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,

Plaintiff,

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, MYRON WINIARSKY, ROBERT LUBIN, ARYEH WEBER, and THE LAW OFFICE OF ARYEH WEBER, ESQ.,

Defendants,

- and -

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

Nominal Defendants.

Index No.: 502779/2020

Mot. Seq. # 010

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR RECONSIDERATION AND REARGUMENT OF THE DISMISSAL OF HER FIRST CAUSE OF ACTION FOR EQUITABLE DISSOLUTION

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Plaintiff, Rena Pachter ("Plaintiff"), 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 motion pursuant to CPLR 2221 for reconsideration and/or reargument of this Court's Decision and Order dated May 5, 2021 (Doc. No. 284) to the extent said Decision and Order granted the request by Defendants, David Winiarski, Esther Winiarski, Myron Winiarsky (collectively, "Defendants"), to dismiss, pursuant to CPLR 3211, Plaintiff's First Cause of Action (Equitable Dissolution) as asserted in Plaintiff's Verified Amended, Consolidated, and Converted Complaint ("Amended Complaint") and for such other and further relief as this Court deems just and proper. As explained herein, reconsideration should be granted, and upon reconsideration, Plaintiff's equitable dissolution claim should be reinstated.

PRELIMINARY STATEMENT

By Decision and Order dated October 13, 2020 (the "October 13 Order") (Doc. No. 147), this Court denied Defendant's initial CPLR 3211 motion by ruling that Plaintiff's First Cause of Action for equitable dissolution of the Companies was cognizable and sufficiently pled. When Defendants again sought CPLR 3211 dismissal of this same equitable dissolution claim—unchanged in Plaintiff's Amended Complaint—the Court this time dismissed the equitable dissolution claim by Decision and Order dated May 5, 2021 (Doc. No. 284).

Plaintiff maintains that her equitable dissolution claim is legally cognizable and duly pled, and that the October 13 Order was correct insofar as it upheld the sufficiency of that claim.

Nevertheless, Plaintiff recognizes that the novelty and complexity of issues here will

almost certainly necessitate appellate review. And, in this regard, Plaintiff is confident that the law supports the viability of equitable dissolution and that her claim will be sustained. Plaintiff thus asserts that, rather than await the appellate endorsement of equitable dissolution—in which case the parties would have to repeat discovery and trial—the best course of action would be to reinstate the claim and allow discovery and trial to go forward in the meantime on all issues asserted in the Amended Complaint.

As explained below, for procedural and substantive reasons, the Court should adhere to its original determination and reinstate Plaintiff's equitable dissolution cause of action.

I. RECONSIDERATION IS WARRANTED AND SHOULD BE GRANTED

A motion for reconsideration and/or reargument under CPLR 2221 requires the movant to demonstrate that "the court misapprehended or misapplied the relevant law or facts" in reaching a prior determination. *See Priv. Cap. Grp., LLC v. Llobell,* 189 A.D.3d 1483, 1484 (2d Dep't 2020); *Coke-Holmes v. Holsey Holdings, LLC,* 189 A.D.3d 1162, 1164 (2d Dep't 2020). As explained below, this standard is met. The Court should grant reargument, and upon reargument, should uphold Plaintiff's equitable dissolution claim. Short of that, Plaintiff respectfully requests that reconsideration be granted to allow a clean record for bringing these issues up for review.

II. STANDARD UNDER CPLR 3211

The pleading standard under CPLR 3211 is settled. The Court, accepting the facts pled as true, must "determine only whether the facts as alleged fit within any cognizable legal theory." *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450, 471 (2021). If the facts alleged "together manifest any cause of action cognizable at law a motion for dismissal will fail." *Id.* Here, the Amended Complaint pleads facts stating a claim for equitable dissolution, which is a theory of relief cognizable under New York law. Accordingly, the claim should be sustained.

III. EQUITABLE DISSOLUTION IS DULY PLED BECAUSE OF DEFENDANTS' EGREGIOUS MALFEASANCE

a. Overview

Equitable dissolution is a well-established and widely-applied basis for dissolution of corporate entities which is amply applicable to Defendants' misconduct under the extreme facts of this case. This doctrine applies to LLCs because it has not been eliminated by the LLC Law nor by agreement of the parties.

b. Equitable Dissolution is Amply Pled

Equitable dissolution, also known as common law 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 equitable dissolution, all of which are applicable here. First, equitable 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, equitable 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, equitable dissolution will be granted in cases of other egregious misconduct violative of management's fiduciary duties. *See Lemle*, *supra*, 92 A.D.3d at 500 ("egregious conduct"); *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. Conduct-regulation is a punitive rationale 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").

