SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ESTATE OF JUDITH LINDENBERG, by and Through its Administrator, RENA PACHTER,

Index No. 502779/2020

Plaintiff,

-against-

DAVID WINIARSKI, ESTHER WINIARSKY, MYRON WINIARSKY, ROBERT LUBIN, ARYEH WEBER, And the LAW OFFICE OF ARYEH WEBER, ESQ.,

Defendants.

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DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION OF PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR REARGUMENT

PRELIMINARY STATEMENT

This Court should deny the motion of Plaintiff Rena Pachter ("**Plaintiff**"), in her representative capacity as Administrator of the Estate of Judith Lindenberg (the "Estate") for an order pursuant to CPLR 2221 for reconsideration and/or Reargument (the "**Reargument Motion**") of this Court's Decision and Order dated May 5, 2021 (the "**Order**"; Doc. No. 284) to the extent that it dismissed the first cause of action for equitable dissolution because the motion fails to identify any facts or law that were overlooked or misapprehended by the Court. The Reargument Motion is merely a regurgitation of Plaintiff's initial opposition to the motion of David Winiarski, Esther Winiarski, Myron Winiarsky, Robert Lubin, Aryeh Weber and the Law Office of Aryeh Weber (collectively and/or individually "**Defendants**") to dismiss various causes of action asserted in the amended complaint, including, the first cause of action for equitable dissolution. As will be demonstrated below, a CPLR 2221 motion to reargue and/or reconsider "is not a vehicle to permit an unsuccessful party a second opportunity to argue issues previously decided or to present

new or different arguments relating to those issues." Estate of Jacob H. Rottkamp, 2010 NYLJ LEXIS 6496 (Surrogate's Ct. Suffolk Co.) *citing* (Emerging Vision, Inc. v. Main Place Optical, Inc., 11 Misc. 3d 1057(A), 815 N.Y.S.2d 494 (Sup. Ct. Nassau Co. 2006); *citing* McGill v. Goldman, 261 A.D.2d 593 (2nd Dept. 1999); William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22 (1st Dept. 1992), *lv. denied, lv. dismissed,* 80 NY2d 1005). In as much as Plaintiff failed to demonstrate any facts and/or law that that this Court overlooked or misapprehended, the Reargument Motion should be denied.

ARGUMENT

POINT I

PLAINTIFF'S FAILURE TO IDENTIFY FACTS OR LAW THAT THIS COURT OVERLOOKED OR MISAPPREHENDED MANDATES THE DISMISSAL OF THE REARGUMENT MOTION

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" Jaspar Holdings, LLC v. Gotham Trading Partners #1, LLC, 186 A.D.3d 582, 130 N.Y.S.3d 19 (2nd Dept. 2020) *citing* (CPLR 2221[d][2]; Degraw Constr. Group, Inc. v McGowan Bldrs., Inc., 178 AD3d 772, 773, (2nd Dep't 2019). A motion to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" McGill v. Goldman, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2nd Dept. 1999) (plaintiff's failure to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in dismissing the complaint mandates the denial of a motion to reargue).

Here, Plaintiff fails to support the Reargument Motion with any facts or law that the Court overlooked. The entire 28 page brief in support of the Reargument Motion contains the very same arguments that Plaintiff asserted in opposition to Defendant's motion to dismiss the first cause of action for equitable dissolution. As such the motion should be denied.

To the extent that Plaintiff asserts that the Reargument Motion should be treated as a motion for reconsideration, such assertion such be denied. A motion for leave to renew must be supported by new or additional facts which were not known to the party seeking renewal, and consequently, not make known to the Court. Jaspar Holdings, LLC at 585. Here, Plaintiff does not even attempt to support the motion with new or additional facts which were not known to her. Consequently, to the extent that this motion is designated as a renewal motion, the motion should be denied.

