SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CHARLES E. RAMOS *Justice* **PART** 53

Index Number : 653201/2014
PIKUS, JEFFREY
vs.
GOLDSTEIN, STUART
SEQUENCE NUMBER : 001
CORPORATE DISSOLUTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

[illegible] decided in accordance with the accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/24/15

_____, J.S.C.
CHARLES E. RAMOS

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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STUART D. GOLDSTEIN, EDWARD M. FOX, and DARIN S. GOLDSTEIN, both individually and derivatively on behalf of TEN SHERIDAN ASSOCIATES, LLC, and SDG MANAGEMENT CORP.,

Plaintiffs,

-against-

Index No. 651209/2014

JEFFREY S. PIKUS and BLUESTAR MANAGEMENT CORP. D/B/A BLUESTAR PROPERTIES, INC.,

Defendants,

-against-

DANIELLE GOLDSTEIN,

Additional Defendant.

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Application of JEFFREY PIKUS, owner of 50% of all the outstanding Class A membership interests in TEN SHERIDAN ASSOCIATES, LLC,

Petitioner,

for the dissolution of TEN SHERIDAN ASSOCIATES, LLC, a New York Limited Liability Company, pursuant to Section 702 of the Limited Liability Company Law,

-against-

Index No. 653201/2014

STUART D. GOLDSTEIN, the other 50% owner of all the outstanding Class A membership interests in TEN SHERIDAN ASSOCIATES, LLC, and EDWARD M. FOX, DARIN GOLDSTEIN, SUSAN GOLDSTEIN, DARIN GOLDSTEIN TRUST, DANIELLE GOLDSTEIN TRUST, HANS P. UTSCH, MICHAEL ROSENBERG, DAVID FASTENBERG, PETER SCHWARTZ, GERI SCHWARTZ, JEFF SCHAKIN, ERIC SCHAKIN, DENIS CASLON, ROBERT MINESS, ALAN HOFFMAN, FREDERICK WEINER, MICHAEL WEINSTEIN, CHARLES ROSENBERG, MYRNA ROSENBERG, AARON JUNGREIS, ROBERT WILLIAMS, SUSAN PIKUS, STEVEN GELLES, RICK ASALS, JUAN CARLOS PARKER, LUIS ANDREOTTI, ERWIN GRONER, GERALD GERMAIN, MARTOM ASSOCIATES INC., LYNN BOOTH, ANDREA ANSON, JACQUELINE

MARKS NON-EXEMPT TRUST, JACQUELINE
MARKS EXEMPT TRUST, ARLENE REISMAN, and
ANDREW L. FREY, the owners of all the outstanding
Class B membership interests in TEN SHERIDAN
ASSOCIATES, LLC,

Respondents.

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Hon. Charles E. Ramos, J.S.C.,

Motion Sequence Number 002 in *Stuart D. Goldstein, et al. v Jeffrey S. Pikus, et al.,* Index No. 651209/2014 (the Goldstein Action), and Motion Sequence Number 001 in *Application of Jeffrey Pikus v Stuart D. Goldstein, et al.,* Index No. 653201/2014 (the Dissolution Action), are hereby consolidated for disposition.

These actions arise out of the ongoing disputes between Stuart D. Goldstein (Goldstein) and Jeffrey S. Pikus (Pikus), the two Managers of Ten Sheridan Associates, LLC (the Company), a New York limited liability company, with respect to the management, operation, and control of the Company and its sole asset, a mixed-use apartment building located at 10 Sheridan Square in Manhattan (the Property).

In Motion Sequence Number 002 of the Goldstein Action, plaintiffs move for an order granting them summary judgment on their first cause of action and dismissing defendants' first through eighth, twelfth and thirteenth counterclaims/cross claims.

Defendants cross move for an order granting summary judgment in their favor on the plaintiffs' first cause of action, and on

their first, second, third, fourth, fifth, sixth, tenth, eleventh, and twelfth counterclaims/cross claims.

In Motion Sequence Number 001 of the Dissolution Action, petitioner Pikus seeks an order dissolving the Company pursuant to Section 702 of New York's Limited Liability Company Law (LLCL); directing the judicial sale of the Company's assets; and, appointing a receiver to supervise the management and liquidation of the Company under LLCL § 703 (a).

Respondents Goldstein, Edward M. Fox, Darin Goldstein, the Darin Goldstein Trust, and the Danielle Goldstein Trust (the SDG Respondents) cross move, pursuant to CPLR § 404 (a) and 3211 (a) (1) and (4), for an Order dismissing the petition, or, in the alternative, pursuant to CPLR 409 (b) and LLC Law § 702, for an Order granting the SDG Respondents, and any other respondents who appear and may wish to participate, the right to purchase petitioner's interest in the Company at a price to be determined at a hearing.

Additionally, respondents Arlene Reisman, Alan Hoffman, Charles Rosenberg, Denis Caslon, David Fastenberg, Eric Shakin (s/h/a Schakin), Erwin Groner, Frederick Weiner, Jeffrey Shakin (s/h/a Schakin), Juan Carlos Parker, Larry Weinstein, Luis Andreotti, Michael Weinstein, Peter and Geri Schwartz, Frederick Asals, Robert Miness, Steven Gelles, Lynn Booth, and Susan Goldstein, each a Class B Member of the Company (the Class B

Respondents) also cross move, pursuant to CPLR § 404 (a) and 3211 (a) (1) and (a) (7), to dismiss the petition.

BACKGROUND

The following facts do not appear to be in dispute.

On December 10, 1996, Pikus formed the Company to serve as a vehicle for the purchase of the Property. On December 11, 1996, the Company entered into an agreement to purchase the Property, a transaction opportunity that was obtained by Pikus. The Property, which was constructed sometime during the 1920's, is a landmarked, 14-story mixed-use building containing approximately 73 residential apartments, a large number of which are studios, and all of which currently are rent regulated.[1]

In order to complete the purchase of the Property, the Company needed to obtain additional funds and/or investors. To this end, Pikus and Goldstein were introduced, and Goldstein agreed to try to procure investors and/or to provide such additional funds as necessary to complete the purchase of the Property. Pikus and Goldstein thereafter executed a written agreement, dated January 9, 1997, memorializing the terms of

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[1]The building was subject to rent stabilization when purchased. Over the years, it appears that some of the apartments were removed from rent stabilization due to luxury/vacancy decontrol. However, the building received a J-51 tax abatement in 2005. Following the decisions in *Roberts v Tishman Speyer Properties, L.P.*, 13 NY3d 270 [2009] and *Roberts v Tishman Speyer Properties, L.P.*, 89 AD3d 444 [1st Dept 2011], all of the apartments became re-subject to rent stabilization.

their agreements and understandings with regard to the purchase and management of the Property and the operation of the Company (the Syndication Agreement) (*see* Goldstein Aff., Exhibit L).

