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.: 502779/2020 <u>Mot. Seq. No. 3</u>

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION FOR PARTIAL DISMISSAL OF THE VERIFIED PETITION UNDER CPLR 3211

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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 opposition to the motion (Mot. Seq. No. 3) by Respondents, DAVID WINIARSKI, ESTHER WINIARSKI, and MYRON WINIARSKY (collectively, "Respondents"),[1] to dismiss the Verified Petition's First, Second, Third, and Fourth Causes of Action pursuant to CPLR 3211(a). As explained herein, the Petition properly pleads claims for dissolution of the Companies and related relief. Accordingly, Respondents' motion should be denied in its entirety.

PRELIMINARY STATEMENT

This case is about separating two families that have become entangled together by the business affairs of the late Judith Lindenberg. Following Ms. Lindenberg's sudden and tragic demise, Respondents' pervasive maltreatment of the Estate ushered a torrent of strife, plaguing these families with perpetual discord. The parties simply cannot remain tied to each other. To end the discord, separation is essential.

Separation is an ancient and venerable means of bringing peace to disputing parties.[2] Judicially, separating is appropriate as grounded in this Court's equity prerogative, which equity

[1] Respondents' motion purports to be made additionally on behalf of the Nominal Respondent Companies. However, the Companies lack sanding with respect to their own dissolution. *See Matter of Clemente Bros. Inc.*, 19 A.D.2d 568, 568 (3d Dep't 1963) *aff'd* 13 N.Y.2d 963 (1963). Petitioner has requested the Nominal Respondent' appearances and this aspect of Respondents' motion to dismiss be stricken. *See* Dkt. No. 81.

[2] *See* Genesis 13:6-11 ("…for their possessions were great so that they could not remain together, and quarreling arose between Avram's herdsmen and Lot's herdsmen…And Avram said to Lot, 'Let there be no quarreling between me and you…Separate yourself from me...'…and thus they separated, one from his brother.")

animates every aspect of this case. Equity is beyond mere discretion—it is the imperative of the Court to bring Solomonic repose to human quarrels. In this case, fundamental fairness impels separating because forcing the parties to stay bound in a discordant and unworkable partnership would be grossly unjust.

Separating is not only practically necessary, it is legally warranted via dissolution of the Companies that tie the parties together. Dissolution—the corporate analog to partition or divorce—provides this Court with the flexibility necessary to effectuate a fair and efficient split. As discussed below, there are two independent legal bases for granting dissolution in this action: equitable dissolution and statutory dissolution. Equitable dissolution of the Companies is necessary and proper due to Respondents' litany of 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 unbind the parties, vindicate Respondents' misbehavior, and ensure the Estate realizes the reasonable economic expectations of its interests.

FACTS

The facts summarized here are more fully set forth in the Verified Petition and accompanying affidavit of Glenn S. Liebman, CPA (Dkt. No. 36), which are considered true on this motion. *See CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268, 284 (1987).

a. The Companies and Properties

The Companies own rent-generating real properties in Brooklyn (the "Properties"). *See* Petition ¶ 28. The Estate is a 50% member of each of the Companies. *See* Petition ¶¶ 23-25 and Exhibits B and C. Respondents are united in interest as the other 50% members of the

Companies, and have exercised exclusive control and management over both the Companies and Properties. *See* Petition ¶¶ 49-63.

Membership in the Companies	
3046 WEST 22 ST. PROPERTIES LLC	Estate: 50% David Winiarski: 50%
D-WIN PROPERTIES LLC	Estate: 50% Esther Winiarski: 50%
HOMES R BEAUTIFUL RE LLC	Estate: 50% Esther Winiarski: 50%
PARK 50 WEST PROPERTIES LLC	Estate: 50% David Winiarski: 50%

Entity	**Property Address**	**Block/Lot**	**Type**
3046 West 22 St Properties LLC	2805-09 West 16th Street, Brooklyn New York	7022/85	Multi-family residential
	2837-39 West 20th Street, Brooklyn New York	7019/74 & 75	Multi-family residential
	3046-50 West 22nd Street, Brooklyn New York	7071/24	Multi-family residential
D-Win Properties LLC	201 Ditmas Avenue, Brooklyn New York	5386/52	Multi-family residential
	3135 Coney Island Avenue, Brooklyn New York	8706/44	Multi-family residential
Homes R Beautiful RE LLC	263 East 9th Street, Brooklyn New York	5361/55	-
Park 50 West Properties LLC	50 Westminster Road, Brooklyn, New York	5072/25	Multi-family residential

b. Misappropriation

While in control of the Companies and their Properties, Respondents converted over $1 million of the Companies' rental income. *See* Petition ¶¶ 64-73. Specifically, rent that the Properties' tenants paid in cash is not reflected in the Companies' bank records, tax returns, or other ledgers. *See* Petition ¶¶ 66-70 and Exhibits L and M. As shown by the affidavit of forensic accountant Glenn Liebman, CPA (Dkt. No. 36), approximately $1,168,000 in rent paid by the Properties' tenants in cash was never received by the Companies.

As further shown by Mr. Liebman, Respondents, while in control of the Companies, improperly transferred about $5 million of the Companies' assets to themselves. *See* Petition ¶ 74. These transfers—to Respondents and their entities—were often disguised as "loans" but were not memorialized in any loan agreement, did not accrue interest, were not secured or guaranteed, lacked any maturity or repayment date, and otherwise lacked any earmark of legitimacy. *See* Petition ¶¶ 74-76 and Exhibit N.

Finally, while in control of the Companies, Respondents falsified the Companies' records and filings to hide their misappropriation and other untoward acts. *See* Petition ¶¶ 71-73.

c. <u>Usurpation and Freeze-Out</u>

After Ms. Lindenberg's death, Respondents usurped control over the Companies. *See* Petition ¶¶ 79-83. As a means of exercising unrestricted control, Respondents forged Ms. Lindenberg's signature including on documents filed with the Department of Buildings. *See* Petition ¶¶ 84-85 and Exhibit O.

Respondents also took improper control over the Companies by excluding the Estate from participation in management, abruptly ceasing all distribution payments, refusing to recognize the Estate's membership rights (including by refusing inspection and accountings), and by retaliating against the Estate for exercising its rights as members (including through harassing and extortionate conduct). *See* Petition ¶¶ 86-91.

d. <u>Breaches of Fiduciary Duty and Other Wrongs</u>

Shortly after Ms. Lindenberg's death, the Estate requested information from Respondents to understand her holdings. *See* Petition ¶¶ 92-94. However, Respondents refused to produce the Companies' operating agreements or other basic documentation. *See* Petition ¶¶ 95-96 and 101-102. Instead, Respondents lied to the Estate about the percent of Ms. Lindenberg's ownership interests. *See* Petition ¶ 97. The Estate was thus forced to commence a discovery proceeding in Surrogate's Court under SCPA § 2103 (which provides a mechanism for an estate to obtain information from persons having knowledge about a decedent's assets).

In the Surrogate's Court discovery proceeding, Respondents ignored process, ignored court orders, and ignored requests for documents. *See* Petition ¶¶ 99-103. Respondents provided contradictory, false, and even falsified disclosure responses (including a falsified operating agreement that Respondents had fabricated solely for discovery). *See* Petition ¶¶ 100-101. Respondents provided false testimony in deposition, and one Respondent even walked out of a deposition and then lied to the Court about his reason for leaving. *See* Petition ¶¶ 119-121. Egregiously, once Respondents were ordered to produce the Companies' rent ledgers, Respondents willfully spoliated all of these inculpatory records and blamed the loss on an unexplained "software" issue. *See* Petition ¶¶ 110-117.