POINT II

THE COURT PROPERLY DISMISSED THE EQUITABLE DISSOLUTION CAUSE OF ACTION

This Court's dismissal of the first cause of action for equitable dissolution of the subject limited liability companies (the "**Companies**") is entirely and directly supported by two Second Department cases – *to wit*, Matter of 1545 Ocean Ave., LLC 72 A.D.121, 893 N.Y.S.2d 590 (2nd Dep't 2010) and Sternberg v. Osman, 181 A.D.2d 897, 582 N.Y.S.2d 206 (2nd Dep't 1992) *appeal dismissed* 80 N.Y.2d 892, 587 N.Y.S2d 902 (1992). In 1545 Ocean Ave., the Second Department held that the "Legislature can only have intended the [limited liability company] dissolution standard [set forth in Limited Liability Company Law Sec. 702] remain the sole basis for judicial dissolution of a limited liability company." The Second Department reasoned, "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 Limited Liability Company Law."

In fact, no court in the State of New York has ever recognized a common law dissolution cause of action for a limited liability company. If this Court became the first New York Court to do so, it would be irreconcilable with the Second Department's instruction to the trial courts in Ocean Ave. that the legal standard of Limited Liability Company Law ("LLCL") Sec. 702 is "the sole basis for dissolution of a limited liability company," and that "it would be inappropriate for this Court to import dissolution grounds" applicable to corporations.

If this Court recognized a limited liability company ("LLC") common law dissolution claim every potential LLC dissolution petitioner can forego the dissolution standards set forth in LLCL Sec. 702 i.e., "whenever it is not reasonably practicable to carry on the business," and simply plead a "common-law" claim for dissolution based solely upon claimed "egregious" fiduciary duty breaches. A recognition of a cause of action for equitable dissolution of a LLC would create a gaping, rule-swallowing, exemption, permitting an easy circumvention of the more stringent dissolution standard chosen by the Legislature in LLCL Sec. 702.

This was not the intent of the Legislature. As will be demonstrated below, the Legislature amended the withdrawal and buyout provisions and retained the dissolution standard of the LLCL for estate and gift tax purposes to minimize the tax value of an ownership interest in an LLC to reflect (1) that the interest is difficult to liquidate, and (2) that purchasers will generally pay less for illiquid positions. The Estate reaped the benefits of the LLCL by claiming that notwithstanding that the Estate's ownership interest in the Companies is valued over $10,000,000, the market value of the Estate is $0.00. (Doc. No. 69). Consequently, the Estate avoided paying any federal or state

income taxes or estate taxes. It was only because of the rigorous default dissolution provisions of the LLCL that make it extremely difficult to sell and liquidate an LLC that Plaintiff was able to claim that market value of its estate was worth $0.00 (Doc. No. 69). and avoid paying any federal or state income or estate taxes (Id.)

The Estate now wants to circumvent the same law that enabled it to avoid paying any taxes – LLCL Sec. 702 - by claiming that the Companies should be dissolved by common law dissolution. A "common law limited liability dissolution" claim would defeat the entire purpose of LLCL Sec. 702.

This Court's dismissal of the equitable LLC dissolution claim is also consistent with Osman that held that "the remedy of common-law dissolution is available only to minority shareholders" and that a 50% shareholder is "not qualified to request common-law dissolution."

A. 1545 OCEAN AVE. MANDATES THE DISMISSAL OF THE CAUSE OF ACTION FOR COMMON LAW DISSOLUTION OF THE LLCS

In 1545 Ocean Ave., this Court held in crystal clear language that LLCL Sec. 702 provides the one and only legal ground in New York for LLC judicial dissolution, forbidding any notion of extra-statutory and common-law judicial dissolution standards or the "borrowing" of other rules applicable to partnerships and corporations. The Second Department ruled that "Legislature can only have intended the dissolution standard [in LLCL Sec. 702] to remain the sole basis for judicial dissolution of a limited liability company." Id. This Second Department holding is consistent with the legislative history of the dissolution and withdrawal provisions of the LLCL.