Under the terms of the Syndication Agreement, the parties agreed that they would attempt to syndicate up to 50% of the Company. Pikus and Goldstein also agreed that they would both be the managers of the Company with equal voting rights, and that as soon as practicable after executing the Syndication Agreement, the parties would execute an operating agreement for the operation and management of the Company (*id.*).

The parties further agreed that Goldstein, or any management company controlled by him, would be retained as the managing agent to manage the Property for an annual management fee, and that "of that fee [Pikus] shall be paid by [Goldstein] an annual supervisor fee equal to 37.5% of the management fee" (*id.*). In addition, the parties agreed that any additional fees earned by the managing agent, other than the management fee, would be divided equally between Pikus and Goldstein.

The Syndication Agreement included a brief summary of the duties and responsibilities of the managing agent including, inter alia, the duty to maintain the Property, to keep its books and records, and to make all required filings. The Syndication Agreement also provided that

> "[a]ny expenditure in excess of $5000 . . . [and] all capital improvements, including but not limited to the roof,

> exterior walls, plumbing, heating plant, windows, etc., shall require the joint approval of [Pikus] and [Goldstein], which approval shall not be unreasonably withheld" *(id.)*.

Shortly thereafter, on January 22, 1997, the Company and SDG Management Corp. (SDG), a company controlled by Goldstein, entered into a management agreement setting forth in more detail the responsibilities and duties of the managing agent (the Management Agreement) (*id.*). In addition to the payment of a management fee, the Management Agreement also provided that the managing agent would receive, inter alia, a construction administration fee of ten percent for any services it performed in planning, supervising and administering construction projects performed in or around the interior or exterior of the Property, including tenant improvements and renovations.

Among its many provisions, section 2.4 of the Management Agreement provided, that except under certain circumstances, the managing agent "shall not approve the execution of or otherwise enter into or bind [the Company] with respect to leases or any contract or agreement without the prior consent of [the Company]" (*id.*).

Pursuant to section 7.3 of the Management Agreement, the Company "designate[d] Edward Fox as its authorized representative to take all action on behalf of [the Company] under this Management Agreement until such time as [the Company] shall notify the [managing agent] of any changes thereto pursuant to

the [notice] provisions of Section 7.1 hereto" (*id.*).

The Company completed its purchase of the Property in March 1997. A written operating agreement dated March 18, 1997 (the Operating Agreement) was entered into by Goldstein and Pikus, designated therein as the Class A Members of the Company, and the investors, designated therein as the Class B Members of the Company (altogether, the Members) (*see* Goldstein Aff., Exhibit D).

Section 2.3 of the Operating Agreement states that the "business and purpose" of the Company is to

> "acquire, own, hold, expand, renovate, lease, manage, sell, operate the real property located at 10 Sheridan Square, New York, New York (the "Premises") and such other business activities and operations that are reasonable related thereto, subject to the conditions hereinafter contained"

(*id.*). Section 3.2 of the Operating Agreement provides that the Company

> "shall continue in full force and effect for a period ending the earlier of:
>
> (A) December 31, 2079, the latest date on which the Company may dissolve;
>
> (B) The election by the Class A Members to terminate the Company; or
>
> (C) the death, insanity, bankruptcy, retirement, resignation or expulsion of any Class A Member, except as provided for herein or unless the Company is reorganized (and, if none of the Managers remain, a new manager is elected) by the election of the Members holding at least 80% of the Membership Interests;
>
> (d) the occurrence of any event which under the

Act, shall make it unlawful for the existence of the Company to be retained;

(e) the sale of the Premises (a "Sale")"

(*id.*).

Under section 5.1 (a) of the Operating Agreement, the "right to manage, control and conduct the business of the Company" is vested exclusively in the Managers, who must be Class A Members. The Operating Agreement designates Pikus and Goldstein to serve as the Company's Managers (*id.*). This section further provides that

> "[a]ll decisions affecting the Company, its policy and management shall be made by the Managers including but not limited to, the purchase, sale, finance, mortgage, lease of any real estate or personal property of the Company, and the Members agree to abide by any such decision"

(*id.*). However, section 5.2 of the Operating Agreement provides that

> "In carrying out Section 5.1, the Managers shall have the power to delegate their authority to qualified Persons. Any such delegation of authority may be rescinded at any time by the Managers. The Managers hereby designate SDG Management Corp., or a successor entity directly or indirectly controlled by Goldstein, ("Goldstein") as Managing Agent for the Premises. The Managing Agent, on consent of the Managers, shall receive remuneration customarily paid for the services rendered, including, but not limited to, disposition, refinancing fees, construction management fees and leasing commissions. The Managing Agent shall have the authority as is generally given to a Managing Agent including, without limitation, the right to enter into, make and perform any and all contracts, leases and other agreements related to the management of the Premises, whether or not such agreements are with persons or entities affiliated with any Member. The

> Managing Agent shall take all necessary action to maintain the Premises in first class condition and to maximize the value of the Premises. The Managing Agent shall maintain the books and records of the Premises in good and accurate order and shall make all required filings with the necessary agencies and parties. The Managing Agent shall make all reasonable and usual repair to the Premises. Upon the death, incompetency, resignation, or bankruptcy of either Manager, the remaining Manager shall have the right to designate the Managing Agent for the Premises"

(*id.*).[2]

Section 5.1 (c) provides that, "[e]xcept as is otherwise specifically provided [in the Operating Agreement], all determinations or consents to be made or actions to be taken by the Managers shall require the action of all the Managers" (*id.*). Additionally, section 5.6 (b) of the Operating Agreement provides that, notwithstanding anything to the contrary in the agreement or the LLCL, the Managers shall not "liquidate or dissolve the Company, in whole or in part" without the unanimous consent of the Class A Members (*id.*).

The Operating Agreement contains both a merger clause and a clause prohibiting oral modification or amendment of the Operating Agreement. Specifically, section 11.4 of the Operating Agreement provides:

> Entire Agreement. All understandings and agreements heretofore made between the Members are merged into

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[2]Section 6.1 of the Operating Agreement provides that "the Managing Agent shall be entitled to an annual management fee of up to 6% of the gross rental revenues collected on account of the Premises in consideration for managing the Premises" *(id.)*.

> this Agreement, which alone fully and completely expresses their agreement with respect to the subject matter hereof. There are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, express or implied, among the Members, other than as set forth in this Agreement and the Articles of Organization. All prior agreements among the Members (including any agreements binding the Company and the Members as members of the Company) are superseded by this Agreement, which integrates all promises, agreements conditions, and understandings among the Members with respect to the Company and its property

(*id.*). Section 11.5 of the Operating Agreement provides:

> Termination, Revocation, Waiver, Modification or Amendment. No termination, revocation, waiver, modification or amendment of this Agreement shall be binding unless agreed to in writing and executed by the Members

(*id.*).