Respondents further refused to provide the Estate with accountings of the Companies' income and expenditures, notwithstanding demand and legal entitlement. *See* Petition ¶¶ 105-109. The Estate was thus forced to bring an action seeking an accounting, which this Court granted. Yet, even after the Court Ordered Respondents to render accountings of the Companies, Respondents failed to do so. *See* Affidavit of Zachary D. Kuperman, Esq. dated August 28, 2020 at ¶¶ 5-7.

e. <u>Harassment, Extortionate, and Vexatious Conduct</u>

Respondents have engaged in a sustained campaign of harassment, extortion, and vexatious conduct against the Estate and its representatives in an effort to oust the Estate and improperly pressure compromise of the Estate's rights. *See* Petition ¶¶ 127-139.

First, one of the Respondents, as attorney for the other Respondents, contacted the

Estate's representatives (the then-fiduciary and his mother, the Petitioner) over 25 times—at one point 9 times in a day—in violation of Rule 4.2 of the New York Rules of Professional Conduct even after he was asked to desist. *See* Petition ¶¶ 127-128 and Exhibit BB. Such improper communication continued to occur even during this proceeding. *See* Dkt. No. 82 at ¶ 4.

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 in an attempt to upend administration of the Estate by challenging Ms. Lindenberg's will. *See* Petition ¶¶ 130-139. 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. *See* Petition ¶ 134.

Respondents also commenced baseless proceedings claiming injury from the probating of Ms. Lindenberg's will, including in claims against the beneficiaries of the Estate, against the notary who notarized the will, and against the Estate's representative. *See* Petition ¶ 136, 138-9.

f. <u>Deadlock, Discord, and Strife</u>

Perpetual discord, animosity, distrust, and strife exist between these parties. With respect to the Companies, the parties disagree on every issue: who should manage the Companies, who should manage the Properties, if the Properties should be sold, if a mortgage should be refinanced, if the Companies should be repaid millions of dollars owed to them, if the Companies should even continue to exist. This strife is toxic to the Companies. Harm to the Companies is thus foregone under the circumstances but may also be inferred by Respondents' recalcitrance and obstructionism in light of their duties to account for the wellbeing of the Companies.

Under these facts and the reasonable inferences drawn from them, the relief sought in the

Petition should be granted, and Respondents' motion to dismiss should be denied.

PROCEDURAL POSTURE

This is a hybrid special proceeding and action for dissolution of the Companies and other relief commenced by Notice of Petition (Dkt. No. 35), Verified Petition (Dkt. Nos. 1-34), expert affidavit of Glenn S. Liebman, CPA (Dkt. No. 36), and Memorandum of Law in support of summary disposition under CPLR 409(b) (Dkt. No. 37). This instant motion to dismiss under CPLR 3211, submitted pursuant to CPLR 404(a) in lieu of an answer, seeks dismissal of the Petition's First, Second, Third, and Fourth Causes of Action. Respondents have not answered or moved with respect to the Petition's Fifth through Tenth Causes of Action.

ARGUMENT

I. STANDARD ON A MOTION TO DISMISS

On a motion to dismiss a petition in a special proceeding, the court must accept petitioner's allegations and evidence as true and must afford the pleading every possible favorable inference. *See Abdur-Rashid v. New York City Police Dep't,* 31 N.Y.3d 217, 255 (2018); *Farouz v. Faltas,* 179 A.D.3d 1064, 1065 (2d Dep't 2020); *Matter of Steinberg*, 183 A.D.3d 1067, 1068 (3d Dep't 2020); *Golden Horizon Terryville Corp. v. Prusinowski,* 63 A.D.3d 930, 934 (2d Dep't 2009). A plaintiff may augment its pleadings though supplemental affidavits, which, on a motion to dismiss, should be granted "their most favorable intendment." *CPC Int'l Inc. v. McKesson Corp.,* 70 N.Y.2d 268, 284 (1987); *533 Park Ave. Realty, LLC v. Park Ave. Bldg. & Roofing Supplies, LLC,* 156 A.D.3d 744, 746 (2d Dep't 2017). Pleadings in equity are afforded a more liberal standard. *See Delcambre v. Delcambre,* 210 N.Y. 460, 466 (1914); *Gnecco v. Inc. Vill. of Great Neck Plaza*, 263 A.D. 828 (2d Dep't 1941); *Goldberg v. Rand*, 37 Misc. 2d 87, 88 (Sup. Ct. Kings Co. 1962). The test on this motion is whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez,* 84 N.Y.2d 83, 87–88 (1994); *Qureshi v. Vital Transportation, Inc*., 173 A.D.3d 1076, 1077 (2d Dep't 2019).

A motion to dismiss under CPLR 3211(a)(1) "on the ground that the action is barred by documentary evidence…may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *Qureshi, supra,* 173 A.D.3d at 1077; *see also Fleming v. Kamden Properties, LLC*, 41 A.D.3d 781, 781 (2d Dep't 2007). Where documentary evidence, although of undisputed authenticity, does not "utterly refute" the complaint, or does not "conclusively establish" a defense, the motion must be denied. *See Kalaj v. 21 Fountain Place, LLC*, 169 A.D.3d 657, 658 (2d Dep't 2019). Under CPLR 3211(a)(1), a "paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable." *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019). A document which requires further explanation or elaboration by non-documentary evidence is insufficient to warrant dismissal. *See Bou v. Llamoza*, 173 A.D.3d 575, 575–76 (1st Dep't 2019).

Under these standards, the facts alleged comport within cognizable legal theories, no documentary evidence has been submitted, and so Respondents' motion should be denied.

II. STATUTORY DISSOLUTION IS WARRANTED UNDER LLCL § 702

Statutory dissolution under LLCL § 702 (Second Cause of Action) should be granted because Respondents' conduct has made it impossible to further the business purpose of the Companies.

a. Statutory Dissolution Standard

According to LLCL § 702, this Court "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." Under this standard, courts have emphasized that the test is whether it is "reasonably practicable" and "not whether it is impossible" to further the business of the LLC in conformity with the operating agreement. *See Fisk Ventures, LLC v. Segal,* No. 3017-CC, 2009 WL 73957, at *3 (Del. Ch. Jan. 13, 2009), *aff'd,* 984 A.2d 124 (Del. 2009).[3]

Under this standard, dissolution pursuant to LLCL § 702 is warranted where "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" within the "context of the terms of the operating agreement." *Mace v. Tunick*, 153 A.D.3d 689, 690 (2d Dep't 2017). Dissolution is also appropriate under LLCL § 702 when the "LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill." *Fakiris v. Gusmar Enterprises, LLC*, 53 Misc. 3d 1215(A) (Sup. Ct. Queens Co. 2016).

b. Respondents' Malfeasance Warrants Dissolution

Respondents' litany of misconduct meets both the "unable or unwilling" test as well as

[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"). Specifically, New York's LLCL § 702 ("whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement") is a near verbatim equivalent of 6 De. Code § 18-802 ("whenever it is not reasonably practicable to carry on the business in conformity with a limited liability company agreement").

the "dysfunctional management" test for dissolution under LLCL § 702.

Respondents' pervasive malfeasance shows they are solely advancing their own selfish interests to the detriment of the Companies, and are thus unwilling or unable to promote the business purpose of the Companies. *See Magee v. Magee*, Index No. 31414/2015, 2017 WL 8773123 (Sup. Ct. Rockland Co. Mar. 8, 2017) ("litany of misdeeds, including self-dealing and diverting funds"); *Advanced 23, LLC v. Chambers House Partners, LLC*, Index No. 650025/2016, 2017 WL 6549787, at *4-5 (Sup. Ct. N.Y. Co. Dec. 22, 2017) (looting allegation requires denial of motion to dismiss claim for dissolution).

