UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: 305 EAST 61ST STREET GROUP LLC, Debtor.	Chapter 11 Case No. 19-11911 (SHL) Pending in the United States Bankruptcy Court for the Southern District of New York
LITTLE HEARTS MARKS FAMILY II L.P., Plaintiff, -against- JASON D. CARTER and 61 Prime LLC, Defendants.	Removed from: Supreme Court of the State of New York, New York County, Index No. 652410/2021 Adversary No.: _____

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1334, 1441, 1446, and 1452, Defendants, Jason Carter ("**Carter**") and 61 Prime LLC ("**Prime**"), collectively (the "**Removing Defendants**") hereby remove the above captioned case styled *Little Hearts Marks Family II L.P v. Jason D. Carter; and 61 Prime LLC*, Index No. 652410/2021 filed by Little Hearts Marks Family II L.P. (the "**Plaintiff**" or "**LHMF**"), and all claims and causes of action, from the Supreme Court of the State of New York, County of New York (the "**State Court**" and the "**State Court Action**"), to the United States District Court for the Southern District of New York (the "**District Court**"). The State Court Action should then be automatically referred to the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**") in accordance with *Amended Standing*

Order of Reference M10-468, dated July 31, 2012, issued by then acting Chief Judge Loretta A. Preska. The Bankruptcy Court has authority, jurisdiction and venue over this action under 28 U.S.C. §§ 1334, 1441, 1446, 1452, and 156(e), Federal Rule of Bankruptcy Procedure 9027, and Local Bankruptcy Rules 5005-1, 9027-1 and 9027-2. As grounds for removal, the Removing Defendants respectfully state the following:

SUMMARY OF THE ARGUMENT

The Bankruptcy Court has federal bankruptcy jurisdiction over the State Court Action because the claims asserted by the Plaintiff rightfully belong in the first instance to chapter 11 debtor 305 East 61st Street Group LLC (the "**Debtor**") and now are the rightful property of the Creditor Trust (defined below) established under the auspices of the Plan and Confirmation Order (each defined below). Moreover, the claims asserted by LHMF against the Removing Defendants in the State Court Action are intertwined with and duplicative of LHMF's previously filed claims against the Debtor, Prime, and Carter. As set forth in more detail below, the facts and circumstances surrounding the State Court Action also implicate Debtor's claims against LHMF. In fact, the State Court Action was filed in retaliation to, and in violation of the post-confirmation injunction contained in the Debtor's plan of liquidation. As a result, the resolution of the claims against the Removing Defendants in the State Court Action will have a significant and direct effect on the Debtor and the administration of its estate.

In the State Court Action, LHMF alleges breach of contract, breach of fiduciary duty, violation of covenant of good faith and fair dealing, and unjust enrichment claims against the Removing Defendants, in addition to alleging aiding and abetting breach of fiduciary duty and alter ego liability claims against Carter individually based on, among other things, the Removing Defendants' supposed improper removal of LHMF as manager of the Debtor, violation of the

Operating Agreement (as defined herein), placing the Debtor into bankruptcy, and forcing the sale of the Debtor's property. A copy of the complaint (the "**Complaint**") filed in the State Court Action is attached hereto as **Exhibit "A"**. The claims asserted by the Debtor in the State Court Action "aris[e] under" "aris[e] in" and "relate to" the above pending chapter 11 case. *See* 28 U.S.C. § 1334(b). As federal bankruptcy jurisdiction exists over the State Court Action, removal pursuant to 28 U.S.C. § 1452 is appropriate and the parties to the State Court Action shall proceed no further in the Supreme Court of the State of New York, County of New York

BACKGROUND

1. The Debtor filed its chapter 11 bankruptcy case (the "**Chapter 11 Case**") on June 10, 2019 (the "**Petition Date**") in the Bankruptcy Court. Prior to the Chapter 11 Case, the Debtor owned and managed a real estate project involving a 10-story building located at 305-307 East 61st Street, New York, New York, 10065 (the "**Building**" or the "**Property**"), a former warehouse which was purchased by the Debtor for conversion into a condominium (the "**Project**"). The Debtor is a New York limited liability company, whose members consist of Prime; LHMF; Thaddeus Pollack; and Onestone305, LLC (collectively, the "**Members**"). The sole member of Prime is Carter.

2. The acquisition of the Building was financed, in part, with a $20 million acquisition loan, and construction of the Project was financed, in part, by capital contributions by Carter and a construction loan (the "**Construction Loan Proceeds**"). Popular Bank (f/k/a Banco Popular North America) ("**PB**") made the following three (3) loans on or about June 8, 2017 (collectively, the "**Pre-Petition Loans**"): (a) the acquisition loan (the "**Acquisition Loan**") evidenced by that certain *Secured Restated Promissory Note*, dated as of June 8, 2017, in the original principal amount of $20,000,000.00; (b) the Building loan (the "**Building Loan**") evidenced by that certain *Building Loan Agreement*, dated as of June 8, 2017, in the original principal amount of up to

$7,830,000.00; and (c) the Project loan (the "**Project Loan**") evidenced by: that certain *Project Loan Agreement*, dated as of June 8, 2017, in the original principal amount of up to $2,170,000.00.

3. On July 1, 2018, prior to the commencement of the Chapter 11 Case, the Debtor, Prime, and Carter initiated an action against the LHMF, and its principal, Mitchell Marks ("**Marks**"), in the Supreme Court of the State of New York, County of New York, captioned *61 Prime LLC et al. v. Little Hearts Marks Family II, LP, et al*., Index No. 653281/2018 (the "**Prime Action**"), asserting that LHMF and Marks committed wrongful acts and omissions of duties in gross violation of the Debtor's operating agreement (the "**Operating Agreement**") including, among other things, wrongfully misappropriating a portion of the Construction Loan Proceeds for their own personal use and benefit between June 2017 and June 2018, and misappropriating the unexcavated land below the Debtor's building, for their own use and benefit. Subsequently, the court in the Prime Action issued a temporary restraining order, in effect removing LHMF as manager of the Debtor and substituting Prime in its place.

4. In response, on August 22, 2018, LHMF, among other things, initiated a lawsuit against Prime, Carter and the Debtor in the Supreme Court of the State of New York, County of New York, bearing Index No. 654198/2018, by filing a complaint (the "**Marks Action**").