The parties do not dispute (1) that the Company has operated and managed the Property, its sole asset and business, as a residential rental property since the Company's inception in 1997; (2) that the Company has been and remains profitable; (3) that the written Operating Agreement designates SDG Management Corp. (SDG) as the Managing Agent of the Property; and (4) that Pikus was involved, in some capacity, with the day-to-day management of the Property from the Company's inception until April 18, 2014.

The record reflects that beginning no later than late 2012 and/or early 2013, various disputes arose between Goldstein and Pikus over the management and control of the Property, with each

accusing the other of various wrongdoing with respect to the management of the Property. The disputes have since expanded to include the issues of who is authorized to manage the Property under the Company's governing documents, and which agreements constitute the Company's governing documents.

Essentially, Pikus alleges that although the Company's Operating Agreement, as written, designates SDG as the sole Managing Agent of the Property, during the first 17 years of the Company's existence, it was Pikus who actually managed the Property and oversaw virtually all facets of the Property's operation.

Pikus alleges that, pursuant to the provisions agreed to in the 1997 Syndication Agreement, the Company was to retain Goldstein and/or his management company to manage the Property "under Pikus's supervision," for which Pikus was to be paid 37.5% of the management fee and 50% of any additional fees.

Pikus alleges that sometime after the Company acquired the Property in March 1997, the "parties" orally modified the Operating Agreement "so that it was consistent with the [Syndication] Agreement's provisions pertaining to the management of the Property - *i.e.*, that Pikus would actively supervise the management of the Property and would be paid 37.5% of the management fee and 50% of any additional fees" (the Oral Modification) (Defendants' Counterclaims/Cross Claims, ¶ 11).

Defendants allege that in reliance on this Oral Modification, Pikus managed the Property for 17 years, for which Goldstein caused Pikus to be paid the aforementioned fees until April 18, 2014.

Defendants allege that, as a result of the disagreements and disputes that have since arisen between the two Managers, on April 18, 2014, Goldstein took actions that effectively froze Pikus out of the management of the Property and of the Company, and ceased paying Pikus his share of the management fee.

Defendants allege that these Manager disputes arose only after Pikus began objecting to an alleged scheme by Goldstein to use the Company's assets for his family's benefit. Defendants allege that, as part of this scheme, Goldstein caused the Company to rent apartments at the Property to two of his children, Darin and Danielle Goldstein, each a Class B Member of the Company, through below market rate "sweetheart leases."

In addition to the low rent, defendants allege that these "sweetheart leases" were intended to afford Goldstein's children the exclusive right to purchase their apartments, at insider prices, if and/or when the Property is converted into condominiums.

The Managers' dispute over the leases escalated in late 2012, after Darin Goldstein, who already was leasing two studio apartments that he had combined in or around 2008, requested

permission to lease and combine an additional, adjacent studio apartment that recently had become vacant. Defendants allege that Pikus objected to the request because Darin Goldstein, who also was the chief operating officer of SDG at the time, refused to agree to certain of Pikus's conditions, including the condition that Darin Goldstein promise to vacate all of his apartments in the event of a sale or a conversion of the Property to a condominium.

After an exchange of e-mails between Pikus and Darin Goldstein discussing/negotiating Pikus's conditions, Darin Goldstein was given a lease for the additional apartment in December 2012. Pikus objected to this lease, and protested to Goldstein that the apartment had been leased to Darin Goldstein without Pikus's consent, as required under the 1997 Management Agreement. Goldstein responded to Pikus's objection, in part, by indicating that Pikus's consent was no longer required under the terms of the Company's Operating Agreement.

Defendants allege that Goldstein, in furtherance of the scheme to use the Company's assets for his family's benefit, also began covertly and improperly re-registering his children's apartments as rent stabilized. Defendants allege that Goldstein undertook this action to provide his children with longevity protection, in addition to low rents. Defendants contend that the apartments leased to the Goldstein children were not required to

be rent stabilized, and allege that the apartments previously had been listed as "owner occupied," and thus temporarily exempt from regulation.

Defendants allege that it was only after Pikus began complaining to Goldstein about this self-dealing, that Goldstein caused the Company to stop paying Pikus his share of the management fee. Defendants allege that thereafter, in a letter dated April 18, 2014, SDG and Goldstein purported to terminate Pikus from any further involvement in the day-to-day management of the Property by claiming that Pikus was merely an at-will consultant of SDG whose services were no longer required.

The Goldstein plaintiffs dispute defendants' claim that the Company's Operating Agreement had been orally modified, and thus that Pikus, rather than SDG, had been the manager of the Property.

Plaintiffs allege that, with the exception of certain major decisions, such as whether to sell or refinance the property, the Operating Agreement expressly delegates all of the Managers' responsibility for the day-to-day management of the Property to SDG, not Pikus. Plaintiffs allege that SDG has performed as the Managing Agent of the Property since the acquisition of the Property, and that between then and April 18, 2014, SDG had paid a monthly consulting fee to Pikus for assisting, as needed, in the management of the Property.

Plaintiffs allege that on April 18, 2014, SDG was forced to terminate Pikus's consultancy after Pikus allegedly embarked on a clandestine campaign to artificially inflate the Company's rent roll and stockpile vacant units, in order to increase the value of his interest in the Company, in the event that the Property were sold or refinanced.

Plaintiffs allege that as part of this scheme, Pikus began intentionally delaying the renovation of vacant apartments, and then demanding that unnecessary, expensive, and duplicative apartment renovations be performed to enable the Company to set higher, but ultimately unachievable, apartment rents. Plaintiffs allege that Pikus's actions caused a depletion in the Company's operating account, and were taken solely as part of Pikus's undisguised desire and effort to cash in on his minority membership interest in the Company, by forcing a premature sale or refinancing of the Property.

Plaintiffs allege that Pikus also has attempted to usurp SDG's authority as Managing Agent of the Property, and has engaged in conduct that has interfered with SDG's ability to manage the Property.

Plaintiffs contend that Pikus's misconduct and misbehavior escalated after Goldstein twice rebuffed Pikus's demands/suggestions that the Company sell and/or refinance the Property. Plaintiffs allege that it was only after Pikus, through

his newly retained counsel, began accusing Goldstein and SDG of breaching their fiduciary duties to the Company and threatening them with litigation, that Goldstein and SDG terminated Pikus's consultancy and commenced the Goldstein Action.

In the Goldstein Action complaint, plaintiffs seek, inter alia, (1) a declaration with respect to the status of the Company's Operating Agreement and the rights of the various parties to manage the Property and Company under the terms of that agreement (First Cause of Action); (2) a permanent injunction enjoining Pikus from interfering or participating in SDG's management of the Property (Second Cause of Action); and, damages arising out of Pikus's alleged breach of his fiduciary duty (Third Cause of Action).