Pursuant to the original New York Limited Liability Company Law as enacted in 1994 (the "1994 LLCL"), LLC members were afforded broad exit rights under the LLCL, and judicial

dissolution was not an issue. Roxanne Makoff, *Judicial Dissolution Under New York's Limited Liability Company Law: Should Breaking Up Be This Hard To Do*, 38 Cardozo L. Rev. 1541, 1556, (2017) *citing* Section 701 of the 1994 LLCL. For example, under 1994 LLCL Sec. 606 (withdrawal of a member) LLC members may withdraw according to the agreement or upon six months' prior written notice, unless, otherwise provided by agreement. Id. Moreover pursuant to sec. 701 of the 1994 LLCL, the withdrawal of a member automatically triggers dissolution. Id.

However, judicial dissolution became more difficult to achieve after the LLCL was amended in 1999 to address the changes of the IRS treatment of an LLC. Heather M. Field, *Checking in on "Check-the-Box Election, and the Future of Tax Simplification"*, 34 Hofstra L. Rev. 405, 463-70 (2005). Pursuant to the post-1999 amendments to the LLCL, a member's statutory exit and dissolution rights were eliminated. Makoff at 1556, 1558. To this extent LLCL Sec. 701(b) provides for the corporate characteristic of perpetual existence: an LLC will not dissolve unless the operating agreement provides for dissolution by a certain date or upon the happening of specified events, consented to by a majority vote or judicially dissolved. Moreover, the legislature deciding that LLCs should be treated similarly to corporations, also amended the withdrawal provisions of the LLCL by eliminating the right to unilaterally withdraw prior to dissolution and winding up. Makoff at 1558 *citing* to N.Y. Bill Jacket, 1999 S.B. 1640, ch. 420, 222d Leg. Reg. Sess. (1999) ("A shareholder of a corporation does not have a right of withdrawal or redemption absent an express agreement. It is appropriate to grant limited liability companies/partnerships similarly to corporations in this area"); *see* LLCL Sec. 606(a).

Consequently, under the post amendment 1999 LLCL, LLC members no longer have statutory dissolution and/or withdrawal rights. Makoff at 1559. Thus, in circumstances where the parties are irreconcilably hostile and the LLC operating agreement does not provide for an

alternative exit mechanism, judicial dissolution – a provision that has not changed since the original enactment of the LLCL – is the only way out for an aggrieved member. *See* In re 1545 Ocean Ave., 595 (holding that LLCL Sec. 702 is the "sole basis for judicial dissolution of a limited liability company.") *See also* In Re Noel Weintraub, 2015 N.Y. Misc. LEXIS 6315 (Sup. Ct. Nassau Co. 2015 ("Dissolution [of an LLC] in the absence of an operating agreement can only be had upon satisfaction of the LLCL Sec. 702").

For example, in Matter of Jeffrey M. Horning v. Horning Constr. LLC, 12 Misc. 3d 402, 408, 816 N.Y.S.2d 877, 882 (Sup. Ct. Monroe Co. 2006) the Court held that "[d]issolution in the absence of an operating agreement can only be had upon satisfaction of the standard of section 702, i.e., 'whenever it is not reasonably practicable to carry on the business.'" The court acknowledged that the LLCL poses an insurmountable challenge to members facing "untenable circumstances" seeking dissolution of an LLC without an operating agreement if the member cannot meet the dissolution standard set forth in LLCL sec. 702. Id. at 408. Nevertheless, the Court did not impose common law dissolution as an end around to LLCL sec. 702. Id. at 411. In Jefferey M. Horning, the petitioner had a 1/3 interest in the subject LLC and the two respondents each had a 1/3 interest in such LLC. Id. at 403. The subject LLC did not have an operating agreement. Id. The LLC was successful but great animosity and discord developed amongst the petitioner and respondents. Id. at 404. Consequently, the petitioner petitioned for the dissolution of the subject LLC because of his "'express desire to sever his relationship with …[the] LLC,' due to 'untenable circumstances.'" Id. at 407.