5. Notably, the Marks Action lists causes of action arising from alleged improper removal of Marks as manager of the Debtor, alleging Carter and Prime's mismanagement of the Property, causing violations to be issued by the Department of Buildings for the City of New York, seeking injunctive relief, demands to transfer funds of the Debtor to LHMF's bank account, as well as to produce documents relative to management of the Debtor. *See* Marks Action Complaint, ¶¶ 16, 24, 36.

6. Upon occurrence of the Petition Date, both the Marks Action and the Prime Action were stayed by operation of 11 U.S.C. § 362.

7. On June 12, 2019, LHMF commenced an adversary proceeding against the Debtor by the filing of a complaint seeking injunctive relief and a declaratory judgement as Docket No. 1 (the "**Adversary Complaint**") in Adversary Proceeding No. 19-01297 (SHL) (the "**Adversary Proceeding**"). The Adversary Complaint asserts, among other things, a claim for breach of contract and breach of the covenant of good faith and fair dealing with respect to LHMF's purported commercial leasehold interest in the Property. *See* Adversary Complaint at ¶ 70. On August 23, 2019, the Debtor filed its answer to the Adversary Complaint as Docket No. 8. On October 14, 2019, the Debtor filed an amended answer with counterclaims as Docket No. 10 in the Adversary Proceeding (the "**Adversary Answer**").

8. The issues raised in the Adversary Proceeding include, among other things, (i) the LHMF sublease with Acqua Ancien (the "**Spa**") (Adversary Answer, ¶¶ 95-100); (b) unauthorized construction by the Spa (Adversary Answer, ¶¶ 114, 118-120); (c) LHMF's breach of its duty of loyalty to the Debtor by entering the Debtor into a lease that gives LHMF more favorable terms than what is authorized under the Operating Agreement (Adversary Answer, ¶¶ 102-103); and (d) LHMF's failure to (i) obtain or maintain required insurance (Adversary Answer, ¶ 108), and (ii) comply with state, federal, municipal and local government rules and regulations in connection with, among other things, work performed at the Property, including excavation, and the construction of an additional floor and elevator stop (Adversary Answer, ¶¶ 114, 118-120).

9. LHMF filed a proof of claim against the Debtor in the Chapter 11 Case on August 30, 2019 (the "**Proof of Claim**"), in the amount of $12,000,000 on the basis of Contractual Indemnification and Breach of Contract.

10. Recognizing the interconnectedness of its claims against the Debtor and the Removing Defendants, LHMF emphasized that:

> if it is determined that Prime and Mr. Carter are not individually liable to Claimant for their actions or inactions, the Claimant asserts claims against the Debtor for monetary damages arising from the Debtor's breaches of the Operating Agreement by, *inter alia*, failing to timely complete the Project (defined below, pay off its mortgages, and secure approval of a condominium offering plan, as expressly contemplated by the Operating Agreement; causing or permitting damage to Claimant's condominium units and other portions of the Building (defined below); and other losses suffered by the Claimant.

Proof of Claim (Attachment) at ¶ 4.

11. Attempting to proceed against Prime and Carter individually, on October 16, 2019, LHMF filed the *Motion of Little Hearts Marks Family II, L.P. Pursuant to 11 U.S.C. § 362(d) for Relief from the Automatic Stay to (A) Proceed with Existing State Court Litigation Against Non-Debtors and (B) Commence Any New Litigation Against Non-Debtors* (the "**Lift-Stay Motion**") [Docket No. 66].

12. Notably, in the Lift-Stay Motion LHMF admits that its claims against Prime and Carter (which are duplicative of claims asserted in the State Court Action) are the same claims that were asserted against the Debtor's estate:

> [LHMF] intends to assert claims. . . against Prime and Mr. Carter arising from their actions in failing to complete the Project, failing to obtain approval of the condominium offering, and permitting the Mortgage to mature without being timely refinanced or paid off. If the State Court rules in the Marks Parties' favor on the claims or counterclaims, then Prime and Carter (and not the Debtor) will be liable for Marks LP's damages. *If, on the other hand, the State Court determines that Prime and Mr. Carter acted properly, then Marks LP's claims against the Debtor. . . would continue to exist.*

Lift-Stay Motion at ¶¶ 27-28 (emphasis added).

13. The Lift-Stay Motion was adjourned from time to time following the appointment of the Chapter 11 Trustee (the "**Trustee**") on October 28, 2019 [Docket No. 79]. As the Trustee

understood that LHMF's claims would directly implicate property of the Debtor's estate, the parties decided to attempt to reach a resolution of some or all of the issues raised in the Lift-Stay Motion through a mediation process, more fully described below. In fact, there has never been a hearing on the Lift-Stay Motion nor has it been withdrawn by LHMF.

14. On May 12, 2020, the Trustee filed the *Chapter 11 Trustee's Plan of Liquidation under Chapter 11 of the Bankruptcy Code* (the "**Plan**") [Docket No. 171], which was subsequently confirmed by order of the Bankruptcy Court entered on August 21, 2020 ("**Confirmation Order**") [Docket No. 219].

15. The Plan created a Creditor Trust (as defined therein) by which the Trustee is vested with power over any and all assets of the Debtor's estate and all of the causes of action held by the Debtor, to be liquidated and distributed to the beneficiaries.

16. Pursuant to that certain Creditor Trust Agreement between the Debtor and the Trustee, effective upon confirmation of the Plan, the Creditor Trustee (as defined in the Plan), is empowered:

> [T]o act on behalf of the Creditor Trust in all adversary proceedings and contested matters (including, without limitation, any Avoidance Actions and Causes of Action) assigned to the Creditor Trust, then pending or that can be commenced in the Bankruptcy Court and in all actions and proceedings pending or commenced elsewhere, and to settle, retain, enforce, or dispute any adversary proceedings or contested matters (including, without limitation, any Causes of Action) and otherwise pursue actions involving Creditor Trust Assets that could arise or be asserted at any time under the Bankruptcy Code or otherwise, unless otherwise specifically waived or relinquished in the Plan. The Creditor Trust shall be authorized to enter into settlements of Causes of Action without a hearing or Court approval.

See Creditor Trust Agreement at 2.2(j) [Docket No. 207-2].

17. Article V of the Plan governs the means for implementation of the Plan. Upon the effective date of the Confirmation Order, assets of the bankruptcy estate transferred to the Creditor Trust. The Plan states in relevant part:

> On the Effective Date, the Debtor shall transfer to the Creditor Trust all of its rights, titles, and interests in and to the Creditor Trust Assets, including, without limitation, all Avoidance Actions and Causes of Action. For avoidance of doubt, the Causes of Action shall be deemed to have been automatically assigned and transferred to the Creditor Trust on the Effective Date without the need for further conveyance or assignment document. Upon the Effective Date, the Creditor Trust shall be deemed to be substituted for, without further order of any court, the plaintiff in all Causes of Action. Any recoveries on account of the Causes of Action transferred to the Creditor Trust shall be distributed in accordance with the Plan.