Defendants since have asserted thirteen counterclaims/ cross claims (hereinafter, counterclaims) against the plaintiffs and Danielle Goldstein (added as an additional defendant), seeking (1) indemnification from the Company for the losses and expenses that Pikus has and will incur as a result of plaintiff's lawsuit (First Counterclaim); (2) a declaration that Pikus is entitled to manage the Property based on the Oral Modification of the Operating Agreement (Second, Third, and Fourth Counterclaims); (3) damages against Stuart, Darin and Danielle Goldstein for breach of their fiduciary duty with respect to the "sweetheart leases" (Fifth Counterclaim); (4) a declaration that the

"sweetheart leases" are null and void as ultra vires (Sixth Counterclaim); (5) damages against Goldstein for breach of his fiduciary duty with respect to allegedly excessive construction fees paid to a Goldstein-controlled construction company (Seventh Counterclaim); (6) damages against Goldstein for breach of section 5.3 of the Operating Agreement, by failing to comply with the various laws and regulations of certain state entities (Eighth Counterclaim); (7) damages against all of the individual plaintiffs for breach of their fiduciary duty in commencing this action, the alleged sole purpose of which was to pressure Pikus to sell his membership interest for a depressed price (Ninth Counterclaim); (8) damages against Goldstein for breach of section 7.3 of the Operating Agreement, by refusing to make the Company's complete books and records available to Pikus for inspection (Tenth Counterclaim); (9) an accounting from Goldstein and SDG (Eleventh Counterclaim); (10) damages against Goldstein for breach of the Syndication Agreement and the Oral Modification of the Operating Agreement, by failing to pay Pikus his percentage of SDG's management fee since April 2014 (Twelfth Counterclaim); and, (11) a declaratory judgment removing Goldstein as a Manager of the Company, and declaring that Pikus is the sole Manager (Thirteenth Counterclaim).

Plaintiffs now move for summary judgment on their first cause of action, and for summary judgment dismissing defendants'

first through eighth, twelfth and thirteenth counterclaims.

Defendants cross-move for summary judgment on the plaintiffs' first cause of action, and for summary judgment on their first through sixth, and tenth through twelfth counterclaims.

On October 22, 2014, before these motions had been fully submitted, Pikus commenced the Dissolution Action, seeking a judicial dissolution of the Company pursuant to LLCL § 702. The SDG Respondents and the Class B Respondents each have moved to dismiss that petition.

DISCUSSION

The Goldstein Action

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiffs' First Cause of Action/Defendants' Second, Third, and Fourth Counterclaims

Both sides have moved for summary judgment with respect to plaintiffs' first cause of action, which seeks a judgment declaring that the Operating Agreement is the sole document controlling the Company's operations and that it superseded any previous agreement or understanding between its members; that

Pikus's authority as a Manager of the Company is limited to management decisions concerning the sale and financing of the Property; that all other management responsibility was irrevocably delegated to SDG; that Pikus's at-will consultancy with SDG was properly terminated; and, that Pikus is not permitted to interfere with the day-to-day management of the Property or of the Company.

Additionally, defendants have moved for summary judgment on their second, third, and fourth counterclaims, each of which seeks a judgement declaring that Pikus is entitled to manage the day-to day operations of the Property, based on the alleged Oral Modification of the Operating Agreement. Plaintiffs have moved for summary judgment dismissing these three counterclaims.

Defendants initially argue that plaintiffs' motion for summary judgment on its first cause of action should be denied as an improper successive motion. Defendants argue that in May 2014, after they had moved to dismiss plaintiffs' second and third causes of action, plaintiffs cross moved, pursuant to CPLR 3211 (c), to convert the motion to one for summary judgment, and upon conversion, for partial summary judgment on their first cause of action. Defendants note that the Court referred to plaintiffs' motion as one for summary judgment motion when it denied the motion as premature.

Although the Court may have referred to the motion as a

summary judgment motion, it did not thereby treat plaintiffs' motion as one for summary judgment. Thus, plaintiffs' instant summary judgment is properly made.

General Obligations Law (GOL) § 15-301 (1) provides that

> "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought"

(*id.*). The no oral modification statute of frauds is subject to certain exceptions. Because GOL § 15-301 (1) nullifies only "executory" oral modifications, once an oral modification "has in fact been acted upon to completion," the modification may be proved *(see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1997]).

Additionally, an oral modification can be established by (1) partial performance of the oral modification, provided that the partial performance was "unequivocally referable to the oral modification"; or, (2) under the principle of equitable estoppel, provided that the conduct relied on to establish the estoppel is not otherwise compatible with the agreement as written (*see Rose*, 42 NY2d at 343-344 [1997]; *see also Richardson & Lucas, Inc. v New York Athletic Club of City of NY*, 304 AD2d 462, 463 [1st Dept 2003] [the exceptions of partial performance and promissory estoppel are unavailable unless the part performance or the acts taken in detrimental reliance are "unequivocally referable" to the new, oral agreement]).

As it is undisputed that the Operating Agreement contains a provision requiring that any modification be in writing and executed by the Members in order to be binding, defendants must establish the alleged Oral Modification of the Operating Agreement fits within one or more of the exceptions to the statute of frauds in order to prevail on their second, third or fourth counterclaims.

Defendants have asserted all three exceptions to the statute of frauds as the bases for the three counterclaims. In their second counterclaim, defendants allege that the Oral Modification has been acted upon to completion; in their third counterclaim, defendants allege that there has been partial performance of the Oral Modification that is explainable only with reference to the Oral Modification; and, in their fourth counterclaim, defendants allege that plaintiffs are equitably estopped from claiming that Pikus is not entitled to manage the Property.

In an affidavit in support of defendants' summary motion and in opposition to plaintiffs' motion, Pikus avers that in reliance on the Oral Modification, he managed the Property for over 17 years, negotiated commercial leases and labor contracts, oversaw the renovation and leasing of residential units, and discussed and determined rent stabilization compliance issues (Pikus Affidavit ¶ 17).

Pikus further avers that, in exchange for these services,

each month Goldstein caused Pikus to be paid 37.5% of the management fee, and 50% of the construction management and any additional fees (*id.* ¶¶ 46-49). In support, Pikus attaches copies of various commercial leases that he executed as a Manager of the Company, e-mails reflecting his other property management activities, and check stubs issued by the Company in payment of his percentage of the construction management fee (*id.*, Exhibits 4-22).

Defendants argue that Pikus's property management activities in exchange for these payments are only explainable with reference to the Oral Modification entitling Pikus to manage the Property. Defendants further argue that Pikus's activities are incompatible with the written Operating Agreement, which provides only for SDG to manage the Property and receive remuneration, and does not authorize any payments to Pikus. Rather, defendants note that section 4.2 of the written Operating Agreement expressly provides that "No Member shall be entitled to any fees, commissions or other compensation from the Company for any services rendered to or performed for the Company, except as otherwise specifically provided in this Agreement."

Defendants argue that the Company's payment of fees to Pikus establishes that the Company acted in a way that was inconsistent with the Operating Agreement, and, thus, is unequivocally referable to the Oral Modification.

Defendants' motion for summary judgment on each of these three counterclaims is denied, and plaintiffs' motion to dismiss these three counterclaims is granted.