Further, managerial dysfunction arises when the company's management is not functioning in a manner conducive to promoting the interests of the Companies. Respondents' looting, spoliation of records, forgery, fraud, and mismanagement are paradigms of dysfunctional management. *See M & M Country Store, Inc. v. Kelly*, 159 A.D.3d 1102, 1104 (3d Dep't 2018); *Amfesco Indus., Inc. v. Greenblatt,* 172 A.D.2d 261 (1st Dep't 1991). Clearly, management rife will such misconduct is not furthering the business of the Companies. *See Magee*, *supra*, 2017 WL 8773123, *Advanced 23, supra*, 2017 WL 6549787, at *4-5.

Respondents' claim that they are "adequately" managing the Companies[4] must be disregarded on this motion, and, in any case, is belied by reality. Thus, Respondents' numerous bad acts shows that dissolution should be granted under LLCL § 702.

c. The Purpose of the Companies Entails Shareholder Wealth Maximization

Assessment of the LLCs' "business purpose" is a central criterion under LLCL §702's dissolution standard. *See Mace v. Tunick*, 153 A.D.3d 689 (2d Dep't 2017). Under bedrock corporate law principles, an LLC's "purpose" must entail economic benefit inuring to the Companies' owners. Here, Respondents have taken the Companies' benefits for themselves to

[4] *See* Respondents' Memorandum of Law (Dkt. No. 59) at p. 25.

the exclusion of the Estate, thereby frustrating the Companies' purposes and thus warranting dissolution under LLCL § 702.

As the Petition pleads (at ¶ 44), "The purpose of each of the Companies is to lawfully engage in the business of real estate ownership for the benefit of the Companies' respective members."[5] Thus, as the Petition pleads, benefit to the Estate (as one of the Companies' members) is an element of the Companies' business purpose.

Respondents, in contrast, suggest that the "purpose" of the Companies is simply to own real property for profit, and thus argue that the statutory dissolution standard cannot be met if the Companies are continuing to operate with respect to real estate ownership and management.

First, the Petition's averments are deemed true on this motion, and thus Respondents' suggestion that the "purpose" of the Companies is simply to own real property must be rejected. *See Mace, supra*, 153 A.D.3d at 691 (court's "determination that [LLC's] purpose was simply to acquire and manage property" was improper on a CPLR 3211 motion).

More fundamentally, as a matter of law, the "business purpose" of the Companies must entail not merely property ownership but also shareholder benefit. Thus, the singular focus on whether the LLCs are operating—even operating productively—is legally incorrect.

It is a bedrock doctrine of corporate law that the legal purpose of business corporations must embrace shareholder wealth maximization. *See* Yosifon, David G., *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 227 (2013). By statute, the "purpose" of an LLC must be a "lawful business purpose." *See* LLCL § 201. According to the Court of Appeals, the term "business purpose" in such a statute must necessarily encompass shareholder wealth

[5] While the "purpose clause" of an LLC's operating agreement is "important" in assessing dissolution under the "not reasonably practicable" statutory standard, such clause is not dispositive because "other evidence of purpose may be helpful" and should be considered by the Court. *Meyer Nat. Foods LLC v. Duff,* No. 9703, 2015 WL 3746283, at *4 (Del. Ch. June 4, 2015). Thus the business purpose pleaded in the Petition should govern on this motion. *See Mace v. Tunick*, 153 A.D.3d 689, 691 (2d Dep't 2017).

maximization. *See In re Co-operative Law Co.*, 198 N.Y. 479 (1910) (corporate "business" purpose means a "purpose to earn money for stockholders" and because attorneys must consider factors other than shareholder benefit, the practice of law cannot be a corporation's "business purpose").

When assessing corporate "purpose," courts have resoundingly endorsed the primacy of shareholder wealth maximization, holding that it is impermissible for a corporation to have a purpose that fails to include shareholder benefit. *See Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919) (purpose of the corporation must be to benefit its shareholders; stated purpose to benefit society was thus improper); *eBay Domestic Holdings, Inc. v. Newmark,* 16 A.3d 1 (Del. Ch. 2010) ("proper corporate purpose" must entail "shareholder wealth maximization"; providing free website for the betterment of humanity was thus not a proper corporate purpose). Accordingly, the purpose of every LLC—including the Companies at issue—must, as a matter of law, entail not mere continued operation but also shareholder wealth maximization.

Accordingly, under the statutory standard of LLCL § 702, which considers whether the purpose of the LLC is being furthered or frustrated, courts have granted statutory dissolution where the LLC was perfectly operational, yet was not operating for the benefit of its members but rather for the private benefit of those in control. *See Haley v. Talcott*, 864 A.2d 86, 96 (Del. Ch. 2004) (statutory dissolution granted even though LLC was operational because, following freeze out, the business "exclusively benefit[ted] one of the 50% members").

Here, the business purposes of the Companies are not and cannot be to simply own and manage real property. Rather, as pled in the Petition (¶ 44), the Companies' purpose includes benefit to its members. Respondents' pervasive looting, oppression, fraud, and breaches of fiduciary duty show that the Companies are being operated, and will continue to be operated, for the private benefit of the Respondents at the expense of the Companies' members. Thus, the purpose of the Companies, insofar as it entails shareholder wealth maximization, is being frustrated. Accordingly, dissolution is warranted under LLCL § 702.

d. Profitability is a Question of Fact

Respondents argue that the Companies are operating "adequately" and that their "financial feasibility" presents a barrier to LLCL § 702 dissolution. *See* Respondents' Memorandum of Law (Dkt. No. 59) at p. 25. However, Respondents have failed to demonstrate the Companies' financial status, much less to the "conclusive" degree required under CPLR 3211(a)(1). In fact, the Companies' past, current, and future profitability is an open question of fact, especially because Respondents have failed to account for the Companies' income, expenditures, assets, and liabilities—although Ordered to do so by this Court.[6] *See also Molod v. Berkowitz,* 233 A.D.2d 149, 150 (1st Dep't 1996).

e. Lawfulness is a Mandatory Element of the Companies' Business Purpose

The Companies' business purpose must be lawful. *See* LLCL § 201; Petition at ¶ 44; *see also Application of Stewart*, 174 Misc. 902 (Sup. Ct. Albany Co. 1940), *aff'd sub nom. Stewart v. Dep't of State*, 260 A.D. 979 (3d Dep't 1940) (purpose of corporation cannot be unlawful). Further, management's duty to adhere to lawful behavior is presumed by law in LLC operating agreements such that illicit conduct by a director warrants dissolution as violative of the business purpose of the company and in breach of such implied term of the operating agreement. *See In re GR BURGR, LLC*, No. CV-12825, 2017 WL 3669511, at *8 (Del. Ch. Aug. 25, 2017) ("felony tax-related conviction" "shattered" presumption inherent in members' agreement "that the other was an honorable actor," thus warranting statutory dissolution). Inasmuch as Respondents' litany of malfeasance is unlawful, the Companies' purpose is being frustrated, thus

[6] Indeed, Respondents' failure to account has preclusive and inferential effect.

warranting dissolution under LLCL § 702.

f. Respondents' Usurpation of Control Violates the LLC Law and Operating Agreements

When a company is not operating "in conformity" with the operating agreement or LLC Law, dissolution must be granted, even if it is otherwise operating profitably.