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, Defendants 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 redress Defendants' misbehavior.

c. Defendants' 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. Defendants 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 Defendants' misappropriation is dissolution.

ii. Oppression and Freeze-Out

Oppression and freeze out are clearly pled. Defendants 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, Defendants 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, Defendants 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 also warrants dissolution. *See Gjuraj, supra*, 110 A.D.3d at 540; *Ferolito, supra*, 99 A.D.3d at 23.

All of Defendants' actions constitute oppression and total exclusion of the Estate from the Companies. Because Defendants 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. Equitable 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).

Defendants have engaged in egregious 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").

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

equitable dissolution.

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

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").

e. Other Relief is Inadequate

Equitable dissolution is warranted 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. Here, any relief short of dissolution would deny the Estate the full value of its membership shares. Indeed, denial of dissolution could 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.

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

a. Overview

Equitable dissolution is available to LLC members irrespective of statute. As explained more fully below, *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008) holds 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, equitable dissolution is a well-established equitable remedy and nothing in the LLC Law abrogates an LLC member's right to equitable dissolution. Therefore, equitable dissolution should be applied in this case. *See In re Carlisle Etcetera LLC*, 114 A.3d 592 (Del. Ch. 2015).[1]

b. Equitable Dissolution is Long-Established and Widely-Applied

Equitable 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 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.

[1] 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"). The holding and analysis of *Carlisle Etcetera* is likewise consonant with New York law. Just as in Delaware, New York supreme courts are vested by the New York Constitution (Const. Art. VI, § 7) and by statute (Judiciary Law § 140-b) with all those equity powers previously possessed by the English court of chancery. *See Runk v. Thomas*, 200 N.Y. 447, 460 (1911) ("The Constitution has perpetuated the ancient equity powers of the Court of Chancery in and through the Supreme Court"); *In re Steinway*, 159 N.Y. 250, 258 (1899) ("the powers of the court of kings bench and the court of chancery as they existed when the first constitution was adopted, blended and continued in the supreme court of the state"); *Alan D. M. v. Nassau Cty. Dep't of Soc. Servs.*, 58 A.D.2d 111, 116 (2d Dep't 1977) ("equity powers of the court, as derived from the chancery" cannot be "abrogated by statute").

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[2] 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").[3] 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), as well as the special fiduciary duties 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

[2] 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…").

[3] 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).

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.").

Equitable (*i.e.* nonstatutory) dissolution has been widely applied to all types of entities, including 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. Nothing in the Operating Agreements Precludes Equitable Dissolution

Defendants have agreed that the applicable "operating agreements of the LLCs, to the extent they exist, are silent as to dissolution" and thus they do not present a barrier to equitable dissolution. *See* Defendants' Memorandum of Law (Doc. No. 59) at p. 19.[4]

d. The LLC Law Does Not Abrogate Equitable Dissolution

The LLC Law does not abrogate equitable dissolution for LLCs. Rather, LLCL § 702 provides just one basis for judicial dissolution. The plain text of that 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 for dissolution—including attorney general dissolution and equitable dissolution. *See In re Carlisle Etcetera LLC*, 114 A.3d 592,

[4] Regardless, any contractual abrogation of equitable dissolution would be unenforceable as against public policy. *See Schimel v. Berkun*, 264 A.D.2d 725, 728 (2d Dep't 1999) ("a provision in a shareholders agreement which purports to prohibit judicial dissolution of a corporation violates public policy as expressed by the Legislature and under the common law").

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's text does not preclude equitable dissolution for dissolution of LLCs.

e. Equitable Dissolution is Available for LLCs under *Tzolis v. Wolff*

Equitable dissolution applies to LLCs. In *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008), the Court of Appeals held that 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. Equitable dissolution is a well-established equitable doctrine for redressing harms by corporate fiduciaries and there is no contrary provision, much less a "clear" one, in the text of the LLC Law.