Defendants' second counterclaim must be dismissed because the relief that defendants seek, a declaratory judgment that Pikus is entitled to manage the Property on a day-to-day basis, is entirely inconsistent with their allegation that the Oral Modification, the alleged source of that right, has been acted upon to completion.

Defendants' third and fourth counterclaims must be dismissed because Pikus's conduct in performing property management services at the Property in exchange for a percentage of SDG's management fee, is not "unequivocally referable" to the Oral Modification.

"'Unequivocally referable' conduct 'is conduct which is inconsistent with any other explanation'" (*45 Nostrand Retail Ltd. v 745 Jeffco Corp.*, 50 AD3d 768, 769 [2nd Dept 2008]). Thus, it is not enough "that the oral agreement gives significance to plaintiff's actions"; rather, the actions alone must be "unintelligible or at least extraordinary," explainable only with reference to the alleged agreement (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]).

Here, Pikus's conduct in performing property management services for over 17 years can reasonably be explained by

Goldstein's and/or SDG's willingness and/or agreement to pay Pikus a portion of SDG's management fee in exchange for his services. While the Operating Agreement may authorize payment only to SDG for its management services, the Operating Agreement does not prohibit SDG from paying Pikus a portion of its fees for his services.

Plaintiffs have produced copies of checks issued to Pikus in payment for his property management services; each of these checks was issued to Pikus by SDG, and not by the Company (*see* Goldstein Aff., Exhibit H). Most, if not all, of these checks also bear the notation "consulting" or "consulting fee" (*id.*) Although defendants also have produced evidence to show that Pikus was paid his percentage of the construction management fees by checks that were issued by the Company, this same evidence appears to show that those checks were issued upon invoices prepared by SDG, in which SDG was billing the Company for SDG's construction management fees (*see* Pikus Aff., Exhibit 15).

These invoices further appear to show that it was SDG that explicitly directed the Company to issue and pay Pikus the amounts representing his percentage of SDG's construction management fees.

Pikus's property management activities to not appear to be "unequivocally referable" to the Oral Modification, nor necessarily incompatible with the Operating agreement as written.

Therefore, this Court determines that the Oral Modification to the Operating Agreement, as alleged, is barred by the statue of frauds.

As the parties have produced no other evidence to demonstrate that any other agreement might exist relating to the operations of the Company and its members, or to raise an issue of fact in this regard, plaintiffs' motion for summary judgment on their first cause of action is granted to the extent of declaring that the Company's Operating Agreement is the primary and controlling document with respect to the Company's operations.

In this regard, LLCL § 417 (a) provides that the members of an LLC "shall adopt a written operating agreement relating to the business of the company, the conduct of its affairs and the rights and powers of its members." "The operating agreement is, therefore, the primary document defining the rights of members, the duties of managers and the financial arrangements of the limited liability company" (*Willoughby Rehabilitation and Health Care Ctr., LLC v Webster*, 13 Misc 3d 1230(A) *4, 2006 NY Slip Op 52067 [U] [Sup Ct, Nassau County 2006], *affd* 46 AD3d 801 [2d Dept 2007], citing Rich, Practice Commentaries, 32A Limited Liability Company Law Section 1.A, p. 4, [McKinney's, 2006]).

Additionally, as under the terms of the Operating Agreement, the Managers expressly delegated their authority to manage the

Property to SDG alone (Operating Agreement § 5.2), plaintiffs also are entitled to a declaration that SDG, and not Pikus, has the authority to manage the Property under the Operating Agreement.

However, to the extent that plaintiffs also seek summary judgment declaring that Pikus's authority as a Manager of the *Company* is limited to management decisions concerning the sale and financing of the Property; that all other management responsibility was irrevocably delegated to SDG; and that Pikus is not permitted to interfere with the day-to-day management of the *Company*, the motion is denied.

Section 5.1 (a) of the Operating Agreement expressly provides that "the right to manage, control and conduct the business of the Company shall be vested exclusively in the Managers" (*id.*). While the Managers thereafter delegated to SDG all of their authority to Manage the Property, they did not expressly delegate to SDG all of their other management responsibility for the Company, but for the management decisions concerning the sale and financing of the Property.

While, as a practical matter, given that the Property is the sole asset and business of the Company, it may well be that these two decisions are all that remain of the Managers' management responsibilities. Nevertheless, the declaration that plaintiffs' seek go beyond the provisions of the Operating

Agreement, as written.

Finally, insofar as plaintiffs seek a declaration that Pikus's at-will consultancy with SDG was properly terminated, the motion is denied. It is not possible to determine, from the parties' conflicting submissions, the exact nature or terms of whatever actual agreement SDG and/or Goldstein might have had with Pikus with respect to his services. Questions of fact remain as to whether Pikus was properly terminated under the terms of such agreement.

Defendants' Fourth and Fifth Counterclaims

Plaintiffs have moved for summary judgment to dismiss defendants' fifth counterclaim, which alleges that the Goldsteins breached their fiduciary duty to the Company by causing it to issue "sweetheart leases" to the two Goldstein children, and defendants' sixth counterclaim, which alleges that these leases violated LLCL § 402 and/or the Oral Modification of the Operating Agreement, and, thus, are null and void as ultra vires. Defendants cross-move for summary judgment on both of these counterclaims.

Plaintiffs argue that dismissal of these counterclaims is warranted because each is barred by the Operating Agreement, which expressly authorizes SDG to enter into leases with individuals affiliated with any Member. In any event, plaintiffs argue that defendants' allegations, that these leases were below

market rate "sweetheart leases," is refuted by the documentary evidence that they have submitted with their motion (*see* Goldstein Aff. ¶¶ 55-56; Exhibits R, S, T and U).

Plaintiffs contend that this evidence establishes that the leases were at market rents and/or were consistent with the monthly rents of other similar studios at the Property, and that these leases benefitted rather than caused damage to the Company and its Members.

Defendants argue that plaintiffs' motion must be denied, and that their motion for summary judgment must be granted, because defendants have produced evidence that the leases were made without Pikus's required consent, as required by the Oral Modification (Pikus Aff. ¶¶ 57-65). Defendants argue that their motion also should be granted because they have produced evidence, i.e., affidavits by two real estate professionals, which establish that the leases are not at market rents and are not consistent with the rents of other studios at the Property.

Both plaintiffs' motion for summary judgment to dismiss defendants fifth counterclaim, and defendants' motion for summary judgment on that counterclaim, are denied. The parties' conflicting accounts and evidence raise triable issues of fact as to whether the disputed leases were made at market rental rates and/or are consistent with other comparable rentals at the Property.

Although plaintiffs argue that the affidavits of the two real estate brokers proffered by defendants should not be credited, as both brokers allegedly are biased (having been fed commissions by Pikus) and have presented only speculative "valuations" based on flawed methodology, it is not the Court's function on a motion for summary judgment to assess issues of credibility (*see Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010]).