A member's usurpation of control—in violation of either the LLC's operating agreement or the LLC Law—renders the LLC not operating "in conformity" with the operating agreement or LLC Law, thus warranting dissolution. *See Acela Investments LLC v. DiFalco,* No. 2018-0558, 2019 WL 2158063, at *33 (Del. Ch. May 17, 2019) ("Aigner has arrogated to himself virtually unfettered control over the Company's management in contravention of the governance structure contemplated in the IDS Agreement. Given this reality, the court concludes that it is not reasonably practicable to carry on the business of the Company in conformity with the IDS Agreement."); *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); *Vila v. BVWebTies LLC*, No. 4308, 2010 WL 3866098, at *8 (Del. Ch. Oct. 1, 2010) (dissolution granted because "one co-equal fiduciary may [not] ignore the entity's governing agreement and declare himself the sole 'decider'"); *Haley v. Talcott*, 864 A.2d 86, 96 (Del. Ch. 2004) (dissolution granted where one member's usurpation of control "left [the other] on the outside, looking in, with no power"); *see also FR Holdings, FLP v. Homapour*, 154 A.D.3d 936, 938 (2d Dep't 2017) (allegation that one member "unilaterally usurped management and control over the LLC in alleged violation of the operating agreement" provides a valid basis for dissolution; however, summary determination was inappropriate and thus matter was remanded for fact-finding).

Here, as described below, Respondents' usurpation of unilateral control is not in conformity with the Companies' operating agreements or LLC Law, thus warranting dissolution.

i. D-WIN PROPERTIES LLC

The Estate is the rightful managing member of D-WIN PROPERTIES LLC because that company's Operating Agreement names Ms. Lindenberg as its managing member and LLCL § 608 dictates that management authority inures to the Estate upon Ms. Lindenberg's death. *See Crabapple Corp. v. Elberg*, 153 A.D.3d 434 (1st Dep't 2017). Yet, in derogation of the Operating Agreement and LLC Law, Respondents have usurped control of D-WIN PROPERTIES LLC and denied the Estate its rightful managerial authority. *See* Petition ¶¶ 79-91. Because Respondents have usurped control, this LLC is not operating in conformity with its Operating Agreement, and so dissolution is warranted under LLCL § 702.

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

Both the Estate and Respondents must share joint control over 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC. These LLCs have no operating agreement and so the provisions of LLCL §§ 401 and 402 mandate that managerial authority is vested in the members who conduct management by vote of their shares. *See Out of the Box Promotions LLC v. Koschitzki*, 15 Misc. 3d 1134(a) (Sup. Ct. Kings Co. 2007). Yet, Respondents have usurped unilateral control of 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC to the exclusion of the Estate, 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.

g. Deadlock and Discord Warrant Statutory Dissolution

The parties' relationship has been beset by extreme distrust and discord as a result of

Respondents' pervasive maltreatment of the Estate. The parties disagree about almost everything, and are deadlocked over basic issues regarding the Companies.

Deadlock is a "quintessential example of a situation justifying a judicial dissolution" of an LLC. *See Vila v. BVWebTies LLC*, No. 4308, 2010 WL 3866098, at *7 (Del. Ch. Oct. 1, 2010). Where deadlock renders it impracticable to achieve the purpose of the LLC in conformity with its operating agreement, dissolution will be granted under LLCL § 702. *See Acela Investments LLC v. DiFalco,* No. 0558-AGB, 2019 WL 2158063, at *25 (Del. Ch. May 17, 2019) ("when an LLC agreement requires that there be agreement between two managers for business decisions to be made, those two managers are deadlocked over serious issues, and the LLC agreement provides no alternative basis for resolving the deadlock, it is not reasonably practicable to continue to carry on the LLC business in conformity with [its] limited liability company agreement."); *Fakiris v. Gusmar Enterprises, LLC*, 53 Misc. 3d 1215(A) (Sup. Ct. Queens Co. 2016).

Accordingly, it is well-settled that acrimony and discord will justify dissolution where acrimony renders functional management no longer practicable. *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" 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) ("acrimonious" relationship and accusation of "financial misconduct" warranted dissolution); *Matter of Shure v. S & S Eatery, L.L.C.,* 35 Misc. 3d 1218(A) (Sup. Ct. Nassau Co. 2012) ("hostile and abusive" and "intimidating" conduct prevented 50% member from exercising management rights); *Phillips v. Hove*, No. 3644, 2011 WL 4404034, at *26 (Del. Ch. Sept. 22, 2011) ("marked animosity between the parties and their inability to agree on basic issues"); *Haley v. Talcott*, 864 A.2d 86, 96 (Del. Ch. 2004) ("strident disagreement," "open hostility," and "inability of the parties to function together" rendered it impracticable for the parties to "take any important action that required a vote of the members"); *see also Besen v. Doshi*, No. 652691/2018, 2019 WL 7212234, at *4 (Sup. Ct. N.Y. Co. Dec. 27, 2019) (parties' "inability to cooperate to the detriment of their co-owned companies yields one conclusion: dissolve all of the joint businesses, now."); *Acela Investments, supra,* 2019 WL 2158063, at *26 n.276, 27, and 33 ("disagreement and discord"; "distrust and animosity").

The parties' intense acrimony and distrust is toxic to the wellbeing of the Companies, and thus warrants dissolution. *See Saunders v. Firtel*, 293 Conn. 515, 536 n.22 (2009). While the specific harms to the Companies have generally been obscured by Respondents' failure to account, they may be inferred under the circumstances. *See Molod v. Berkowitz*, 233 A.D.2d 149, 150 (1st Dep't 1996) ("Dissolution is not to be denied merely because the dissension has not yet had an appreciable impact on the firm's profitability"). Indeed, as just one example, what might otherwise have been a mundane mortgage issue became yet another quarrel which spilled into this litigation. *See*, *e.g.*, Dkt. No. 101.

Acrimony and deadlock make any chance of functional management hopeless specifically for 3046 WEST 22 ST. PROPERTIES LLC and HOMES R BEAUTIFUL RE LLC for which joint control is required by LLCL §§ 401 and 402, as explained above. *See* Petition ¶¶ 155-159. Thus, even if Respondents agreed to relinquish their unilateral control and allow joint control as required by the LLC Law, functional management for these Companies is not reasonably practicable. 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, acrimony and discord present an insurmountable deadlock warranting dissolution, and thus dissolution should be granted under LLCL § 702.

h. Unjustified Halt of Construction

Dissolution of HOMES R BEAUTIFUL RE LLC is warranted under LLC § 702 because Respondents are unwilling to promote the business of that Company. Specifically, as pled in the Petition (at ¶¶ 141-145), Respondents have unjustifiably halted construction of a new 4 to 6-story, multiple-occupancy residential development at 263 East 9th Street, Brooklyn, New York—the only Property owned by HOMES R BEAUTIFUL RE LLC.[7] David Winiarski stated that the reason construction was halted was because the Estate sought to obtain information about Ms. Lindenberg's membership interests in the Companies. *See* Petition Exhibit FF. Accordingly, Respondents have simply stopped furthering that Company's purpose without any legitimate justification. Management's inability or unwillingness to further this Company's purpose is a central basis for dissolution under LLCL § 702, and thus dissolution of this LLC should be granted.