See Plan at Art. V Section B (6).

18. Importantly, under the Plan, upon confirmation and in lieu of the automatic stay, all actions concerning property of the Debtor's estate, including disputed claims and causes of action of the Debtor, were permanently enjoined from commencing actions. Article X, governs the preservation of rights, including all causes of action not expressly sold, settled, or released and specifically provides:

> EXCEPT AS OTHERWISE PROVIDED IN THE PLAN, ALL ENTITIES WHO HAVE HELD, HOLD OR MAY HOLD CLAIMS, INTERESTS, CAUSES OF ACTION, OR LIABILITIES AGAINST THE DEBTOR'S ESTATE, THE TRUSTEE, THE CREDITOR TRUST, AND THE CREDITOR TRUSTEE SOLELY IN SUCH CAPACITY, INCLUDING BUT NOT LIMITED TO ANY AND ALL PROPERTY OF THE DEBTOR AND THE CREDITOR TRUST ASSETS, ARE PERMANENTLY ENJOINED AND PRECLUDED, FROM AND AFTER THE EFFECTIVE DATE, FROM: (A) COMMENCING OR CONTINUING IN ANY MANNER ANY ACTION OR OTHER PROCEEDING OF ANY KIND AGAINST ANY ENTITY ENTITLED TO EXCULPATION UNDER THIS PLAN, ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY CLAIMS, INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR; (B) ENFORCING, ATTACHING, COLLECTING OR RECOVERING BY ANY MANNER OR MEANS ANY JUDGMENT, AWARD, DECREE OR ORDER AGAINST ANY ENTITY ENTITLED TO EXCULPATION ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY CLAIMS, INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR; (C) CREATING, PERFECTING OR ENFORCING ANY LIEN, CLAIM OR ENCUMBRANCE OF ANY KIND AGAINST ANY ENTITY ENTITLED TO EXCULPATION ON ACCOUNT OF OR IN CONNECTION WITH OR WITH RESPECT TO ANY SUCH CLAIMS, INTERESTS, CAUSES OF ACTION OR LIABILITIES OF THE DEBTOR. . .

See Plan at Art. X Section E.

19. Furthermore, Article XI of the Plan governing retention of jurisdiction in the Bankruptcy Court provides, among other things:

> Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, to the extent legally permissible, the Bankruptcy Court shall, after the Effective Date, retain such jurisdiction over the Chapter 11 Case and all Persons and Entities with respect to all matters related to the Chapter 11 Case, the Debtor, the Trustee, the Creditor Trust and the Plan, including jurisdiction to. . . [d]ecide or resolve any motions, adversary proceedings, contested or litigated matters and any other Causes of Action that are pending as of the Effective Date *or that may be commenced in the future*, and grant or deny any applications involving the Debtor that may be pending on the Effective Date or instituted by the Creditor Trust after the Effective Date; provided that the Creditor Trust shall reserve the right to commence actions in all appropriate forums and jurisdictions.

See Plan at Art. XI Section 7 (emphasis added).

20. Prior to the commencement of the State Court Action, LHMF, Carter and the Trustee agreed to participate in a mediation with the Trustee in an effort to attempt to resolve some or all of the matters described in the actions pending in this and State Court. In this regard, on March 24, 2021, in contemplation of the mediation, the Trustee, in his capacity as Creditor Trustee under the Creditor Trust Agreement, sent a letter and preliminary mediation statement to Carter for the purpose of outlining his various claims being alleged by the Debtor's estate against Carter and Prime.[1] Indeed, the Trustee set forth claims believed to be held solely by the Debtor's estate, many of which encompass the very claims asserted by LHMF against the Removing Defendants in the State Court Action, including among other things: breach of contract, breach of fiduciary duty, and violation of covenant of good faith and fair dealing.

21. Significantly, on April 12, 2021, essentially the same day that the Trustee, LHMF and Carter agreed to a briefing and meeting schedule for the mediation, LHMF went ahead and filed the Complaint commencing the State Court Action. The filing of the Complaint by LHMF

[1] Upon information and belief, on the same day, the Trustee sent a letter to LHMF asserting various claims by the Debtor against LHMF, again in contemplation of the proposed mediation.

was concealed from both Carter and Trustee notwithstanding the fact that the Trustee and Carter were under the impression that all of the parties, including LHMF, were to participate in the Trustee's mediation.

22. Because LHMF is asserting alleged claims of the Debtor against Carter and Prime which LHMF is enjoined from pursuing under, among other things, Articles V and X of the Plan and Section 2 of the Creditor Trust Agreement, and because the Trustee is asserting identical claims against Carter and Prime (which are the subject of the Trustee's proposed mediation), this case should be removed to the District Court and thereafter referred to the Bankruptcy Court.

GROUNDS FOR REMOVAL

A. "Related To" Jurisdiction

23. The State Court Action is subject to removal because the State Court Action is "related to" the Chapter 11 Case and the Debtor's bankruptcy estate. *See* 28 U.S.C. §§ 1334(b) and 1452(a). Specifically, under 28 U.S.C. § 1452(a) "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a). Under 28 U.S.C. § 1334(b), [the District Court] has original jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Because the claims in the State Court Action are "related to" the Chapter 11 Case, removal is permitted by 28 U.S.C. § 1452(a) and 28 U.S.C. § 1334(b).

24. The Second Circuit has adopted the test set forth by the United States Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), for determining whether a civil proceeding conceivably could "have any effect on the estate being administered in bankruptcy" and, thus, is "related to" the bankruptcy case. *See In re Cuyahoga*

Equip. Corp., 980 F.2d 110, 114 (2d Cir. 1992). "The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding is whether its outcome might have any 'conceivable effect' on the bankrupt estate. If that question is answered affirmatively, the litigation falls within the 'related to' jurisdiction of the bankruptcy court." *N.Y. City Emps.' Ret. Sys. v. Ebbers (In re Worldcom, Inc. Sec. Litig.)*, 293 B.R. 308, 317 (S.D.N.Y. 2003) citing *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) (citations and quotation marks omitted).