However, plaintiffs' motion for summary judgment dismissing defendants' sixth counterclaim is granted, and defendants' motion for summary judgment is denied.

This Court has now determined that the alleged Oral Modification to the Operating Agreement is barred by the statue of frauds. Section 5.2 of the Operating Agreement designates to the Managing Agent the authority and right, "without limitation ... to enter into, make and perform any and all contracts, leases and other agreements related to the management of the Premises, whether or not such agreements are with persons or entities affiliated with any Member" (*id.*). As the leases fall within the scope of authority granted to SDG under the Operating Agreement, they are not ultra vires.

Defendants' Eighth Counterclaim

Plaintiffs have moved for summary judgment dismissing defendant's eighth counterclaim, which alleges that Goldstein may

have breached section 5.3 of the Operating Agreement.

Section 5.3 of the Operating Agreement provides, in pertinent part, that "[n]otwithstanding any other provision contained in this Agreement, the Managers shall not perform any act in violation of any applicable laws or regulations" (*id.*).

Defendants base this breach of contract counterclaim against Goldstein entirely on the allegation made in paragraph 57 of plaintiffs' complaint, which alleges that Darin Goldstein, since taking up residency at the Property, "has been a 'model tenant,' paying his full rent on time, and even serving as a de facto on-site manager for the Company, without compensation" (*id.*).

Defendants allege, on information and belief, that the Company does not have unemployment insurance or workers' compensation insurance for Darin Goldstein. Defendants allege that "*if it is true* that Darin Goldstein has served ... as a 'manager' for the Property *at Stuart Goldstein's direction*," then Goldstein breached the Operating Agreement by failing to maintain appropriate insurance as required by the New York State Department of Labor and the New York State Workers' Compensation Board, and by violating the minimum wage laws (Defendants' Counterclaims, ¶ 92). Thus, defendants allege, Goldstein may have unnecessarily subjected the Company and its Members to significant penalties by these entities.

Plaintiffs argue that dismissal of this cause of action is

warranted because the claim is hypothetical, and fails to allege an actual breach of the Operating Agreement, or that the Company has sustained any actual damages. In any event, plaintiffs' note that SDG maintains all legally required insurance for its employees, including Darin Goldstein, and proffer SDG's certificate of insurance evidencing such coverage (Goldstein Aff. ¶ 58, Exhibit V).

Plaintiff's motion for summary judgment is granted, as defendants do not allege, and have presented no evidence that might establish, that Stuart Goldstein directed his son to serve as a de facto manager at the Property without compensation, in possible violation of his obligations under section 5.3 of the Operating Agreement. As both the claimed breach and the damages are purely hypothetical, dismissal is warranted.

Defendants' Tenth and Eleventh Counterclaims

Defendants have moved for summary judgment on their tenth counterclaim, alleging that Goldstein has breached section 7.3 of the Operating Agreement by refusing to provide Pikus with the Company's complete books and records, and on their eleventh counterclaim, seeking an accounting.

Section 7.3 of the Company's Operating Agreement provides, in pertinent part, that

> "[p]roper and complete books of account of the Company shall be kept by the Managers or upon designation, the Managing Agent, at the Company's principal place of business and shall be available for inspection or audit

by any other Member or such Member's duly authorized representative"

(*id.*).

In support of their motion, defendants proffer the affidavit of Pikus, who avers that he duly requested that the Company's complete books of account be made available for inspection and audit, and that Goldstein refused to provide Pikus with these records and instead directed him to make such requests through Goldstein's counsel (Pikus Aff., ¶¶ 84-86). Defendants also submit copies of various e-mails documenting the exchange between Pikus and Goldstein and their attorneys on this subject (Pikus Aff., Exhibits 26-27).

In opposition, plaintiffs argue that neither Goldstein nor his counsel refused to make the required books and records available; rather, as is evident from the above-mentioned e-mail exchange, they merely instructed Pikus that his information requests should be made through counsel. Plaintiffs also proffer the affidavit of Goldstein, who avers that he never refused to make any records available, but instead instructed Pikus that any proper informational requests should be made by and between counsel (Goldstein Aff., ¶¶ 77-79).

Defendants' motion for summary judgment on their tenth counterclaim is denied, as defendants' submissions on this motion fail to establish whether access to the Company's books and records was or was not provided to Pikus. It is unclear from the

parties' submissions whether plaintiffs have refused to provide Pikus with access to the relevant records, or whether defendants are claiming that Goldstein, by refusing personally to provide Pikus with access to the relevant books and records, was in breach of the Operating Agreement.

In any event, the averments contained in the Goldstein affidavit are sufficient to raise an issue of fact as to whether Goldstein and/or SDG have refused and/or failed to provide Pikus with all the books and records to which he was entitled.

Defendants' motion for summary judgment on their eleventh counterclaim, which seeks an accounting based on the alleged refusal of Goldstein and SDG to make the requisite books and records available and/or permit a meaningful inspection, also is denied. Defendants argue that Pikus is entitled to an accounting solely by reason of his membership in this limited liability company. In opposition, plaintiffs argue that Pikus's membership status alone does not entitle him to this equitable relief.

To be entitled to an equitable accounting, defendants must establish: (1) a fiduciary duty owed by the plaintiffs; (2) that defendants have no adequate remedy at law; and (3) that defendants have demanded an accounting and that plaintiffs have refused the demand *(see Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568 [1st Dept 2011]).

While there is no dispute that Goldstein owes a fiduciary

duty to Pikus, defendants have failed to establish that Pikus has no adequate remedy at law. Here, the Operating Agreement not only expressly provides that a member is entitled to inspect the Company's books and records (Operating Agreement § 7.3), but further provides that a member's rights and obligations under the agreement "shall be enforceable in equity as well as at law or otherwise" (*id.*, § 11.10).

Additionally, defendants have not explicitly alleged that Pikus made a demand for an accounting that was refused. In any event, to the extent that Pikus's request for access to the books and records could be considered a demand for an accounting, Pikus has yet to establish that his request was, in fact, refused.

Defendants' Twelfth Counterclaim

Plaintiffs have moved for summary judgment to dismiss defendants' twelfth counterclaim, which alleges that Goldstein breached the Syndication Agreement and the Oral Modification of the Operating Agreement, by failing to pay Pikus 37.5% of the management fee from April 2014 until the present. Defendants have moved for summary judgment on this counterclaim.

Plaintiffs' motion to dismiss the twelfth counterclaim is granted, and defendants' motion for summary judgment on this counterclaim is denied. To the extent that defendants have based this cause of action on the alleged Oral Modification to the Operating Agreement, the claim is barred by the statue of frauds.

To the extent that defendants have based this cause of action on the Syndication Agreement, the claim must also fail. Section 11.4 of the Operating Agreement contains a broad merger clause which, by its terms, establishes that all prior understandings and agreements between the members were merged into and superseded by the Operating Agreement.