III. EQUITABLE DISSOLUTION IS WARRANTED BECAUSE OF RESPONDENTS' EGREGIOUS MALFEASANCE TOWARDS THE COMPANIES AND ESTATE

Equitable dissolution (First Cause of Action) is a well-established and widely-applied basis for dissolution of corporate entities amply applicable under the extreme facts of this case. As discussed below, equitable dissolution is necessary to ensure the Estate is not deprived of the

[7] Respondents' denial of these allegations is of no value on this motion.

economic value of its membership interest and to vindicate Respondents' misconduct. This doctrine applies to the LLCs at issue because it has not been limited by the LLC Law nor by agreement of the parties. The Estate, as an oppressed member of the Companies, has standing to seek their equitable dissolution. Here, equity compels a fair and swift separation of the parties, and thus Respondents' motion should be denied and equitable dissolution should be granted.

a. Equitable Dissolution is Adequately Pled

Equitable dissolution is warranted when an entity's management has engaged in certain misconduct towards the entity or its shareholders including (i) looting or other wrongful self-enrichment, (ii) managing the entity for the sole benefit of those in control, for example, by oppression or freezing out of minority shareholders, or (iii) other "egregious conduct" that violates management's fiduciary duties. *See Leibert v. Clapp*, 13 N.Y.2d 313 (1963); *Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540 (1st Dep't 2013) (freeze out); *Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dep't 2012) (looting; minority oppression); *Lemle v. Lemle*, 92 A.D.3d 494, 495 (1st Dep't 2012) (payment of excessive compensation, reimbursement of personal expenses, and cancellation of personal debts); *Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) ("dissipation" of corporate assets); *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"); *Yu v. Yu*, Index No. 656611/2016, 2018 WL 3928392, *4-5 (Sup Ct. N.Y. Co. Aug. 16, 2018).

The Petition's claim for equitable dissolution (First Cause of Action) is predicated on Respondents' looting of the Companies' assets, their oppression and freezing-out of the Estate, and the multiplicity of egregious breaches of their fiduciary duties to the injury of the Companies and Estate. *See Leibert, supra,* 13 N.Y.2d 313; *Ferolito*, *supra*, 99 A.D.3d 19; *Lemle*, *supra*, 92 A.D.3d at 500; *Gjuraj v. Uplift Elevator Corp*., 110 A.D.3d 540 (1st Dep't 2013); *Leight, supra*, 18 A.D.2d at 982; *Gaines, supra*, 15 A.D.2d at 743.

Respondents do not dispute that, as a general matter, equitable dissolution is appropriate based on the detailed and supported allegations in the Petition. Nevertheless, Respondents perfunctorily claim, without support, that "Respondents are not looting the LLCs." Respondents' Memorandum of Law (Dkt. No. 59) at p. 17-18. Of course, this bare denial must be disregarded on this motion because the Petition's pleadings of looting are deemed true, and indeed, are shown to be true through ample evidence. Regardless, Respondents fail to address the Petition's other allegations of oppression and freeze-out or Respondents' litany of other egregious misconduct.

b. The Availability of Parallel Relief is Insufficient to Warrant Dismissal

Equitable dissolution should be granted because the Estate has been wholly deprived of the value of its membership in the Companies due to Respondents' wrongful conduct. The Court should apply this doctrine to ensure the Estate realizes the economic expectations of its membership, as well as to redress Respondents' maleficence and to discourage further abuse. *See Leibert v. Clapp*, 13 N.Y.2d 313 (1963); *Lewis v. Jones*, 107 A.D.2d 931 (3d Dep't 1985).

There is no other relief available to the Estate that would fully accomplish the aims of equitable dissolution. Here, any relief short of dissolution would deny the Estate the value of its membership shares. Indeed, denial of dissolution would leave the Estate bound to a partnership with those who have violated "every canon of fair play toward a partner," *Dow v. Beals*, 149 Misc. 631, 632 (Sup. Ct. N.Y. Co. 1933), and who have been "disqualified" from conducting business in the corporate form, *Leibert, supra*, 13 N.Y.2d at 317. Relegating the Estate to anything less than a full remedy would be "abhorrent" to the law. *Lewis, supra*, 107 A.D.2d at 933.

Contrary to Respondents' argument, courts have flatly held that the potential availability of other relief does not warrant dismissal of a claim for equitable dissolution. *See Leibert, supra*, 13 N.Y.2d at 316 ("It is certainly no bar to the grant of such relief that…the plaintiff might have sought relief from some of the numerous acts of oppression and wrongdoing in fragmented actions by way of stockholders' derivative suits or otherwise."); *Gilbert v. Hamilton*, 35 A.D.2d 715 (1st Dep't 1970), *aff'd,* 29 N.Y.2d 842 (1971) ("That remedies other than that here pursued may be available against corporate directors does not vitiate this complaint"). This is especially true here because, as discussed above, any other relief would be inadequate to achieving the aims of equitable dissolution: to "assure the recovery" of the value of the shareholder's "investment in defendant corporations" as well as to "prevent further misuse" by wayward directors. *Lewis, supra*, 107 A.D.2d at 932. Therefore, equitable dissolution should be granted.

IV. EQUITABLE DISSOLUTION IS AVAILABLE HERE FOR THE NOMINAL RESPONDENT LLCS

a. Nothing in the Operating Agreements Precludes Equitable Dissolution

Respondents agree that the applicable "operating agreements of the LLCs, to the extent they exist, are silent as to dissolution" and thus do not present a barrier to equitable dissolution. *See* Respondents' Memorandum of Law (Dkt. No. 59) at p. 19.

b. The LLC Law Does Not Abrogate Common Law Dissolution

The LLC Law does not abrogate common law dissolution for LLCs. Rather, LLCL § 702 provides just one basis for judicial dissolution. The plain text of the statute—the court "may decree dissolution"—is permissive, and does not purport to afford the exclusive avenue for judicial dissolution of LLCs, nor does it limit other bases (including common law or equitable bases) for dissolution. *See In re Carlisle Etcetera LLC*, 114 A.3d 592, 601 (Del. Ch. 2015) (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").

LLCL § 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).

Thus the LLC Law cannot preclude equitable dissolution for dissolution of LLCs.

c. *Tzolis v. Wolff* Holds that Equitable Dissolution is Available for LLCs

The doctrine of equitable dissolution is applicable to LLCs. According to the Court of Appeals in *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008), all well-established equitable doctrines for redressing harms by corporate fiduciaries are available in the LLC context in the absence of a "clear legislative mandate to the contrary." *Id*. at 109; *see also Gottlieb v. Northriver Trading Co. LLC*, 58 A.D.3d 550 (1st Dep't 2009).[8]

Equitable dissolution, as Respondents accede, is a long-recognized, well-established, and

[8] The *Tzolis v. Wolff* holding comports with the general rule of law that "courts will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quotations omitted); *Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288, 291 (1960); *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 1332 (1946) ("equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command"); *Brown v. Swann*, 35 U.S. 497, 503 (1836) ("The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction" of statutes).

widely-applied nonstatutory basis for redressing harms by corporate fiduciaries. *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).

As to a "clear legislative mandate to the contrary," Respondents have failed to proffer any, and indeed, there is none. As discussed in Petitioner's Memorandum of Law in support of the Petition (Dkt. N. 37), and unrefuted by Respondents on this motion, the LLC Law does not expressly or implicitly abrogate or contradict equitable dissolution or any nonstatutory basis for dissolution. Nowhere does any language in the statutory text purport to decree the LLC Law as the exclusive basis for dissolution of LLCs. *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"). In fact, the plain text of LLC §§ 701 and 702 is permissive and acknowledges the existence of other avenues available for dissolution of LLCs.

Therefore, pursuant to *Tzolis v. Wolff*, in the absence of any provision—much less a "clear" provision—in the LLC Law to the contrary, equitable dissolution is available in the LLC context.

Accordingly, courts have repeatedly held that LLC members are entitled to equitable dissolution remedies 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).