The Court denied the petition for dissolution and held,

> the Limited Liability Company Law was designed to protect members from such disruptions and expressly avoids such a result. While section 606 (a) requires dissolution and winding up upon

> withdrawal of a member, withdrawal is not available just for the asking, especially if there is no operating agreement. Instead, section 701 (b) insists that the
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> "death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited liability company shall be continued without dissolution" (Limited Liability Company Law §701 [b] [emphasis supplied]) except in the event of a majority vote (not applicable here).
>
> Thus, instead of triggering dissolution upon announced intention to withdraw, the Limited Liability Company Law provides for just the opposite. Dissolution in the absence of an operating agreement can only be had upon satisfaction of the standard of section 702, i.e., "whenever it is not reasonably practicable to carry on the business."

Id. at 407.

The Court understood the predicament that a member of an LLC may have if the LLC does not have an operating agreement with a dissolution provision if the rigorous standard of LLCL Sec. 702, i.e., “whenever it is not reasonably practicable to carry on the business” cannot be satisfied. Id. at 408. The Court recognized that the LLCL default rules leaves LLC members at the mercy of other members and facilitate a majority using its power to exclude the minority indefinitely from any return on the investment in the enterprise. Id. at 409. Notwithstanding such consequences, the Court did not apply common law dissolution to dissolve the limited liability company but held that “[d]issolution in the absence of an operating agreement can only be had upon satisfaction of the standard of section 702” and held:

> Given this statutory standard, the very real dilemma faced by petitioner, foreseen in the excellent article by Peter A. Mahler, *When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up to the Task?* (74 NY St BJ 8 [June 2002]), readily can be seen. As Mahler ably explains, dissolution under the Limited Liability Company Law is not as easy as distribution under the Business Corporation Law. With the 1999 amendments (L 1999, ch

420), the previous default dissolution rules under § 701, which required dissolution upon the withdrawal of a member unless the remaining members voted to continue, "was eliminated" in favor of the provision quoted above. (74 NY St BJ at 10 [text following n 18].) The 1999 amendments, with respect to section 606 (a) and section 701, "jettisoned the partnership model in favor of the corporate model, but left LLCL § 702 untouched." (*Id.*) Because of the "relative ease of exit under partnership law" (*id.*), section 702 was not problematic before 1999. But when the more rigorous requirements of the current section 701 were enacted, eliminating dissolution rights upon a member's withdrawal in favor of the solitary section 702 "not reasonably practicable to carry on business" standard, **LLC members such as petitioner were, and are, left at the mercy of other members' conduct which does not in the circumstances create the statutory standard for judicial dissolution in section 702**, particularly in view of the fact that there is no buy-out provision in the Limited Liability Company Law similar to that in the Business Corporation Law and other like statutes.

Retention of section 702 in unaltered form (i.e., originally designed for compatibility with the very flexible pre-1999 partnership default dissolution rules, but now applied to the more restrictive corporate model default dissolution rules) appears not to have been an oversight. Section 702, according to Mahler, "closely tracks the language in § 902 of the ABA Prototype LLC Act," which contains commentary "suggest[ing] a deliberate avoidance of the typical grounds for dissolution found in corporate dissolution statutes, on the ground that 'disgruntled members' of an LLC 'would be encouraged to make this sort of allegation in limited liability company breakups.' " (*Id.* [quoting ABA Prototype LLC Act § 902, Commentary at 64].) Mahler predicted that the tension between amended section 606 and section 701, on the one hand, and unaltered section 702, on the other hand, would create litigation in a case like this:

"The most likely candidates are post-amendment LLCs without operating agreements and therefore governed by the LLCL's new default rules. A member of such an LLC has no right to withdraw and no right to receive fair value for his or her interest. An action for judicial dissolution may be the only way out." (*Id.* at 13.)