Tzolis ruled that even though the LLC Law does not contain a derivative action provision (and, in fact, the Legislature 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" which could not be inferred from statutory silence. *Id*. at 109.

This holding comports with the general rule 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); *see also Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288, 291 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 1332 (1946); *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); *Wilcox v. Wilcox*, 14 N.Y. 575, 579 (1856) (equitable power is vested by the Constitution in the supreme court "until it shall be taken away by some express or clear provision of law"); *Schumann v. 250 Tenants Corp*., 65 Misc. 2d 253, 257 (Sup. Ct. N.Y. Co. 1970) ("when the statute creates an additional or supplemental remedy, the pre-existing rights of any party at common law or in equity, and the cognizance of the courts to pass on such rights are not stripped away unless the Legislature has noted its clear and explicit intention to do so"); *see also In re Steinway*, 159 N.Y. 250, 264 (1899) ("By enabling a stockholder to get some information in a new way, [the statute regarding inspection rights] did not impliedly repeal the common-law rule which enabled him to get other information in another way; for the courts do not hold the common law to be repealed by implication, unless the intention is obvious.").[5]

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

[5] Indeed, inasmuch as the supreme 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"); *Alan D. M. v. Nassau Cty. Dep't of Soc. Servs*., 58 A.D.2d 111, 116 (2d Dep't 1977) ("Nor can this traditional function be abrogated by statute, since it is founded in the equity powers of the court, as derived from the chancery").

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 and thus is available by default in the LLC context. *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").

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).

Defendants have failed to proffer any "clear legislative mandate to the contrary," and indeed, there is none. The LLC Law does not expressly or implicitly abrogate or contradict equitable dissolution or any nonstatutory basis for dissolution. As explained above, nowhere does 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 availability of other avenues 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.

f. Enactment of the Business Corporations Law Did Not Abrogate Equitable Dissolution for Corporations

Just as the enactment of the Business Corporation Law did not abrogate equitable dissolution for business corporations, the enactment of the Limited Liability Company Law did not abrogate equitable dissolution for LLCs.

In 1961, the Legislature first enacted Business Corporation Law Art. 11, the statutory framework for judicial dissolution of corporations, including § 1102 (directors' petition for judicial dissolution where "assets of a corporation are not sufficient to discharge its liabilities or that a dissolution will be beneficial to the shareholders"), § 1103 (shareholders' petition for

dissolution where "assets are not sufficient to discharge its liabilities, or that they deem a dissolution to be beneficial to the shareholders"), and § 1104 (judicial dissolution in case of deadlock among directors or shareholders). These legislative enactment presented no barrier to the subsequent application of equitable dissolution to business corporations by the Court of Appeals in *Leibert v. Clapp*, 13 N.Y.2d 313 (1963) and *Gilbert v. Hamilton*, 29 N.Y.2d 842 (1971) or any subsequent Appellate Division decision, including *Gaines v. Adler*, 15 A.D.2d 743 (1st Dep't 1962) and *Leight v. 551 Fifth Ave., Inc.*, 18 A.D.2d 982 (1st Dep't 1963).

Nor did the 1979 enactment of BCL § 1104-a (judicial dissolution at the request of 20% or more of shareholders under special circumstances) impair the recognition of equitable dissolution for corporations in *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63 (1984) and *Lewis v. Jones*, 107 A.D.2d 931 (3d Dep't 1985), or in any of numerous later rulings. Indeed, these ruling explicitly recognized the availability of equitable dissolution to less than 20% shareholders, despite the statutory limit.

There is no principled reason why the enactment of the Limited Liability Company Law should be any different. If equitable dissolution applies to corporations after the enactment of the BCL dissolution legislation, then it should also apply to LLCs the same way.

g. Defendants' Reliance on *1545 Ocean* is Misplaced

Defendants 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 provides the exclusive basis for judicial dissolution of LLCs to the exclusion of equitable dissolution. However, *1545 Ocean* did not discuss or ever mention equitable dissolution, 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

remedies in dissolution of LLCs. Therefore, Defendants' argument that LLCL § 702 provides the only basis for dissolution of LLCs (thereby abrogating 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, Defendants 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 *1545 Ocean* court did not hold, or even imply, that equitable dissolution was eliminated by the LLC Law. Rather, the court explains—in the very next sentence—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. Thus the Second Department ruled that the statutory standard for dissolution under

LLCL § 702 centers on the text of that statute and does not incorporate other statutory provisions regarding dissolution found in other chapters of the Consolidated Laws.