Indeed, inasmuch as this Court's equitable powers are vested by the New York Constitution, it is questionable whether the legislature could ever limit the courts' equitable authority to dissolve an LLC. *See Carlisle Etcetera, supra*, 114 A.3d at 602 ("If [LLC statute] 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."); *see also Poper v. Supreme Council of Order of Chosen Friends*, 61 A.D. 405, 406–07 (2d Dep't 1901) (statutes did not limit the court's equitable power to appoint receiver, "and, if they did, it might well be that they would be unconstitutional, as infringing the ancient jurisdiction of the court").

d. Respondents' Reliance on *1545 Ocean* is Misplaced

Respondents argue, based on an out-of-context misquotation from *In re 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (2d Dep't 2010), that LLCL § 702 eliminates equitable dissolution for LLCs. However, *1545 Ocean* did not discuss or even mention this doctrine, did not limit any equitable remedies, and did not hold that LLCL § 702 precludes any nonstatutory basis for dissolution of an LLC. In fact, the *1545 Ocean* opinion expressly recognizes that *Tzolis v. Wolff* would allow for nonstatutory dissolution of LLCs. Therefore, Respondents' argument that LLCL § 702 provides the only basis for dissolution of LLCs, to the exclusion of equitable dissolution, should be rejected.

Preliminarily, *1545 Ocean* is factually and legally inapposite. Unlike in this proceeding, the operating agreement in *1545 Ocean* stated that "dissolution of the Company, shall be governed by" LLCL § 702. *Id*. at 125. Further, the "sole ground for dissolution cited by" the petitioner in *1545 Ocean* was "deadlock" based on violations of the operating agreement. *Id*. Thus the only issues before the court in *1545 Ocean* were (1) the standard for dissolution under LLCL § 702, and (2) whether deadlock could meet this statutory standard. That case is therefore inapplicable to any question related to equitable dissolution.

More fundamentally, Respondents misinterpret language cherry-picked from the opinion to argue that LLCL § 702 is the "sole basis" for dissolution of an LLC. A reading of the opinion shows that the court in *1545 Ocean* did not hold or even imply that equitable dissolution was eliminated by the LLC Law. Rather, the court explains—in the very next sentence, omitted by Respondents—that LLCL § 702 does not import "deadlock" concepts from other statutes such as the Business Corporation Law or Partnership Law statues, writing:

> Although various provisions of the LLCL were amended, LLCL 702 was neither modified nor amended in 1999. In declining to amend LLCL 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 (*see* McKinney's Statutes §§ 74, 153, 191). Phrased differently, since the Legislature, in determining the criteria for dissolution of various business entities in New York, did not cross-reference such grounds from one type of entity to another, it would be inappropriate for this Court to import dissolution grounds from the Business Corporation Law or Partnership Law to the LLCL.

Id. at 126. The Second Department thus ruled that the statutory standard for dissolution under LLCL § 702 begins with the text of the statute and does not incorporate other statutory standards for dissolution.

This ruling must be limited to statutory standards, and cannot mean that other doctrines (including valuation doctrines, cannons of payout priority, and other concepts) are inapplicable in dissolution of LLCs.[9] Indeed, *1545 Ocean* cannot be interpreted to mean that the Legislature intended, *sub silentio*, to abrogate equitable dissolution for LLCs because such a holding would be contrary to *Tzolis v. Wolf*, which held that only a "clear legislative mandate," not an implication by omission, is sufficient to eliminate long-standing and well-settled equitable doctrines for redressing corporate abuses.

Subsequent Second Department cases have made clear that *1545 Ocean* does not eliminate equitable doctrines in dissolution of LLCs. *See Mizrahi v. Cohen*, 104 A.D.3d 917 (2d Dep't 2013) (equitable remedy of forced buyout applied 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) (same).

In short, while *1545 Ocean* speaks to the statutory standard for dissolution of LLCs under LLCL § 702, the case does not and cannot have any application to equitable dissolution.

V. PETITIONER HAS STANDING TO SEEK EQUITABLE DISSOLUTION

a. Overview

Respondents' assertion that 50% members lack standing to obtain equitable dissolution is flatly incorrect. Courts have granted equitable dissolution to oppressed 50% shareholders. *See Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dep't 2012); *In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015). The test for equitable dissolution centers on abuse of control, and any shareholder harmed by such an abuse of control has standing to obtain equitable dissolution regardless of ownership percentage.

[9] Equitable dissolution is not derived from the Legislature's enactment of the BCL or Partnership Law, but from the inherit equitable power of the court over juridical entities. Thus, pursuant to *Tzolis v. Wolff*, the doctrine is automatically imported to LLCs, and can only overridden by an affirmative statutory statement disavowing it.

b. Control is the Benchmark of Equitable Dissolution

As enunciated by a century of case law, equitable dissolution is appropriate whenever those in control of an entity are looting a corporation or otherwise continuing the corporation's existence for the benefit those in control. *See Leibert v. Clapp*, 13 N.Y.2d 313, 315 (1963) ("directors and others in control…have been 'looting' its assets…and continuing the corporation's existence for the sole purpose of benefitting those in control"). Thus, abuse of control is the central focus of equitable dissolution. *See Ferolito, supra,* 99 A.D.3d at 28 ("shareholders in control have been continuing the corporation's existence for the sole purpose of benefitting those in control"); *Leight v. 551 Fifth Ave., Inc.,* 18 A.D.2d 982, 982 (1st Dep't 1963) ("the corporation is being exploited for the private benefit of its managing and controlling stockholders"); *Gaines v. Adler*, 15 A.D.2d 743, 743 (1st Dep't 1962) ("the corporation has been in the past and is now being exploited exclusively for the private benefit of its managing and controlling stockholders"); *Lennan v. Blakeley*, 273 A.D. 767, 767 (1st Dep't 1947) ("directors are continuing the existence of the corporation for the sole purpose of benefiting those in control…at the expense of the other stockholders"). Equitable dissolution centers on abuse of control because control gives rise to fiduciary duties; breach of those duties warrants judicial intervention. *See Leibert, supra*, 13 N.Y.2d at 315; *Lewis, supra*, 107 A.D.2d at 932 (equitable dissolution is warranted when "officers or directors of the corporation are engaged in conduct which is violative of their fiduciary duty to shareholders").

No aspect of fiduciary duty depends on any percentage of membership. Members of an LLC owe fiduciary duties to all other members of the LLC, regardless of percent ownership. *See Piller v. Princeton Realty Assocs. LLC*, 173 A.D.3d 1298, 1303–04 (3d Dep't 2019) ("members of a limited liability company owe one another a fiduciary duty"); *McGuire Children, LLC v.*

Huntress, 24 Misc. 3d 1202(A) (Sup. Ct. Erie Co. 2009) ("members of an LLC owe fiduciary duties to each other"). Further, managers of LLCs—both those that are duly elected and those who seize control—owe fiduciary duties to the LLC and its members, regardless of percent ownership. *See Atlantis Mgmt. Grp. II LLC v. Nabe*, 177 A.D.3d 542, 543 (1st Dep't 2019) ("As the managing members of the LLCs, the individual defendants owed plaintiff—a nonmanaging member—a fiduciary duty"); *21st Century Diamond, LLC v. Allfield Trading, LLC,* 110 A.D.3d 615, 615 (1st Dep't 2013) (defendant owed fiduciary duties under de facto officer doctrine by having "seized control" of LLC).