The language of section 702 has been authoritatively held to be "plain and unambiguous," providing for a "strict" standard, "reflecting legislative deference to the parties' contractual agreement to form and operate a limited liability company." (*Dunbar Group*,

> *LLC v Tignor*, 267 Va 361, 367, 593 SE2d 216, 219 [2004] ["Only when a … court concludes that present circumstances show that it is not reasonably practicable to carry on the company's business in accord with its articles of organization and any operating agreement, may the court order a dissolution of the company"].) … Although "the presence of a reasonable exit mechanism [in an operating agreement] bears on the propriety of ordering dissolution under 6 Del. C. § 18-802" (*id.* at 96), and the same would be true under Limited Liability Company Law § 702, the absence of an agreement here leaves the court with no choice but to apply the strict Limited Liability Company Law § 702 standard. [emphasis supplied]

Id. at 408.

Similarly, to Jeffrey M. Horning, this Court in In re 1545 Ocean Avenue, after reviewing the legislature history of the LLCL also held that LLCL Sec. 702 is the "sole basis" to dissolve a LLC and held:

> The Limited Liability Company Law came into being in 1994. Many of its provisions were amended in 1999 (L 1999, ch 420) to track changes in federal tax code treatment of such entities (see Peter A. Mahler, *When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up to the Task?*, 74 NY St BJ 8 [June 2002]). Such amendments included changes in how the withdrawal of a member was to be treated (Limited Liability Company Law § 606) and events of dissolution which relate back to the operating agreement (Limited Liability Company Law § 701).
>
> Although various provisions of the Limited Liability Company Law were amended, Limited Liability Company Law § 702 was neither modified nor amended in 1999. In declining to amend Limited Liability Company Law § 702, *the Legislature can only have intended the dissolution standard therein provided to remain the sole basis for judicial dissolution of a limited liability company* (*see* McKinney's Cons Laws of NY, Book 1, 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 Limited Liability Company Law.

Id. at 126.

Moreover, In Jeffrey M. Horning the Court held that the Legislature intentionally made the dissolution standard more stringent for a limited liability company than a corporation and held:

> The foregoing analysis … in a comprehensive survey, Douglas K. Moll, *Minority Oppression & The Limited Liability Company: Learning (Or Not) From Close Corporation History* (40 Wake Forest L Rev 883, 925-940 [2005]), which shows beyond peradventure that the limitations imposed by the new default withdrawal and dissolution provisions enacted after promulgation in late 1996 of the IRS "check the box" regulations (Treas Reg [26 CFR] §§ 301.7701-1 to 301.7701-3), were intentional and designed for estate and gift tax purposes "[t]o minimize the tax value of an ownership interest" in an LLC "to reflect (1) that the interest is difficult to liquidate, and (2) that purchasers will generally pay less for illiquid positions." (40 Wake Forest L Rev at 936 [collecting authorities at 937-939].) "While perhaps accomplishing an estate tax goal, the elimination of default withdrawal and dissolution rights leaves minority members vulnerable to oppressive majority actions since the minority can no longer easily exit the venture with the 0value of its investment." (*Id.* at 939-940, citing 1 F. Hodge O'Neal & Robert B. Thompson, O'Neal's Close Corporations: Law and Practice § 2:7, at 2-57 [3d ed 2002] ["What is overlooked or assumed away is that when harmony among the parties breaks down (as long experience with human nature suggests will happen) the new (withdrawal and dissolution) default rules facilitate a majority using its power to exclude the minority indefinitely from any return on the investment in the enterprise"].)

Id. at 410.