This ruling only means that LLCL § 702 does not incorporate other *statutory* provisions. The terms "Business Corporation Law" and "Partnership Law" in *1545 Ocean* mean those statutes. The holding cannot mean that the whole body of corporation and partnership laws (including equitable doctrines) is inapplicable to LLCs. Clearly, numerous nonstatutory doctrines (including valuation doctrines, cannons of payout priority, capacity, and other concepts), must be applicable in dissolution of LLCs, as it would yield an absurd result if *1545 Ocean* intended otherwise.[6]

Indeed, *1545 Ocean* cannot hold that the Legislature abrogated equitable dissolution for LLCs *sub silentio,* because *Tzolis v. Wolf* states that only a "clear legislative mandate," not an implication by omission, is sufficient to eliminate such a long-standing and well-settled equitable doctrine for redressing corporate abuses. Because equitable dissolution is not derived from the Legislature's enactment of any statute, but from the inherent equitable power of courts over juridical entities, *Tzolis v. Wolff* holds that this doctrine is automatically imported to LLCs, and can only be overridden by an affirmative statutory statement abrogating it.

Subsequent Second Department cases have made clear that *1545 Ocean* does not eliminate equitable doctrines in dissolution of LLCs even absent statutory authority. *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,*

[6] In the LLC context, courts often look to the decisional and statutory laws governing partnerships and corporations. *See Najjar Grp., LLC v. W. 56th Hotel LLC*, 110 A.D.3d 638, 639 (1st Dep't 2013) (looking to BCL § 626 and case law regarding pre-suit demand); *JMM Properties, LLC v. Erie Ins. Co*., No. 5:08-cv-1382, 2013 WL 149457, at *6 (N.D.N.Y. Jan. 14, 2013), *aff'd*, 548 F. App'x 665 (2d Cir. 2013) (unpub.) ("Courts have looked to New York common law regarding corporations and partnerships" for guidance in cases involving LLCs); *Aloha Power Co., LLC v. Regenesis Power, LLC*, No. CV 12697, 2017 WL 6550429, at *3 (Del. Ch. Dec. 22, 2017) ("the Court may look to cases interpreting similar Delaware statutes concerning corporations and partnerships" in interpreting LLC statutes").

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 relevance to equitable dissolution.

h. The Sufficient Pleading of a Statutory Dissolution Claim Does Not Preclude Equitable Dissolution

Procedurally, fundamental rules of pleading allow Plaintiff here to assert claims for both equitable dissolution as well as statutory dissolution.

First CPLR 601 states: "The plaintiff in a complaint…may join as many claims as he may have against an adverse party." Second, CPLR 3014 expressly allows alternative and even inconsistent claims. As such, it is well settled that a plaintiff may plead contradictory claims. *See Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 218 (1984) ("plaintiff is entitled to advance inconsistent theories in alleging a right to recovery"); *Sorge v. Gona Realty, LLC, 1*88 A.D.3d 474, 474–75 (1st Dep't 2020) ("CPLR 3014 specifically authorizes pleading of inconsistent theories"); *Kerzhner v. G4S Gov't Sols., Inc.*, 138 A.D.3d 564, 565 (1st Dep't 2016); *Gold v. 29-15 Queens Plaza Realty, LLC*, 43 A.D.3d 866, 867 (2d Dep't 2007) ("plaintiffs were entitled to plead alternative and inconsistent causes of action"). Thus, even where one cause of action would preclude the existence of another, every plaintiff may plead as many causes of action as state a cognizable claim. *See Shear Enterprises, LLC v. Cohen*, 189 A.D.3d 423 (1st Dep't 2020); *Segal v. Cooper*, 49 A.D.3d 467, 467–68 (1st Dep't 2008). A plaintiff need not elect between inconsistent remedies at the pleading stage. *See Wilmoth v. Sandor*, 259 A.D.2d 252, 254 1st Dep't 1999); *Strauss v. DiCicco*, 64 A.D.2d 979, 980 (2d Dep't 1978).

