limited Liability Company Law expressly authorizing a buyout in a dissolution proceeding" did not divest court of equitable power to order buyout).

In this case, equitable buyout, rather than dissolution by liquidation, is the fairest and most appropriate remedy for several reasons: (i) it allows the Companies' existence to continue, (ii) it would avoid the unnecessary expense and risk of judicial sales, (iii) it would allow

continuity of control, and (iv) it would allow the Respondents to maintain their membership interests in the Companies unrestricted by the Estate's partnership.

This Court should find equitable buyout is warranted, set a hearing to determine the fair value of the Companies in order to fix a buyout amount, and should enter a judgment in the Estate's favor based on that amount.

b. Payment of Fair Value is Due Upon Withdrawal

The Estate may withdraw as a member from the Companies upon their dissolution. *See* LLCL § 606. Upon withdrawal, the Estate is entitled to receive "the fair value of [its] membership interest" in the Companies. *See* LLCL § 509; *see also Man Choi Chiu v. Chiu,* 125 A.D.3d 824 (2d Dep't 2015), *lv. den.* 26 N.Y.3d 905 (2015).

This provision operates the same way as equitable buyout, in that it is predicated on dissolution, requires a finding of the fair value of the Companies, and effects a forced sale of the Estate's membership interests in exchange for their equivalent value.

Petitioner respectfully requests that upon dissolution, this Court permit the Estate to withdraw, order payment of the "fair value" of the Estate's interests in the Companies, and set a hearing to determine this amount.

c. Equitable Buyout is Particularly Appropriate Given Management's Malfeasance

An equitable buyout amount should reflect Respondents' liabilities to the Companies and include payment of Petitioner's legal fees as well as prejudgment interest. *See Tierno v. Puglisi,* 279 A.D.2d 836, 839-40 (3d Dep't 2001) (imposing liability for corporate debt upon party guilty of breach of fiduciary duty); *May v. Flowers*, 106 A.D.2d 873, 875 (4th Dep't 1984); *Dow v. Beals*, 149 Misc. 631, 632 (Sup. Ct. N.Y. Co. 1933) (ouster of partner who has committed malfeasance instead of judicial sale). Respondents' actions in derogation of their fiduciary duty

to the Companies warrant relief equitably tailored to the circumstances. *See Kemp & Beatley*, supra, 64 N.Y.2d at 73. Petitioner respectfully requests that the valuation date of the Companies be set at the date of Ms. Lindenberg's death, and that prejudgment interest be calculated from that date. *See* CPLR 5001; *see also Matter of Fleischer*, 107 A.D.2d 97, 101 (2d Dep't 1985) (upholding imposition of 12% interest on value of shareholder's interest upon dissolution).

CONCLUSION

For the reasons stated herein, dissolution is warranted and should be granted, and incident to dissolution, this Court should order a forced buyout of the Estate's membership interests in the Companies, and, to this end, should set a hearing to determine their fair values.

WHEREFORE, summary disposition should be granted on the First, Second, Third, and Fourth Causes of Action of the Verified Petition.

Dated: New York, New York
February 4, 2020

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