Nothing about the history, development, or rationale for the doctrine of equitable dissolution comports with a percent-based limitation on standing. Rather, courts have repeatedly equitably expanded standing to obtain dissolution by ignoring ownership percentages as required to meet the ends of justice. *See Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) (where statutory dissolution was only available to shareholders owning over 20% of the company, equitable dissolution was available to plaintiff who owned less than 20%); *Lewis v. Jones*, 107 A.D.2d 931 (3d Dep't 1985) (same).

c. Respondents Misinterpret *Sternberg v. Osman*

Respondents incorrectly rely on *Sternberg v. Osman*, 181 A.D.2d 897 (2d Dep't 1992) for the proposition that the Estate, because it is a 50% member of the Companies, is not entitled to equitable dissolution. However, *Sternberg* did not impose a numerical limitation on standing to obtain equitable dissolution. Rather, that case held that mere deadlock caused by a stalemate of equal membership positions did not give rise to equitable dissolution because deadlock alone, without oppression or abuse of control, is insufficient. The *Sternberg* opinion explains that the parties "constitute all of the officers and directors" of the company, in addition to each being coequal members, and there were no allegations of looting or oppression, and thus no basis to award equitable dissolution. *See id.* at 897-8.

Respondents read into this case a rule that never existed before *Sternberg* and has never been applied since. None of the cases cited by *Sternberg* discuss any particular percent ownership as a barrier to equitable dissolution. Instead, the cases cited by *Sternberg* for this proposition (*Leibert v. Clapp*, 13 N.Y.2d 313 (1963) and *Lewis v. Jones*, 107 A.D.2d 931 (3d Dep't 1985)) discuss a power imbalance exploited for the benefit of the controlling shareholder. But a power imbalance, and its unjustified exploitation, can arise even with supposedly equal ownership stakes (as discussed further below).

Finally, neither *Sternberg* nor Respondents offer any rationale why equitable dissolution should be denied for a 50% member (but not a 49% member) where the standard for equitable dissolution was otherwise met. *Cf. Bonavita v. Corbo,* 300 N.J. Super. 179, 187 (Ch. Div. 1996) (explaining that distinction between 49% and 50% ownership for obtaining dissolution "would make no sense"). In the absence of any rationale, Respondents' argument should be rejected.

d. "Minority" Status Is Not Determined Numerically

Assuming that "minority" status is required for standing to obtain equitable dissolution, the issue is not determined mathematically. In this case, the Estate is a "minority" shareholder because it lacks power and control.

"Corporate law does not define 'minority' shareholders on the basis of numbers alone. Rather it undertakes a contextual inquiry into relations of power within the corporation." Chander, Anupam, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 163 (2003); *see also* Garza, Julian J., *Rethinking Corporate Governance: The Role of Minority Shareholders-A Comparative Study*, 31 ST. MARY'S L.J. 613, 620 (2000) ("minority shareholder status is not dependent solely upon a mechanistic account of stock ownership percentages").

As such, whenever courts have been called on to define "minority" or "majority" shareholder status, they have expressly rejected a mechanistic, numerical approach. Instead, the distinction between "majority" and "minority" status turns on power and control. *See Hollis v. Hill*, 232 F.3d 460, 466 (5th Cir. 2000) (in equitable dissolution, "question of minority versus majority should not focus on mechanical mathematical calculations, but instead…whether they have the power to work their will on others—and whether they have done so improperly"); *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 371 n.7 (1999) (fifty-percent shareholder constituted "minority" shareholder under dissolution statute); *Bonavita v. Corbo*, 300 N.J. Super. 179, 187-8 (Ch. Div. 1996) ("in determining whether a particular shareholder can exercise statutory rights granted to 'minority' shareholders, the focus must be on that shareholder's power-or the lack thereof"); *Baron v. Pritzker*, 52 Pa. D. & C.4th 14 (Com. Pl. 2001) (shareholder could assert "minority" rights because defendant 50% shareholder constituted a "majority" shareholder owing fiduciary duties); *see also In re PHC, Inc. S'holder Litig.*, 894 F.3d 419, 429–30 (1st Cir. 2018) (holding that while courts sometimes use "terminology" employing a "majority shareholder/minority shareholder dichotomy," "employment of such language" was "only in the abstract" and not numerical).

Thus, courts have repeatedly ruled that an oppressed 50% owner constitutes a "minority" shareholder, including for purposes of dissolution. *See Hollis, supra*, 232 F.3d at 466 (50% owner was "minority" for purposes of in equitable dissolution); *Balsamides, supra*, 160 N.J. at 371 n.7 (1999) (fifty-percent shareholder constituted "minority" shareholder under dissolution statute); *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982) (failure to grant receivership over corporation would result in "deadlock of indefinite duration which would, in effect, leave the existing directors in perpetual control of the corporate entity, and would relegate the one-half owners of the corporation to a perpetual minority status”).

Here, Respondents have seized unilateral control over the Companies to the exclusion of the Estate, and have misused that control in breach of their fiduciary duties. *See 21st Century Diamond, LLC v. Allfield Trading, LLC,* 110 A.D.3d 615, 615 (1st Dep’t 2013) (defendant owed fiduciary duties under de facto officer doctrine by having “seized control” of LLC); *Bookhamer v. I. Karten-Bermaha Textiles Co.*, 52 A.D.3d 246, 247 (1st Dep’t 2008) (50% member who “took over management” of LLC breached his fiduciary obligation to the LLC’s other 50% member during her life and her estate after her death). Based on this control dynamic, the Estate constitutes a “minority” shareholder for purposes of equitable dissolution.

e. The Estate Has Equitable Standing to Obtain Dissolution

The Estate has equitable standing to obtain dissolution regardless of whether it is a “minority” member of the Companies or whether *Sternberg v. Osman*, *supra*, limits standing to “minority” shareholders. *See In re Carlisle Etcetera LLC*, 114 A.3d 592, 601-7 (Del. Ch. 2015).

In corporate shareholder relationships, courts will confer equitable standing on plaintiffs as necessary to achieve the aims of justice. *See Schoon v. Smith*, 953 A.2d 196, 204 (Del. 2008) (“equitable standing for a stockholder…can be judicially extended to address new circumstances”). Accordingly, courts have granted plaintiffs equitable standing to obtain dissolution. *See Carlisle Etcetera, supra*, 114 A.3d at 601-7 (plaintiff had equitable standing to obtain equitable dissolution of LLC); *Lewis v. Jones*, 107 A.D.2d 931 (3d Dep’t 1985) (plaintiff who lacked standing to obtain dissolution under BCL § 1104-a had standing to obtain equitable dissolution).

Indeed, a central application of equitable dissolution has been to escape the strictures of percentage-based standing rules. *See Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) (plaintiff who owned less than 20% of a corporation and thus could not obtain statutory dissolution could obtain equitable dissolution); *Lewis, supra*, 107 A.D.2d 931 (same); *see also Piazza v. Gioia*, Index No. 5786/2015, 2016 WL 4000625, at *10 n.3 (Sup. Ct. Kings Co. July 26, 2016) ("Common-law dissolution is generally utilized by minority shareholders holding less than 20% of the corporation's shares, who are unable to avail themselves of Business Corporation Law § 1104-a").

Equitable standing is appropriate here because equity commands a disregard of ridged forms that work injustice. A numerical approach to equitable dissolution would be inimical to the flexibility at the heart of equity. Equity will also look at substance and reality rather than labels. The reality of Respondent's actions is that the Estate has no voting, control, participation, or access rights, and thus, in essence, has a zero percent membership interest.

Finally, equity will not require a vain or futile act, and will deem done what could or should have been done. If a strict numerical definition of "minority" applied, the Estate could freely transfer 1% of its membership in the Companies, obtain a 49% interest, and thus obtain dissolution. *See Bonavita v. Corbo,* 300 N.J. Super. 179, 187 (Ch. Div. 1996) (explaining that it "would make no sense" to deny dissolution to a 50% shareholder but grant it to a 49% shareholder).

Thus, assuming "minority" status is required for dissolution, equity should deem the Estate a minority member of the Companies.