Defendants' Thirteenth Counterclaim

Plaintiffs move for summary judgment to dismiss defendants' thirteenth counterclaim, in which defendants seek a declaratory judgment removing Goldstein as a Manager of the Company and declaring Pikus to be the sole Manager.

Plaintiffs argue that dismissal of this counterclaim is warranted, because the Company's Operating Agreement does not contain any provision for the removal or expulsion of either Manager, and the LLCL does not otherwise permit a party to bring a cause of action for such relief.

While defendants concede that the Operating Agreement lacks a specific provision for the removal of a Managing Member, defendants argue that the lack of such a provision does not necessarily preclude this counterclaim.

Defendants note that in *Ross v Nelson* (54 AD3d 258 [1st Dept 2008], the First Department upheld the removal of a member-manager by a majority vote of the members pursuant to LLCL § 414, the LLCL default provision for removing a manager,

notwithstanding that the Operating Agreement itself lacked a specific mechanism for such removal. In any event, defendants argue that dismissal of this counterclaim is not warranted because this Court has broad equitable powers that it could exercise to remove Goldstein as a Managing Member (citing *Garber v Stevens*, 2012 WL 2091186 [Sup Ct NY County 2012] [wherein the court exercised its equitable power to remove a general partner from a partnership and to elevate a limited partner to general partner]).

Plaintiffs' motion for summary judgment to dismiss defendants' thirteenth counterclaim is granted.

In *Ross* (54 AD3d 258), the appellate court held that where an Operating Agreement clearly and unambiguously allowed for the removal of a Manager, but lacked any specific mechanism to effect such a removal, the parties could resort to the removal mechanism contained in LLCL § 414, which allows for removal of a manager by majority vote of the other members. In *Ross*, the Operating Agreement contained a provision that allowed for the dissolution of the limited liability company upon the "expulsion" of a member-manager. The court held that, because such a provision "clearly and unambiguously" allowed for a member-manager's removal, the parties could rely on LLCL § 414 to supply the default mechanism for such removal.

Here, however, the Company's Operating Agreement contains no

provision that allows for the removal of a Manager. Nor is there any provision allowing for the dissolution of the Company upon the expulsion or removal of a Manager. Thus, absent any provision that clearly and unambiguously allows for the removal of a Manager, the default provision of LLCL § 414 is not triggered (*see Friedman v Ridge Capital Cpro.*, 2010 WL 5799429 *6 [Sup Ct NY County 2010] [LLCL § 414 would not have been triggered in *Ross* if the Operating Agreement had not otherwise allowed for a change or removal of managers]).

As for exercising this Court's broad equitable powers, even assuming that such exercise would be considered appropriate in certain extreme circumstances, defendants' have not alleged that any qualifying circumstance is present here (*see Garber v Stevens*, 2012 WL 2091186 [Sup Ct, NY County 2012] [exercise of broad equity powers to remove a general partner is appropriate where the removal is necessary to preserve the partnership; where a partner's breach of fiduciary responsibility has rendered the partnership into an entity that is no longer viable; or, where such removal is necessary to prevent the loss of the partnership's principal asset]).

Defendants' First Counterclaim

Finally, plaintiffs have moved for summary judgment dismissing defendants' first counterclaim, which seeks indemnification, including attorneys' fees, under the

indemnification provision contained in section 5.5 of the Operating Agreement. Defendants have moved for summary judgment on this first counterclaim.

Section 5.5 of the Operating Agreement provides:

> Indemnification. No Manager shall be liable, responsible or accountable in damages or otherwise to the Company or to any other Member, and each Manager shall be indemnified by the Company against any losses, judgments, liabilities, expenses and amounts paid in settlement of any claims sustained by him in connection with the Company provided that the same were not the result of fraud, gross negligence or misconduct on the part of such Manager, and except that such Manager shall repay to the Company any amounts paid to such Manager in excess of those to which he is entitled to receive under the terms of this Agreement.

Plaintiffs argue that defendants' first counterclaim must be dismissed because the Operating Agreement's indemnification provision does not include any mention of attorneys' fees that are incurred in a suit commenced by and on behalf of the Company based upon a Manager's misconduct. Plaintiff's argue that dismissal is further warranted because the indemnification provision only allows a Manager to recover such amounts as are not the result of the Manager's fraud, gross negligence or misconduct. Plaintiffs argue that, here, Pikus's misconduct in attempting to enforce superseded documents in violation of the Operating Agreement precludes any indemnification.

Plaintiffs further argue that defendants' counterclaim for indemnification fails because the indemnification provision does not unequivocally refer to claims between the parties, as opposed

to third party claims; the indemnification provision, absent any specific reference to attorneys' fees, cannot be read so as to deviate from the general rule that parties to a litigation are responsible for their own attorneys fees; and, defendants are not entitled to indemnification for acts wholly for their own purposes and gain.

Plaintiffs' motion to dismiss defendants' first counterclaim is denied. Defendants motion for summary judgment on this counterclaim also is denied.

Although plaintiffs argue that the indemnification provision does not unequivocally refer to claims between the parties, as opposed to third-party claims, section 5.5 of the Operating Agreement clearly alludes to claims between the parties, in providing that "[n]o Manager shall be liable, responsible or accountable in damages or otherwise to the Company or to any other Member" (*id.*).

Additionally, by then referencing "any losses, judgments, liabilities, [and] expenses" incurred in connection with such claims, the indemnification provision would appear to include attorneys' fees. While the indemnification provision does preclude Pikus from recovering for any amounts that were the result of fraud, negligence, or misconduct on his part, such misconduct, if any, has yet to be determined.

Defendants' motion for summary judgment on their

indemnification counterclaim also is denied, as plaintiffs have asserted claims for breach of fiduciary against Pikus, which have yet to be determined. Thus, an award of summary judgment on this counterclaim would be premature.

The Dissolution Action

By this second action, the petitioner Pikus seeks a judicial dissolution of the Company pursuant to LLCL § 702. The SDG Respondents and the Class B Respondents each have cross-moved to dismiss the petition, on the ground that petitioner has failed to meet the standards for dissolution under LLCL § 702 and controlling case law.

LLCL § 702 provides, in pertinent part, that:

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

(*id.*).

For dissolution of an LLC under section 702,

> "the petitioning member must establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible"

(*Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]; *see also Doyle v Icon*, LLC, 103 AD3d 440, 440 [1st Dept. 2013]

[quoting and applying the same standard]; *Schindler v Niche Media Holdings*, 1 Misc 3d 713, 716 [Sup Ct, NY County 2003] ["judicial dissolution will be ordered only where the complaining member can show that the business sought to be dissolved is unable to function as intended, or else that it is failing financially"]). Judicial dissolution of a limited liability company is considered a drastic remedy (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d at 131). "The appropriateness of an order for dissolution of [a] limited liability company is vested in the sound discretion of the court hearing the petition" (*id.* at 133 [internal quotation marks and citations omitted]).