The Estate took advantage of the tax benefits recognized by the Court in Jeffrey M. Horning. Pursuant to Plaintiff's affidavit submitted to the Surrogate's Court (Doc. No. 69) and an affidavit submitted to this Court by Plaintiff's accountant (Doc. No. 44), the Estate claims a 50% interest in the following properties: (a) 50 Westminster Road, Brooklyn valued by Plaintiffs accountant at $15,000,000 (p. 32 of Doc. No. 44); (b) 811-815 Ocean Avenue, Brooklyn valued by Plaintiff's accountant at $4,500,000 (Id.); (c) 3045-50 West 22nd Street, Brooklyn valued by Plaintiff's accountant at $3,200,000 (Id.); (d) 2805-09 West 16th Street, Brooklyn valued by Plaintiff's

accountant at $800,000 (Id.); (e) 2837 West 20th Street, Brooklyn valued by Plaintiff's accountant at $600,000 (Id.) ; (f) 201 Ditmas Avenue, Brooklyn; (g) 3135 Coney Island Avenue, Brooklyn and (g) 263 East 9th Street, Brooklyn. The Estate also claims a 1/3 ownership interest in a property located at 2169 Coney Island Avenue, Brooklyn. Pursuant to Plaintiff's accountant, the market value of the properties that Plaintiff claims an ownership interests is at least $24,100,000 (Id.). The Estate's 50% of its claimed ownership interest would be at least $12,050,000.[1] However, Plaintiff swore in an affidavit submitted to the Surrogate's Court that the Estate's claimed 50% ownership interest in such properties has a $0.00 market value and as a result thereof does not have federal or state income or estate tax liabilities (Doc. No. 69). The Estate was able to significantly discount the value of the properties and avoid paying taxes because of the rigorous default dissolution provisions of the LLCL that intentionally make it difficult to liquidate the Estate's membership interest in the Companies. This Court should not permit the Estate to have its cake and eat it too by letting the Estate reap the tax benefits of being an LLC but letting the Estate circumvent the LLCL by applying common law dissolution.

Based upon the foregoing, common law dissolution with respect to limited liability companies is not a viable cause of action in New York. In fact, there is not one court in New York that has ever applied common law dissolution to a limited liability company. None of the tens of cases cited by Plaintiffs hold or recognize that a New York LLC may be dissolved by common law dissolution. Plaintiff's reliance on Tzoliz v. Wolff, 10 N.Y.3d 100 (2008) to support such a holding or recognition is entirely misplaced. Tzoliz does not concern the issue of equitable dissolution of an LLC. The issue at bar in Tzoliz was, "whether derivative suits on behalf of LLCs are allowed." Id. at 104. The Court ruled in the affirmative because no statutory provision exists

[1] Such amount does not include the Brooklyn properties located at 2169 Coney Island Avenue, 201 Ditmas Avenue, 3135 Coney Island Avenue, and 263 East 9th Street.

for a derivative LLCL suit, a fiduciary would be "left wholly without remedy" to address a breach of another members fiduciary duty. Id. at 105.

Here, unlike derivative actions, LLC dissolution is specifically addressed in LLCL Sec. 702. Thus, unlike derivative actions prior to Tzoliz, Plaintiffs and/or other members of an LLC have an express remedy if they seek dissolution of an LLC. Tzoliz does not provide that a member may circumvent the express provisions enacted by the New York State Legislature if they are not satisfied with such statutory provisions. Moreover, in Matter of 1545 Ocean Ave., LLC, which was decided by the Second Department two years **after** Tzoliz, the Appellate Court held, that "Legislature can only have intended the dissolution standard [in LLCL Sec. 702] to remain the sole basis for judicial dissolution of a limited liability company." Id. Consequently, common law dissolution is not a basis to dissolve an LLC.