In equity, well-settled procedural rules allow joinder of ostensibly inconsistent legal and equitable claims. Pleading inconsistent legal and equitable claims is especially proper where, as here, the legal claims are disputed, fragmented, and uncertain. *See Union Pac. R. Co. v. Bd. of*

Comm'rs of Weld Cty., Colo., 247 U.S. 282, 287 (1918) ("It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law"); *Hochman v. LaRea*, 14 A.D.3d 653, 655 (2d Dep't 2005); *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225, 228 (1st Dep't 1993); *Equitable Life Assur. Soc. of U.S. v. Mait*, 279 A.D. 194, 197 (1st Dep't 1951). Regardless, for a legal remedy to vitiate an equitable claim, the legal "remedy must be plain and adequate and as certain, prompt, complete and efficient to attain the ends of justice and its prompt administration as the remedy in equity," *Lesron Junior, Inc. v. Feinberg*, 13 A.D.2d 90, 93 (1st Dep't 1961), which is not the case here. In any event, Defendant has failed to make any such showing, through documentary evidence or otherwise, as required under CPLR 3211. *See Seneca Ins. Co. v. Lincolnshire Mgmt., Inc.*, 269 A.D.2d 274, 275 (1st Dep't 2000); *Isopo v. Giambanco*, 31 Misc. 3d 1217(A) (Sup. Ct. Nassau Co. 2011).

The Court of Appeals has explicitly stated that common law dissolution is proper notwithstanding the availability of parallel legal relief. *See Gilbert v. Hamilton*, 29 N.Y.2d 842 (1971), *aff'g* 35 A.D.2d 715 (1st Dep't 1970) ("That remedies other than that here pursued may be available against corporate directors does not vitiate this complaint"); *Leibert v. Clapp*, 13 N.Y.2d 313, 316 (1963). Indeed, courts have explicitly upheld the availability of common law dissolution notwithstanding the explicit availability of statutory dissolution. *See Fedele v. Seybert*, 250 A.D.2d 519 (1st Dep't 1998). Lack of an adequate legal remedy is not and has never been an element of common law dissolution.

Indeed, in shareholder oppression actions, the Court of Appeals has specifically held that in "exceptional case" involving "fraud, misrepresentation, self-dealing, deliberate waste of

corporate assets, or gross and palpable overreaching," the Court's equitable "powers are complete to fashion any form of equitable and monetary relief as may be appropriate," notwithstanding the availability of statutory remedies. *Loengard v. Santa Fe Indus., Inc.*, 70 N.Y.2d 262, 266 (1987). *Cf. also Mullin v. WL Ross & Co. LLC*, 173 A.D.3d 520, 522 (1st Dep't 2019) (fiduciary relationship obviates necessity of inadequacy of legal remedy).

Thus, courts have directly upheld pleading both statutory dissolution and equitable dissolution claims. *See Ferolito v. Vultaggio*, 99 A.D.3d 19 (1st Dep't 2012); *Hanley v. Hanley*, 64 Misc. 3d 1202(A) (Sup. Ct. Albany Co. 2019); *Kassab v. Kasab*, 56 Misc. 3d 1213(A) (Sup. Ct. Queens Co. 2017).

II. PLAINTIFF HAS STANDING TO SEEK EQUITABLE DISSOLUTION

a. Overview

Defendants' 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 numerical ownership percentage.

b. Control is the Benchmark of Equitable Dissolution

As enunciated by a century of case law, equitable dissolution is available for any shareholder 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. Rather, members of an LLC owe fiduciary duties to the other members of the LLC, regardless of percent ownership. *See Piller v. Princeton Realty Assocs. LLC*, 173 A.D.3d 1298, 1303–4 (3d Dep't 2019) ("members of a limited liability company owe one another a fiduciary duty"); *Jones v. Voskresenskaya,* 125 A.D.3d 532, 533 (1st Dep't 2015).

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. Defendants Misinterpret *Sternberg v. Osman*

Defendants incorrectly rely on *Sternberg v. Osman*, 181 A.D.2d 897 (2d Dep't 1992) for the proposition that the Estate, solely 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, the *Sternberg* opinion explains that the parties, in addition to each being coequal members, "constitute all of the officers and directors" of the company, and there were no allegations of looting or oppression, and thus no basis to award equitable dissolution. *See id.* at 897-8. Thus *Sternberg* held that mere deadlock caused by a stalemate of equal membership positions did not merit equitable dissolution because deadlock alone, without oppression or abuse of control, is insufficient.