Pikus contends that dissolution of the Company is warranted because Goldstein's actions in renting apartments to family members at below market rates, providing long term rent protection to those members, and stockpiling apartments for purchase in the event of a condominium conversion, have prohibited the Company from realizing or achieving its purpose - "to generate as much revenue as possible from the leasing and sale of the Property" (Petitioners Memorandum of Law in Support of the Petition, at 2).

Pikus additionally contends that the conflict and disagreement between the Company's two Managers with respect to the management of the Property make it unfeasible to carry on its business. More specifically, Pikus contends that the Managers'

dispute, over whether or when to sell the Property, has "deadlocked" the Company's operations: i.e., unanimity cannot be reached because one Manager wants to maximize the Company's value by converting the Property to a condominium, or by refinancing and then converting the Property to a condominium, while the other ostensibly desires to maintain the Property as a rental property.

Here, however, the Company's Operating Agreement provides that the stated "business and purpose" of the Company is to

> "acquire, own, hold, expand, renovate, lease, manage, sell, operate the real property located at 10 Sheridan Square, New York, New York (the "Premises") and such other business activities and operations that are reasonable related thereto, subject to the conditions hereinafter contained"

(*id.*, § 2.3). Although Pikus alleges that Goldstein's actions and alleged wrongdoing have prohibited the Company "from generating as much revenue as possible," Pikus does not allege that the Company is unable to function in accordance with its Operating Agreement, or that either the Company or the Property are failing financially.

Unless the wrongful acts of a managing member, although sufficient to give rise to a derivative claim, are contrary to the contemplated functioning and purpose of the limited liability company, they do not provide a basis for judicial dissolution (*Matter of 1545 Ocean Ave., LLC*, 72 AD3d at 132).

Thus, without more, the allegations of overreaching and

breach of fiduciary duty by Goldstein do not provide the requisite grounds for dissolution of this limited liability company (*see Widewaters Herkimer Co., LLC v Aiello*, 28 AD3d 1107, 1108 [4th Dept 2006]; *Schindler*, 1 Misc 3d at 716-717).

Additionally, our courts have held that

> disputes between members are alone not sufficient to warrant the exercise of judicial discretion to dissolve an LLC that [] operates in a manner within the contemplation of it purposes and objectives as defined in its articles of organization and/or operating agreement. It is only where discord and disputes by and among the members are shown to be inimicable to achieving the purpose of the LLC will dissolution under the "not reasonably practicable" standard imposed by LLCL § 702 be considered by the court to be an available remedy to the petitioner ([*Matter of 1545 Ocean Ave., LLC*], 72 AD3d at 130-132). Where the purposes for which the LLC was formed are being achieved and its finances remain feasible, dissolution pursuant to LLCL § 702 should be denied (*see In re Eight of Swords, LLC*, 96 AD3d 839 [2d Dept 2012]).

(*Matter of Sieni v Jamsfab, LLC*, 2013 WL 3713604 *5, 2013 NY Misc Lexis 2900 *12-13, 2013 NY Slip Op 31473[U] *5 [Sup Ct, Suffolk County 2013]).

Here, petitioner does not either allege or argue that the Company's finances are not viable. Moreover, it appears that, despite the ongoing disputes between the Managers, the Company is still able to operate and manage the Property, its sole asset and business, through its designated Managing Agent; and, that most of the original purposes of the Company, as listed in section 2.3 of the Operating Agreement, are still being achieved (*see In re*

Eight of Swords, LLC, 96 AD3d at 840).

While petitioner alleges that there is a "deadlock" between the Managers regarding whether to sell or convert the Property to condominiums, or keep the Property as a rental property, petitioner has failed to show that this alleged "deadlock" is interfering with the Company's stated business and purpose, as reflected in the Operating Agreement.

> "Deadlock" is a basis, in and of itself, for judicial dissolution under Business Corporation Law § 1104. However, no such independent ground for dissolution is available under LLCL 702. Instead, the court must consider the managers' disagreement in light of the operating agreement and the continued ability of [the Company] to function in that context.

(*In re 1545 Ocean Ave., LLC*, 72 AD3d at 129). While the decision to sell or convert the Property will require the unanimous consent of both Managers, until such unanimity is achieved, the Operating Agreement provides for the continuing operation and management of the Property by the Managing Agent, to whom the Managers previously had delegated their authority with respect thereto. Thus, even if the disputes, disagreements, and alleged "deadlock" between the Managers continue, the management and operation of the Property, the sole asset and business of the Company, can continue.

As the petition contains no allegations that the Company's stated purposes have been or will be "utterly defeated" by the disputes between the Managers, or that theses disputes will

prevent the Company from achieving its stated purposes or will cause the Company to fail financially (see *In re the Sieni v Jamsfab, LLC*, 2013 WL 3713604 *6, 2013 NY Misc Lexis 2900 *15, 2013 NY Slip Op 31473[U] *6), the petitioner has failed to state a cognizable claim for dissolution under LLCL § 702. Therefore, the cross motions by the SDG respondents and the Class B respondents, to dismiss the petition, is granted, and the petition is hereby dismissed.

Accordingly, it is

ORDERED that the branch of plaintiffs' summary judgment motion in *Stuart D. Goldstein, et al. v Jeffrey S. Pikus, et al.*, Index No. 651209/2014 (Motion Sequence Number 002), which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action, is granted solely to the extent that it is ADJUDGED and DECLARED that the Company's Operating Agreement is the primary and controlling document with respect to the Company's operations; and that SDG Management Corp., and not Jeffrey S. Pikus, has the authority to manage the Property under the Operating Agreement; and, it is further

ORDERED that the branch of plaintiffs' motion in *Stuart D. Goldstein, et al. v Jeffrey S. Pikus, et al.*, Index No. 651209/2014, which seeks summary judgment dismissing defendants' counterclaims and cross claims is granted to extent of dismissing defendants' second, third, fourth, sixth, eighth, twelfth and

thirteenth counterclaims and cross claims, and the motion is otherwise denied; and it is further

ORDERED that the defendant's motion in *Stuart D. Goldstein, et al. v Jeffrey S. Pikus, et al.,* Index No. 651209/2014, for summary judgment in their favor on plaintiffs' first cause of action, and on their first, second, third, fourth, fifth, sixth, tenth, eleventh, and twelfth counterclaims and cross claims, is denied; and it is further

ORDERED that petitioners' motion by order to show cause in *Application of Jeffrey Pikus v Stuart D. Goldstein, et al.,* Index No. 653201/2014 (Motion Sequence Number 001), for an order granting judicial dissolution of Ten Sheridan Associates, LLC pursuant to Limited Liability Company Law § 702, is denied; and it is further

ORDERED that respondents' cross motions in *Application of Jeffrey Pikus v Stuart D. Goldstein, et al.,* Index No. 653201/2014, for an order dismissing the petition for judicial dissolution of Ten Sheridan Associates, LLC, is granted, and the petition is dismissed.

Dated: July 20, 2015

J.S.C.