25. Here, the State Court Action "relates to" the Chapter 11 Case and the administration of the Debtor's bankruptcy estate. Specifically, in the Complaint, LHMF asserts claims duplicative of claims asserted in the Marks Action, in the Adversary Proceeding, and related to claims asserted in the Prime Action. In response, the Debtor filed its counterclaim in the Adversary Proceeding, alleging LHMF's breach of its duty of loyalty to the Debtor in addition to the failure of LHMF to comply with state, federal, municipal and local government rules and regulations in connection with work performed at the Property. The resolution of the State Court Action will directly impact the Debtor because the Trustee has already asserted that the very claims alleged in the State Court Action are derivative claims held by the Debtor, and will therefore impact the handling of the administration of its bankrupt estate.

26. Furthermore, satisfaction of the *Pacor* test is further reflected in the fact that adjudication of the State Court Action will alter the Debtor's rights and liabilities. Although the State Court Action was initiated against Prime and Carter, the outcome will inevitably have a significant impact on the administration of the Debtor's bankruptcy estate because, to establish that Prime and Carter, among other things, breached the Operating Agreement, breached their fiduciary duty by removing Marks as manager of the Debtor and improperly placing the Debtor into bankruptcy, LHMF must establish that the claims at issue in the Complaint are direct claims

rather than derivative claims which are directly implicated in the Chapter 11 Case's claims allowance process. These questions would be subject to inconsistent determinations unless they are decided a single time in the Bankruptcy Court.[2]

27. Indeed, LHMF admitted as much in the Lift-Stay Motion, when referencing claims against Prime and Carter, which encompass the claims asserted in the State Court Action: "If, on the other hand, the State Court determines that Prime and Mr. Carter acted properly, then Marks LP's claims against the Debtor. . . would continue to exist." Lift-Stay Motion at ¶ 28.

28. Thus, as set forth above, the State Court Action and each and every claim and cause of action asserted therein, constitutes property of the Creditor Trust and relates to the Chapter 11 Case. Accordingly, removal pursuant to 28 U.S.C. § 1452 is appropriate under "related to" bankruptcy jurisdiction.

B. "Arising In" or "Arising Under" Jurisdiction

29. Removal is also permitted based on "arising in" or "arising under" jurisdiction under 28 U.S.C. § 1452(a) and 11 U.S.C. § 1334(b). 28 U.S.C. § 157(b) provides that, "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11[.]" "'[A]rising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *World Travel Vacation Brokers, Inc. v. The Bowery Sav. Bank (In re Chargit Inc.),* 81 B.R. 243, 247 (Bankr. S.D.N.Y. 1987). Actions that "arise under"

[2] Similarly, even though a ruling in the State Court may not be binding on the Debtor, because the resolution of LHMF's claims against Prime and Carter will require extensive involvement of the Debtor to establish whether the a breach of the Operating Agreement occurred, allowing the State Court Action to proceed will negatively affect the administration of the Chapter 11 Case by distracting the Debtor from maximizing value for all creditors. *See Calpine Corp. v. Nevada Power Co. (In re Calpine Corp.),* 354 B.R. 45, 50 (Bankr. S.D.N.Y. 2006) ("In light of the identity of interest between Calpine and Fireman's, Calpine will suffer irreparable harm if the Nevada Litigation continues through the risk of collateral estoppel and evidentiary prejudice, a drain on its estate due to its indemnification obligations to Fireman's and a significant burden and distraction of key employees from its restructuring efforts.")

Chapter 11 involve claims predicated on a right created by a provision of Chapter 11. *Id*. 28 U.S.C. § 157(b)(2) specifies a list of core proceedings. The claims and causes of action in the State Court Action constitute "core" matters in the following respects:

a. They are matters concerning the administration of the Debtor's bankruptcy estate (28 U.S.C. § 157(b)(2)(A));
b. They are matters concerning the allowance or disallowance of claims against the Debtor and its estate (28 U.S.C. § 157(b)(2)(B));
c. They are matters concerning counterclaims by the Debtor and its estate against persons filing claims against the estate (28 U.S.C. § 157(b)(2)(C));
d. They are proceedings that may determine orders to turn over property of the Debtor and its estate (28 U.S.C. § 157(b)(2)(E)); and
e. They are matters concerning other proceedings affecting the liquidation of the assets of the Debtor and its estate or the adjustment of the debtor-creditor relationship (28 U.S.C. § 157(b)(2)(N),(O)).

30. In the State Court Action, LHMF asserts claims against Carter and Prime, which are "core" because they belong to the Debtor's estate under Section 541(a) of the Bankruptcy Code. The thrust of LHMF's claims is that the Removing Defendants (i) improperly removed LHMF as manager of the Debtor, (ii) violated the Operating Agreement by mismanaging the company, defaulting on the mortgage, placing the Debtor into bankruptcy, and forcing the sale of the Property.

31. Although the Debtor is not a named defendant, the claims that LHMF has asserted are core claims that uniquely affect the bankruptcy estate because (i) the claims asserted by LHMF are duplicative of claims asserted in the Marks Action in addition to the Adversary Proceeding and belong to the Creditor Trustee and not to LHMF; (ii) LHMF filed a Proof of Claim in the Chapter

11 Case; (iii) the treatment of causes of action against the Debtor's estate is set forth in Section 2 of the Creditor Trust Agreement requiring that the claims be adjudicated by means of the Creditor Trust; (iv) adjudication of the State Court Action would create duplicative litigation, impact the property of the estate, waste judicial resources, and create the possibility of inconsistent rulings; (iv) the claims implicate the good faith nature of the bankruptcy sale involving the Property and the releases provided in connection therewith; and (v) the Debtor's indemnity obligations to Carter and/or Prime will be triggered if a judgment is entered in the State Court Action.

32. Because the State Court Action is comprised entirely of core matters, which must be resolved in the Bankruptcy Court's claims allowance process and because LHMF's claims may limit the Creditor Trustee's ability to maximize value for all stakeholders, the claims and causes of action brought in the State Court Action "arise under" or "arise in" title 11 and therefore confer original jurisdiction of the State Court Action in the District Court (and the Bankruptcy Court by reference from the District Court).

TIMELINESS OF REMOVAL

33. LHMF commenced the State Court Action on April 12, 2021 and service was accomplished on April 15, 2021. Accordingly, under 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure, this Notice of Removal is timely because it is being filed within (30) days after service of a copy of the summons and Complaint, which is the initial pleading setting forth the claims for relief on which the State Court Action is based.