B. A COURT'S RECOGNITION OF A CAUSE OF ACTION FOR COMMON LAW DISSOLUTION OF AN LLC WOULD BE IMPROPER JUDICIAL LEGISLATION

An LLC is a creature of statute, and therefore legislation governing LLC strictly controls "and the courts must not engage in judicial legislation or expansion of the terms of the governing statutes" In re Christine Carol G.M., 1994 NYLJ LEXIS 9125 (Sup. Ct. Kings Co. 1994). Recognition of a common law limited liability claim would be nothing short of judicial legislation. As demonstrated above, the Second Department in 1545 Ocean Ave. held that "the Legislature can only have intended the dissolution standard [provided in LLCL Sec. 702] remain the sole basis for judicial dissolution of a limited liability company". Thus, it would be improper for this Court to recognize a common law dissolution claim for a LLC. "It is the right of the courts to interpret the laws, and of the Legislature to enact them, and where the Legislature has assumed to act upon a question, it is in rare cases that the courts should give effect to their enactment beyond what the

Legislature itself has chosen to indicate". Bushtis v. Catskill Cement Co., 128 A.D. 780, 113 N.Y.S. 294 (App. Div. 3rd Dept. 1908).

Consistent thereto, the Second Department in Kaminski v. Sirera, 169 A.D.3d 785, 94 N.Y.S.3d 301 (2019) refused to recognize common law rights outside the LLCL. The trial court in Kaminski, held that a non-member but owner of shares in an LLC had a common law right to pursue derivative claims on behalf of an LLC. However, the Second Department reversed the trial court and held that the non-member owner of the subject LLC did not have a common law right to pursue derivative claims. Kaminski at 787.

In addition, "the Court of Appeals observed that historically, New York Courts were considered divested of equity jurisdiction to order dissolution of corporations, as statutory prescriptions were deemed 'exclusive'. There is no more reason to conclude that Courts have a general, non-statutory power to augment the LLCL's prescriptions for dissolution by incorporation what are essentially alien BCL provisions." Peter A. Mahler, *When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up to the Task?*, 74 NY St BJ 8 (June 2002) citing to in re Kemp & Beatley, Inc. (Gardstein), 64 N.Y.2d 63, 69, 484 N.Y.S.2d 799 (1984).

While the Court may have sympathy for Plaintiff's plight based upon her baseless allegations, such misplaced sympathy does not empower this Court to enact new laws permitting Plaintiff and the Estate to circumvent LLCL Sec. 702. The Court in Jeffrey M. Horning, also recognized the petitioner moving for dissolution of the LLC was faced with "untenable" circumstances – because of the "more rigorous requirements of the current section 701 were enacted, eliminating dissolution rights upon a member's withdrawal in favor of the solitary section 702 'not reasonably practicable to carry on business' standard, LLC members such as petitioner were, and are left at the mercy of other members' conduct which does not in the circumstances

create the statutory standard for judicial dissolution in section 702, particularly in view of the fact that there is no buy-out provision in the Limited Liability Company Law.." Id. at 409. However, the Court in Horning did not engage in judicial legislation by creating a common law dissolution claim because the petitioner could not meet the dissolution standards set forth in LLCL Sec. 702 and held, "[d]issolution in the absence of an operating agreement can only be had upon satisfaction of the standard of section 702…" Id. at 408.

The Legislature purposefully drafted the LLCL to make it challenging for an LLC to dissolve or liquidate. "LLCL Section 702…'closely tracks the language in § 902 of the ABA Prototype LLC Act,' which contains commentary 'suggest[ing] a deliberate avoidance of the typical grounds for dissolution found in corporate dissolution statutes, on the ground that 'disgruntled members' of an LLC 'would be encouraged to make this sort of allegation in limited liability company breakups.' (Id. [quoting ABA Prototype LLC Act § 902, Commentary at 64].)" Jeffrey M. Horing *citing* Peter A. Mahler, *When Limited Liability Companies Seek Judicial Dissolution, Will the Statute Be Up to the Task*?, 74 NY St BJ 8 (June 2002). Additionally, "the dissolution provisions enacted after promulgation in late 1996 of the IRS "check the box" regulations (Treas Reg [26 CFR] §§ 301.7701-1 to 301.7701-3), were intentional and designed for estate and gift tax purposes "[t]o minimize the tax value of an ownership interest' in an LLC 'to reflect (1) that the interest is difficult to liquidate, and (2) that purchasers will generally pay less for illiquid positions.'" Horning at 410.