None of the cases cited by *Sternberg* discuss any particular percent ownership as a barrier to equitable dissolution. Instead, the cases cited 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 ostensible coequal ownership (as discussed further below).

Defendants read into this case a rule that never existed before *Sternberg* and has never been applied since. Their misreading stems from the transposition of the word "only," which is intended to modify the clause "looting…and violating their fiduciary duty" rather than as imposing a new limitation on standing.[7] Indeed, such "terminology" employing a "majority shareholder/minority shareholder dichotomy" is generally intended "only in the abstract" and not as imposing a limitation on shareholder rights. *See In re PHC, Inc. S'holder Litig*., 894 F.3d 419, 429–30 (1st Cir. 2018).

Finally, neither *Sternberg* nor Defendants 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, Defendants' 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."

[7] Similar language constructions clearly do not impose a new element or limitation. When an opinion states that a rule "only applies to individuals who…", the Court does not intend to shut out entities, or that a statute "only applies to defendants who…" the court clearly does not intend to foreclose plaintiffs, third-party defendants, or respondents from the applicability of the statute—especially without any rationale, analysis, or logic to such a limitation.

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 for equitable dissolution, statutory dissolution, and other purposes. *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, Defendants 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 Defendant'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.

III. IT WAS ERROR FOR THE COURT TO REVERSE ITS PRIOR ORDER

The October 13 Order, which upheld as properly pled Plaintiff's claim for equitable dissolution, constitutes law of the case, and so the pleading sufficiency of this claim should have been adhered to. *See JFK Family Ltd. P'ship v. Millbrae Nat. Gas Dev. Fund 2005, L.P.,* 169 A.D.3d 780, 78 (2d Dep't 2019).

Further, Defendants were precluded under CPLR 3211(e) from again seeking dismissal of this claim under the single-motion rule. *See Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738, 739 (2d Dep't 2015); *B.S.L. One Owners Corp. v. Key Int'l Mfg., Inc.*, 225 A.D.2d 643, 643 (2d Dep't 1996); *Schwartzman v. Weintraub,* 56 A.D.2d 517, 517 (1st Dep't 1977).

It was error for the Court to dismiss Plaintiff's equitable dissolution claim, *sua sponte*, or to consider Defendants' request as a belated motion for reconsideration, after having upheld the same claim on a prior motion to dismiss. *See Carbon Cap. Mgmt., LLC v. Am. Exp. Co.,* 88 A.D.3d 933, 936 (2d Dep't 2011); *Merriwether v. Osborne*, 66 A.D.3d 851, 852 (2d Dep't 2009); *Adams v. Fellingham*, 52 A.D.3d 443, 444 (2d Dep't 2008); *Owens v. Stuart*, 292 A.D.2d 677, 678, 739 N.Y.S.2d 473, 474 (3d Dep't 2002); *Reisman v. Coleman*, 226 A.D.2d 693, 694, 641 (2d Dep't 1996). This rule against vacating prior orders is especially true of dismissal, which requires a heightened standard as it directly implicates the substantive rights of a plaintiff, constitutional rights to due process, and procedural rights under CPLR 3211. *See Menardy v. Gladstone Properties, Inc.*, 100 A.D.3d 840, 842 (2d Dep't 2012).

Where a substantive change to a prior order is sought, relief can only be obtained through a direct appeal, by motion on notice to vacate pursuant to CPLR 5015(a), or upon a timely motion on notice to reargue under CPLR 2221(d). *See Herpe v. Herpe*, 225 N.Y. 323, 327 (1919); *Sokoloff v. Schor*, 176 A.D.3d 120, 133 (2d Dep't 2019); *Carter v. Johnson*, 110 A.D.3d

656, 659 (2d Dep't 2013); *Armstrong Trading, Ltd. v. MBM Enterprises*, 29 A.D.3d 835, 836 (2d Dep't 2006). These did not occur here.

Accordingly, the Court should grant this motion, adhere to the holding of its October 13 Order, and uphold Plaintiff's equitable dissolution claim as properly pled.

CONCLUSION

For the reasons stated herein, Plaintiff's motion should be granted in its entirety.

Dated: New York, New York
June 4, 2021

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