VENUE

34. Venue is proper in this Court. Under 28 U.S.C. §§ 1441(a), 1446(a), and 1452(a), venue lies for this action in the United States District Court for the Southern District of New York because it is the federal judicial district and division embracing the Supreme Court for the State of

New York, County of New York where the State Court Action is pending. *See* 28 U.S.C. § 1452 (authorizing removal "to the district court for the district where such civil action is pending").

ATTACHMENTS AND STATE COURT NOTICE

35. Under Bankruptcy Rule 9027, the Removing Defendant attaches hereto as **Exhibit "B"**, a copy of the docket sheet in the State Court Action as evidence that all documents filed in the State Court Action are included herein.

36. As required by Bankruptcy Rule 9027(b), the Removing Defendants will promptly give Plaintiffs written notice of the filing of this Notice of Removal, and will file a copy of this Notice of Removal with the Clerk of the Supreme Court for the State of New York, County of New York.

37. Nothing in this Notice shall be interpreted as a waiver or relinquishment of the Removing Defendants' right to assert all defenses, counterclaims and other rights and claims. For the avoidance of doubt, the Removing Defendants submit that there are no viable claims or causes of action asserted against them in the State Court Action.

FINAL ORDERS

38. The Removing Defendants consent to the entry of final orders and/or judgments by this Bankruptcy Court.

CONCLUSION

All of the requirements of 28 U.S.C. §§ 1334 and 1452(a) have been satisfied, and Notice is hereby given that this State Court Action is removed from the Supreme Court for the State of New York, County of New York, to the United States Bankruptcy Court for the Southern District of New York.

Dated: May 13, 2021

ALSTON & BIRD LLP

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LITTLE HEARTS MARKS FAMILY II L.P.,

Plaintiff,

-against-

JASON D. CARTER and 61 PRIME LLC,

Defendants.

Index No.

SUMMONS

To the above-named Defendants

61 Prime LLC
c/o Carter Management Corp.
Attn: Jason Carter
445 Park Avenue, 9th Floor
New York, NY 10022

Jason Carter
c/o Carter Management Corp.
445 Park Avenue, 9th Floor
New York, NY 10022

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue is CPLR § 503. The parties in this case reside in Manhattan and the claims arise from a transaction of business in Manhattan.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LITTLE HEARTS MARKS FAMILY II L.P., Plaintiff, -against- JASON D. CARTER and 61 PRIME LLC, Defendants.	Index No. **COMPLAINT**

Plaintiff Little Hearts Marks Family II L.P. ("Little Hearts" or "Plaintiff") alleges:

INTRODUCTION

1. Defendant Jason D. Carter ("Carter") and a company he owns, 61 Prime LLC ("Prime," and together with Carter, "Defendants"), violated fiduciary duties to Plaintiff Little Hearts and others and breached contractual obligations as the Managers of 305 East 61 Street Group LLC ("Company") by pursuing a plan to misappropriate for themselves a valuable building in the Upper East Side located at 305 East 61st Street (the "Building"). This Building was acquired by Little Hearts to be owned by the Company and developed into a luxury condominium.

2. Defendants became members and ultimately managers of the Company and used those positions to squeeze out Little Hearts and transfer the Building to themselves by violating the fiduciary duties Defendants had to Little Hearts and other members of the Company.

3. Defendants perpetrated a scheme to transfer the Building as Managers by creating an artificial foreclosure and bankruptcy. They refused to enforce the Company's rights to require its members to pay off the Company's acquisition and construction loans when those loans matured. These loans were personally guaranteed in full by Defendants and Plaintiff. The operating agreement of the Company (the "Operating Agreement") and other related contracts

provided for payment of loans, but Defendants did not follow these contracts notwithstanding that they were obligated to do so as Managers of the Company.

4. Defendants' refusal to pay off the loans, including their 62.5% share of the loan amount, forced the Company to default, creating an opportunity for Defendants to place the Company into a bankruptcy proceeding to ultimately acquire the Building.

5. The Company, however, was solvent as the value of its sole asset, the Building, significantly exceeded the loans and the operating and other agreements provided for payment of those loans. At the time of the bankruptcy filing, the value of Building was at least $105,000,000.

6. Rather than use funds available to the Company, Defendants used the other Company members' equity, including Little Hearts's sweat equity in spending years to develop and significantly increase the value of the Building, to purchase the loans from the Lender (defined below) through an entity Defendants incorporated on the same day the Company was placed into bankruptcy by Defendants. Defendants acquired the Building as the only bidder in a bankruptcy sale in August 2020.

7. As a result of Defendants' violations of fiduciary duties and breaches of contractual obligations, Plaintiff has been seriously injured. The damages are at least $48,052,000 in lost capital and the loss of valuable rights afforded to Plaintiff in the Operating Agreement, including the right to "retain, use, occupy [and] develop" designated units in the Building.

PARTIES

8. Plaintiff Little Hearts is a New York limited partnership with its principal place of business is at 488 Madison Avenue, New York, NY 10022.

9. Defendant Carter resides in New York and his place of business is c/o Carter Management Corp., 445 Park Avenue, 9th Floor, New York, NY 10022.

10. Defendant Prime is a New York limited liability company with its principal place of business at c/o Carter Management Corp., 445 Park Avenue, 9th Floor, New York, NY 10022. Prime's principal place of business is also Carter's principal place of business.

11. Carter manages and is the only member of Prime and all times relevant to the claims here, Carter was in complete control of Prime. Carter caused Prime to commit the misconduct alleged herein for the benefit of Carter and was Carter's alter ego.

12. The parties in this case reside in Manhattan, the Building is in Manhattan and the claims arise from a transaction of business in Manhattan. Therefore, this Court has jurisdiction under CPLR § 301 and venue is proper in New York County under CPLR § 503.

FACTS

A. Purchasing the Building; Organizing an Ownership Group

13. Little Hearts's principal, Mitchell Marks ("Marks"), is in the business of buying, renovating, and selling real estate in New York.

14. In 2014, Marks learned that a 65,000 square foot warehouse at 305 East 61st Street, between Second Avenue and a ramp off the 59th Street bridge could be purchased. This building totaled 65,000 square feet and housed an art facility, but its ten floors could be converted into residential units.

15. Marks investigated and concluded that the Building could be purchased at a fair price and converted into a condominium. He negotiated, and on August 15, 2016, signed a contract for purchase of the Building for $40,000,000. The contract required a down payment of $2,000,000 and Little Hearts paid the down payment, which was credited to its purchase of certain units in the Building.