VI. PETITIONER'S CLAIM FOR EQUITABLE BUYOUT SHOULD BE UPHELD

a. Buyout is the Most Equitable Remedy under the Circumstances of this Case

Petitioner should be granted equitable buyout (Third Cause of Action) upon dissolution of the Companies because buyout of the Estate's membership interests is the most fair, efficient, and appropriate remedy to redress Petitioner's rights in this case. Equitable buyout, rather than dissolution by liquidation, would avoid the expense and inefficiency of multiple judicial sales, and would allow Respondents to continue their membership in the Companies without the Estate's involvement.

Courts have resoundingly approved the remedy of an equitable buyout in dissolution of LLCs. *See PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 839 (2d Dep't 2020) ("most equitable method of resolving" dissolution of LLC was equitable buyout); *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); *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); *Matter of Superior Vending, LLC*, 71 A.D.3d 1153 (2d Dep't 2010); *Matter of Davis*, 174 A.D.2d 449 (1st Dep't 1991) (fairness required forced buyout); *Lyons v. Salamone*, 32 A.D.3d 757 (1st Dep't 2006); *Matter of Wiedy's Furniture Clearance Center Co*., Inc., 108 A.D.2d 81 (3d Dep't 1985).

Accordingly, this Court should (i) award equitable buyout to Petitioner, (ii) set a hearing to determine the valuation amount, (iii) set the valuation date as Ms. Lindenberg's date of death,[10] and (iv) set a prejudgment interest rate for the buyout amount[11].

Respondents' motion, while conceding that equitable buyout is an appropriate remedy in dissolution of LLCs, argues that dissolution is a prerequisite to an equitable buyout, and thus argues that, without dissolution, Petitioner's claim for an equitable buyout should be dismissed

[10] *See PFT Tech., LLC v. Wieser*, 181 A.D.3d 836, 838 (2d Dep't 2020) (in equitable buyout upon dissolution, "court should set the valuation date for the minority member's interest by reference to the equities of the case").
[11] *See Matter of Fleischer*, 107 A.D.2d 97, 101 (2d Dep't 1985) (12% prejudgment interest on value of shareholder's shares upon dissolution).

as well. However, as explained above, Petitioner has a right to dissolution of the Companies, both under LLCL § 702 and under the doctrine of equitable dissolution. Thus, equitable buyout should be granted as the proper remedy in this case.

b. Respondents' Claim Preclusion Argument is Wholly Inapposite

Respondents' discussion of a previous Surrogate's Court proceeding is irrelevant to dismissal. As noted by Respondents (Dkt. No. 59 at p. 27), a separate turnover proceeding under SCPA § 2104 was commenced and quickly withdrawn without prejudice before the commencing document had even been entertained, before any responsive pleading had been served, and without any ruling or determination. Withdrawal of a claim without prejudice and without an adjudication on the merits has no preclusive effect. *See Maurischat v. Cty. of Nassau*, 81 A.D.3d 793, 794 (2d Dep't 2011); *AutoOne Ins. Co. v. Valentine*, 72 A.D.3d 953, 955 (2d Dep't 2010); *Weldotron Corp. v. Arbee Scales, Inc.,* 161 A.D.2d 708, 709 (2d Dep't 1990). Regardless, Petitioner's withdrawn assertion of a claim for turnover in Surrogates Court under surrogate-specific procedural law (SCPA § 2104) is far too different to have any bearing on equitable buyout in this action, which is predicated on different rights and arises out of different facts.

c. "Forum Shopping" is Not a Dismissal Doctrine

This proceeding was commenced in the proper Court, which, sitting in equity, has plenary jurisdiction over the parties and claims here. Respondents' vague allegation of "forum shopping" is not a legal basis for dismissal. A plaintiff's choice of forum is entitled to strong deference and should only be disturbed pursuant to established doctrines. *See Swaney v. Acad. Bus Tours of New York, Inc*., 158 A.D.3d 437, 438 (1st Dep't 2018); *Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks (USA) Inc.,* 131 A.D.3d 431, 431 (1st Dep't 2015) ("plaintiff's choice of forum should rarely be disturbed"). Respondents have failed to show any legal doctrine of "forum shopping" dismissal, and so this aspect of the motion should be rejected.

VII. WITHDRAWAL SHOULD BE PERMITTED UPON DISSOLUTION

Withdrawal (Fourth Cause of Action), like equitable buyout, also seeks a buyout of the Estate's interest in the Companies with a corresponding determination of the fair value of such membership. *See Deerin v. Ocean Rich Foods, LLC*, 158 A.D.3d 603, 607 (2d Dep't 2018) ("upon withdrawing as a member of a limited liability company, a withdrawing member is entitled to receive…the fair value of his or her membership interest").

Upon decreeing dissolution, the Court may concomitantly grant withdrawal. Respondents do not deny this, but instead argue that in the absence of dissolution, withdrawal should be denied as well. However, because dissolution is proper, as explained above, so is withdrawal with a resulting buyout.

VIII. LEAVE TO ANSWER SHOULD BE DENIED IN THE COURT'S DISCRETION

The instant motion to dismiss this special proceeding was submitted in lieu of an answer pursuant to CPLR 404(a) and may be considered as an answer due to its denials, factual averments, and submission of proof. *See Matter of HGK Asset Mgmt., Inc.*, 228 A.D.2d 246 (1st Dep't 1996). Upon denial of Respondent' motion, the Court may grant or deny leave to submit an answer to the petition in its sound discretion. *See Ford v. Pulmosan Safety Equip. Corp.,* 52 A.D.3d 710, 711 (2d Dep't 2008); *Targee St. Internal Med. Grp. P.C. Profit Sharing Tr. v. Nationwide Assocs., Inc.,* 300 A.D.2d 497, 498 (2d Dep't 2002) ("Leave to submit an answer following denial of a motion to dismiss a special proceeding is discretionary…and the Supreme Court providently exercised its discretion").

Here, the Court should not grant Respondents leave to answer but instead should grant Petitioner summary disposition on the Petition's First, Second, Third, and Fourth Causes of

Action under CPLR 409(b). *See* Petitioner's Memorandum of Law submitted in support of summary disposition, annexed to the Affirmation of Zachary D. Kuperman dated August 28, 2020 as Exhibit A.

Further, Respondents have not requested leave to submit an answer upon denial of their motion. Having failed to request leave to answer, Respondents should not be granted leave.

IX. PETITIONER SHOULD BE PERMITTED TO AMEND THE PLEADING AND TO PURSUE PARALLEL CLAIMS

In the event that any aspect of Respondents' motion is granted, Petitioner should be permitted to amend her pleading to assert new and supplemental allegations in support of her claims for dissolution and other relief. *See Rockland Cty. Dep't of Soc. Servs. on behalf of Chrystal J. v. Marese W.*, 181 A.D.3d 608, 609 (2d Dep't 2020); *Bargil Assocs., LLC v. Crites*, 135 A.D.3d 676, 678 (2d Dep't 2016) (dismissal should have been without prejudice to refiling); *Inzerillo v. Town of Huntington*, 67 A.D.3d 736, 738 (2d Dep't 2009) ("court erred…in determining that the dismissal should be with prejudice").

Further, Petitioner has not yet asserted direct claims against Respondents, and so any decision on this motion should be without prejudice to any parallel direct claims Petitioner may choose to assert.

Finally, Respondents' CPLR 3211 motion addresses only to the First through Fourth Causes of Action of the Verified Petition. Thus, Petitioner's derivative claims (Fifth through Tenth Causes of Action) should proceed in any event.

CONCLUSION

WHEREFORE, Respondents' motion should be denied in its entirety, the Petition's First, Second, Third, and Fourth Causes of Action should be upheld, and Petitioners' request for summary disposition should be granted.

Dated: New York, New York
August 28, 2020

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