Based upon the foregoing, recognition of a common law LLC dissolution claim would be judicial legislation because the Second Department expressly held, that in the absence of an operating agreement providing otherwise, the Legislature intentionally enacted LLCL to be the "sole basis" to dissolve an LLC.

To the extent that this Court believes that the LLCL as enacted does not adequately protect an LLC member claiming untenable circumstances to withdraw from an LLC or dissolve an LLC, this Court is constrained to "avoid judicial legislation even if they believe there are errors or omissions in the legislation" Murphy v. Bd. of Educ., 104 A.D.2d 796, 480 N.Y.S.2d 138 (2nd Dep't. 1984) *citing* McKinney's Cons Laws of NY, Book 1, Statutes, § 73.

Based upon the foregoing, this Court properly dismissed the first cause of action for common law dissolution of the LLCs

C. **PLAINTIFF'S CLAIM OF 50% OWNERSHIP OF THE COMPANIES PRECLUDES A CLAIM OF COMMON LAW DISSOLUTION**

Even if common law dissolution is applicable to limited liability companies – which pursuant to 1545 Ocean Ave. it is not – Plaintiff as claimed 50% owners of the Companies are not qualified to seek common law dissolution. The Second Department in Osman in a corporate judicial dissolution case held "the remedy of common-law dissolution is available only to minority shareholders" and that 50% shareholders are not "qualified to request common law dissolution". Here, Plaintiff's claim that the Estate has a 50% membership interest in the Companies (Id.) precludes the Estate from seeking common law dissolution. See, Office Group Inc. v. Sinesio, 2020 N.Y. Misc. LEXIS 3913, (Sup. Ct. N.Y. Co. 2020) (Trial Court held that a 50% shareholder cannot maintain a clam for common law dissolution because she is not a minority shareholder).

D. **IT WOULD BE A VIOLATION OF THE DOCTRINE OF STARE DECISIS TO NOT FOLLOW THE SECOND DEPARTMENT'S HOLDINGS IN 1545 OCEAN AVE. AND OSMAN**

A recognition of common law dissolution to a 50% member of a limited liability company would be inapposite to the Second Departments' holdings in 1545 Ocean Avenue and Osman and contrary to the well-founded principles of *stare decisis*.

The Second Department in Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 476 N.Y.S.2d 918 (1984) explained that "[t]he doctrine [sic.] of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Second Department pronounces a contrary rule. This is a general principle of appellate procedure necessary to maintain uniformity and consistency and, consequently, any cases holding to the contrary are disapproved [citations omitted]." *See also* Opalinski v City of New York, 164 A.D.3d 1354, 84 N.Y.S. 3d. 499 (2nd Dep't 2018) (trial court must follow appellate authority).

Inasmuch as the Second Department has already expressly held that LLCL Sec. 702 is the "sole basis" for judicial dissolution of a limited liability company and that a 50% owner is not qualified to seek common law dissolution, and such holding has never been reversed by the Second Department or the Court of Appeals, it is respectfully submitted that this Court should not depart from these decisions.

CONCLUSION

Based on the facts of the case at bar, and the above referenced authority, it is respectfully requested that this Court deny Plaintiff's motion and grant Defendants such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 14, 2021

Respectfully,
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CERTIFICATION OF WORD COUNT

Pursuant to Rule 202.8(b) of the Uniform Civil Rules For the Supreme Court and the County Court, I certify that the attached memorandum of law in opposition to Plaintiff's motion for Reargument and/or reconsideration contains 5,645 word which is within the 7,000 applicable word limit.

Dated: New York, New York
June 14, 2021

Respectfully,
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