16. After signing the contract for purchase, Marks organized a small four-member group of real estate investors ("Members") to finance, purchase and convert the Building. The four-member group who held ownership in the Company were: Little Hearts (30% in Class B); Prime (50% in Class B); Onestone (10% in Class A); and Thaddeus Pollock (10% in Class A).

17. Marks reached agreements with the three other members to develop the Building, designated the floors each member would own and convert and renovate, the investment obligations each would make for acquisition, conversion, and other details (the "Project").

18. The Company acquired the Building on August 15, 2016 for $40,000,000. The Project was financed by a $20,000,000 acquisition loan ("Acquisition Loan"), and $21,328,000 invested by the Members ($20,000,000 for acquisition of 305 East 61st and $1,328,000 for closing costs).

19. An investment was also necessary for construction. Construction was funded with $10,000,000, a loan of $5,186,000 from Banco Popular North America ("Construction Loan") and $4,924,000 invested by the four members, in addition to other monies invested by the Members for renovations.

20. The Acquisition and Construction Loans were secured by one mortgage held by Banco Popular North America, the lender of both loans (the "Mortgage"). The Loans were assigned to a company called 305 East 61st Street Lender LLC ("Lender").

21. The Mortgage was personally guaranteed in whole by Carter and Marks, and guaranteed in whole by Little Hearts and Prime.

B. Subscription Agreement and Operating Agreement

22. The Members signed a Subscription Agreement and an Operating Agreement. These agreements assigned to each a part of the Building (a specific floor or floors) and required

each Member to assume as part of their capital contributions responsibility for payment of a portion of the Mortgage.

23. Prime was required to pay 5/8ths of the Mortgage, $18,750,000, and Little Hearts, Onestone and Pollock were each required to pay $3,750,000 of the Mortgage (1/8th each).

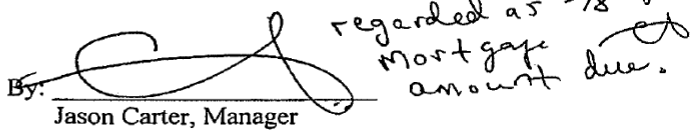
24. The Members signed promissory notes for the Acquisition Loan ("Acquisition Notes") totaling $20,000,000 plus interest, and signed promissory notes for the Construction Loan totaling $10,000,000, plus interest ("Construction Notes," together with Acquisition Notes, the "Notes").

25. Carter, owner of Prime, has disputed that Prime was responsible to pay 5/8ths the Mortgage. However, the agreements are clear that Prime promised to pay 5/8ths of the Mortgage, and on the Acquisition Note that Carter signed included a statement that Prime was responsible for 5/8ths of the Mortgage. The signature page of Prime's Acquisition Note reads:

IN WITNESS WHEREOF, this Note is executed and delivered by the undersigned on the day and year first above written.

BORROWER:

61 Prime LLC



By: _____
Jason Carter, Manager

26. The Operating Agreement governed management of the Company. It was amended twice, and the final version was in effect during the time the claims alleged arose.

27. The Operating Agreement was an agreement by and between Little Hearts, Prime, Onestone and Pollock.

28. The Operating Agreement provided that each Member acquired exclusive ownership and use of one or more floors of the Building with the right to "retain, use, occupy [and] develop" the floors designated to each. Exhibit A at ¶¶ 4(F)(i)-(ii); 9(F), 9(H) & Ex. "A".

29. Little Hearts acquired exclusive rights to the "basement/cellar and first floor" (the "Ground Floor Unit"), the second floor ("Second Floor Unit"), and "10th floor and roof" ("Penthouse Unit") (collectively, "Marks Units").

30. Prime acquired exclusive rights to the 4th, 5th, 6th, 7th and 9th floors. *Id*.

31. Pollock acquired exclusive use of the 3rd floor. *Id*.

32. Onestone acquired exclusive use of the 8th floor. *Id*.

33. The Operating Agreement granted Little Hearts rights to make any alterations to and/or sell, lease, sublease, assign, and use each of the Marks Units or any portion thereof, without the Company's consent and without the payment of any fees or expenses to the Company. *Id*. at ¶ 9(F).

34. In reliance on the rights granted to Little Hearts under the Operating Agreement, Little Hearts spent millions of dollars renovating each of the Marks Units to use, lease or sell.

35. The Operating Agreement granted the right to a proposed twenty-five (25) year lease from the Company to Little Hearts, as landlord or as tenant, for the Ground Floor Unit. *Id*. at ¶ 9(G) & Ex. "F".

36. On or about August 15, 2016, the proposed lease for the Ground Floor Unit was executed by the Company and Little Hearts (the "Lease").

37. After August 15, 2016, Little Hearts entered into a valuable sublease, as sub-landlord, with non-party Acqua Ancien Bath New York, Inc. ("Spa"), as sub-tenant, for the Ground Floor Unit for a term of 15 years ("Sublease"). The Company consented to the Sublease.

C. Prime and Carter Instigate Litigation to Take Over Management of the Company

38. Little Hearts was Manager of the Company under the terms of the Operating Agreement (Ex. A at ¶ GG of the definitions section) and as manager was responsible for the Project from the date of inception in 2016 until early July 2018.

39. In Spring 2018, two years after closing the acquisition of the Building, Prime refused to pay $62,500 of its original subscription to the Company. Little Hearts, as Manager, requested payment. Defendants refused to pay. The Company (managed by Little Hearts) filed a lawsuit for payment against Prime captioned *305 East 61st Street Group LLC v. 61 Prime LLC*, Index No. 652934/2018 (N.Y. Sup. Ct.).

40. On May 25, 2018, Prime and Carter used this litigation as an excuse to start their own litigation to improperly remove Little Hearts as Manager.

41. Prime, Carter, the Company filed an action to remove Little Hearts as Manager against Little Hearts and Marks in New York Supreme Court captioned *61 Prime LLC, et al. v. Little Hearts Marks Family II, LP, et al.*, Index No. 653281/2018 (the "Prior Action").

42. The complaint falsely alleges that Little Hearts and its principal, Marks, engaged in "wrongful acts and omissions" as Manager of the Project, and that Little Hearts should be removed as the Company's Manager and replaced by Carter and Prime.

43. On July 2, 2018, Prime and Carter moved for a TRO *ex parte* with no notice or hearing and based on grossly false allegations requested that Little Hearts be removed as Manager immediately. One of the false allegations alleged by Prime and Carter was that the Building's condominium offering plan was defective when it was not.

44. The TRO was granted, and the Court scheduled a hearing for a preliminary injunction hearing. Carter and Prime thus had exclusive authority to manage the Company's business affairs. The TRO:

(a) Removed Little Hearts as Manager of the Company by enjoining and restraining it from "[t]aking any action on behalf of or in connection with, pertaining to or affecting East 61st Street Group, LLC, or the building or property located at 305 East 61 Street without [Carter and Prime's] prior written consent";

(b) Granted authority to "Jason Carter, as manager of plaintiff 61 Prime, LLC" to act on behalf and represent the Company "in all matters": and

(c) Granted exclusive authority to "Jason Carter or 61 Prime, LLC" to prepare, amend, or modify the Company's tax documents and the condominium offering plan for the Project. Prior Action, ECF Doc. 35.

The TRO required Little Hearts to:

(a) Turn over all of the Company's books and records to "Jason Carter on behalf of 61 Prime, LLC";

(b) Instruct third parties to release all Company files to "61 Prime, LLC and Jason Carter"; and

(c) Make available for inspection all Company files to effectuate the transfer of said files to "Jason Carter on behalf of 61 Prime, LLC." *Id*.

50, With the stroke of pen, the TRO transferred total control of the Building to Carter and Prime. Of course, Carter and Prime were required to appear and prove their allegations at the preliminary injunction hearing.

51. The preliminary injunction hearing was held on February 7 and 8, 2019. Little

Hearts moved for appointment of a receiver to manage and oversee the Company's operations. Justice Gerald Lebovits presided and issued a statement on May 17, 2019, holding that Prime and Carter had failed to prove that Little Hearts violated any law or contractual provisions as Manager of the Project.

52. The May 17, 2019, transcript states in relevant part that Defendants did not have a case:

> MS. HALPERIN [Defendants' counsel]: That's never been the case, Judge. Respectfully, that has never been the plaintiff's position. The plaintiff's position has been that the plaintiff did not want to be held hostage by a former manager, the initial manager that committed a number of, shall we say, breaches –
>
> THE COURT: That was not what occurred during the two days of hearings before me. It was just the opposite; **two days of hearing that proved the entitlement for the other way: to appoint a receiver, at the request of Little Hearts Marks. You gave it your best shot, and in two days, all you did was prove that you don't have a case**.

53. Carter and Prime had lost. They failed to prove any of the allegations against Marks and Little Hearts. Judge Lebovits was ready to issue a decision against Carter and Prime.

54. On June 10, 2019, just a few weeks later, Carter and Prime placed the Company into a Chapter 11 bankruptcy in the Southern District of New York Bankruptcy Court under a case captioned *In re 305 East 61st Street Group, LLC*, case no. 19-11911 (SHL) (the "Bankruptcy Proceeding"). The automatic stay prevented Judge Lebovits from issuing an order undoing the TRO. Carter and Prime remained in control.

55. On the same day Defendants caused the Company to file for bankruptcy, Carter incorporated a shell company called "Lazarus 5" (defined below). Subsequently, Carter and Prime sold the Building to Lazarus 5.

56. A manager of a New York LLC is required to perform his duties as a fiduciary "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." *See, e.g.*, N.Y. LLC Law § 409.[1]

57. The conduct of Carter and Prime gaining control and then ownership of the Building for themselves violated the interests of the other Members.

58. The Bankruptcy Proceeding was unnecessary as the Company was solvent. The value of the Company's asset, the Building, far exceeded the Company's liabilities.

59. The reason for Carter and Prime to declare bankruptcy was to stay an adverse ruling by Justice Lebovits and to gain sole ownership of the Building from the other Members, including Little Hearts.

60. In sum, Defendants placed the Company into the Bankruptcy Proceeding:

a. To prevent an adverse ruling from Justice Lebovits and appointment of a receiver;

b. To prevent Little Hearts and the other Members from gaining control of their units in the Building; and

c. To force use of the procedures of the Bankruptcy Court to sell the Building to a new company Carter incorporated to acquire ownership of the Building for Carter's personal gain.

D. As Managers, Defendants Grossly Mismanaged the Company

61. As Managers of the Company, the fiduciary duties of Carter and Prime extended to management of the Company and its asset, the Building. As discussed below, in the two years that followed the TRO, Carter and Prime did not advance any construction work, renew building

[1] Section 409 (a) states: "A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances."

permits, advance the condominium offering plan, or correct the stop work order issued by the City of New York for the illegal work commenced by Defendants.

62. The Operating Agreement repeats § 409 of the LLC statute and requires the Managers to "discharge the Manager's duties to the Company and to the other Members in good faith and with that degree of care that an ordinarily prudent person and an experienced real estate developer in a similar position would use under similar circumstances." Ex. A. at ¶ 9(I).

63. As Managers, Carter and Prime were also "required to devote as much time as is reasonably necessary to the management of the Company's business to the extent of obtaining detailed proposals and bids from subcontractor and professionals which may be necessary to perform all work required to expedite the filing of alteration plans, obtaining municipal and utilities approvals and executing the alteration work in order to obtain a new certificate of occupancy for a mixed use residential/commercial building, as herein contemplated and provided." *Id*. at 9(F).

64. After the TRO was issued and Carter and Prime took over, they breached these obligations, engaged in unlawful conduct, violated their fiduciary duties to Little Hearts and the other members, and grossly mismanaged the Project. Among other things:

- Within just thirty days after the TRO was issued, Defendants failed to renew building permits with the NYC Department and caused a full Stop Work Order and a halt to all construction (including Little Hearts's construction in its Units and its subtenant, the Spa's construction in the Ground Floor Unit), at costs to the Company of hundreds of thousands of dollars per month. Before failing to renew the permits, Carter told Marks that he would not renew them unless Marks paid Carter $10,000,000.

- Engaged in negligent and unlawful excavation work in the cellar of the Building which destroyed the mechanical room, without a permit and without supervision, that could have caused the Building to collapse. When the DOB discovered the unlawful work that was done it issued a full Stop Work Order. It is standard industry procedure that a certificate of correction be filed and the condition corrected. Upon information and belief, this dangerous condition remains uncorrected.

- Cut the power and water to the Ground Floor Unit, which was subleased by Little Hearts to the Spa, and locked the Spa out of the Ground Floor Unit both before and

after the Court enjoined Defendants from doing so. On three occasions Carter padlocked the door to the Spa where the police were called to remove the lock. The police told Carter he was not allowed to harass this tenant.

- Violated a temporary restraining order and court order dated August 23, 2018 directing Defendants to re-install power and water to the Spa's ground floor unit.

- Caused the Spa to sue the Company for the loss of millions of dollars by being unable to occupy the spaced it rented.

- Failed to provide accounting and building updates to the other Members, as required by the Operating Agreement.

- Denied the Members access to all of the Company's books and records.

- Failed to pursue a pending RPAPL Section 881 special proceeding which was necessary to obtain a license to access the adjacent property to complete required Local Law 11 work on the east side of the Building, which created a safety hazard to the public.

- Failed to install permanent electricity so that the heaters in the Building could be operated and the Building could be heated.

- Violated a temporary restraining order dated December 3, 2018 that required Defendants to run permanent electricity to the Building.

- Prevented Little Hearts from installing permanent electricity in violation of a Court order.

- Permitted roof leaks to go unabated in the Building notwithstanding twenty-two written requests that the leaks be repaired.

F. Carter and Prime Defaulted in Payment of the Mortgage in Furtherance of Their Plan to Gain Ownership of the Building

65. Each Member, including Prime and Little Hearts, was responsible for payment of the Mortgage. Prime was responsible for $18,750,000 and Little Hearts, Onestone, and Pollock were each responsible for $3,750,000 of the Mortgage.

66. Carter and Marks personally guaranteed payment of the entire Mortgage.

67. Pursuant to the Mortgage's terms, the loan matured in December 2018. Upon default, interest increased to sky high 24% per annum.

68. Within the months leading up to the Mortgage's maturity, Marks repeatedly advised Carter and Prime that the Mortgage was almost due and that Defendants, as Managers with exclusive authority to act on behalf of Company pursuant to the TRO, were obligated to ensure all Members timely paid their portion of the Mortgage to avoid a default.

69. Defendants did not timely pay the Mortgage. Carter and Prime did not call the Notes due and failed to pay their 5/8ths portion of the Mortgage, $18,750,000. Instead, Carter attempted to refinance the Mortgage with commercially unreasonable terms from a personal friend of Carter. Carter tried to pressure Little Hearts to accept his refinancing proposal and laughed at the other Members and called Marks telling him "there is only going to be one winner here, and it's not going to be you – give in while there is something still left in it for you."

70. Although refinancing was not required and not necessary because of each Members' agreement to pay portions of the Mortgage, Little Hearts presented multiple refinancing proposals at commercially reasonable terms, which Carter unreasonably refused to consider. This was not Little Hearts's preferred choice, but if Defendants really did not have money to satisfy their debt obligations to the Company, Little Hearts was ready to consider any reasonable solution to save the Building it had worked so hard on to develop.

71. After the Mortgage matured, Carter refused to require the Members to pay off their respective portions of the Mortgage pursuant to their Subscription Agreements with the Company, Section 2 and Exhibit A of the First Amendment to the Operating Agreement, and the Notes, which were due and payable on the same day the Mortgage matured.

72. The reason for Carter's refusal to demand that each Member pay off their shares of the Mortgage (which Little Hearts was always prepared to do), particularly since the Operating Agreement did not contemplate or require refinancing, is obvious: Carter did not want the

Mortgage paid so he could purchase the Building in the new company he incorporated out of the bankruptcy.

73. Although Carter sits on a vast fortune estimated to be over $300,000,000 from which he could pay his portion of the Mortgage ($18,750,000), his choice was to force a default on the Mortgage.

74. Upon default, the Mortgage began accruing interest at the 24% per annum default rate, and foreclosure proceedings were commenced by the Lender within months after the default on April 29, 2019. *See 305 E 61st Street Lender LLC v. 305 East 61st Street Group LLC,* Index No. 850097/2019 (N.Y. Sup. Ct.).

75. By permitting the Mortgage to mature without enforcing the Company's right to require the Members to pay off the Mortgage, Defendants added **$23,000,000** in additional debt to the Project, which wiped out much of the Members' expected profit and investment, excluding carrying costs and other fees and expenses.

76. All Carter and Prime needed to do was repay the Lender by enforcing the Company's rights against its Members to provide sufficient funds to allow the Company to repay its secured obligations to the Lender. Taking that step would have prevented the foreclosure proceeding and eliminated the Bankruptcy Proceeding. All Members would own their designated units today instead of Carter owning all of the them alone.

77. Instead, Carter and Prime chose a path destructive to the Members, but profitable to the interests of Carter and Prime.

E. Carter and Prime Purchase the Building in the Bankruptcy Proceeding

78. On June 10, 2019, the very same day that Defendants caused the Company to commence the Bankruptcy Proceeding, Carter formed a new entity, Lazarus 5, LLC ("Lazarus 5").

Lazarus 5 was incorporated solely for the purpose of purchasing the Mortgage from the Lender in bankruptcy and then forcing a sale of the Building to Lazarus 5.

79. On or about January 14, 2020, more than one year after Carter failed to enforce the Company's rights to require the Members to pay the Mortgage, and subsequently causing the Company to default on paying the Mortgage, the Bankruptcy Court authorized the Chapter 11 Trustee:

a. To enter into a settlement agreement with the Lender setting the amount due under the Mortgage.

b. To obtain $2,000,000 of new money via Company-in-possession financing ("DIP Loan"); and

c. To enter into a purchase and sale agreement with the Lender that contemplated the sale of the Building subject to higher or otherwise better offers.

80. A few months later, in or about mid-April 2020, instead of paying his 5/8ths portion of the Mortgage, Carter used that money to purchase the Mortgage from the Lender and acquire the Building for his own personal gain.

81. At the August 12, 2020 bankruptcy sale of the Building, Carter's shell company, Lazarus 5, was the only bidder and purchased the Building for approximately $50,000,000.

FIRST CAUSE OF ACTION
BREACH OF FIDICIARY DUTY AGAINST ALL DEFENDANTS

82. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

83. The elements of a cause of action for breach of fiduciary duty are: (i) a fiduciary relationship; (ii) misconduct by defendant; and (iii) damages caused by defendant's misconduct.

84. New York Limited Liability Company Law provides that managers of a limited liability company owe a fiduciary duty to the LLC and the other members of the LLC. LLCL § 409.

85. Carter and Prime were Managers of the Company and owed a fiduciary duty to the Members, including Little Hearts.

86. This fiduciary duty is stated in Paragraph 9(I) of the Operating Agreement which requires Managers to "discharge the Manager's duties to the Company and to the other Members in good faith and with that degree of care that an ordinarily prudent person and an experienced real estate developer in a similar position would use under similar circumstances."

87. This duty as stated in Paragraph 9(F) of the Operating Agreement also requires Managers "to devote as much time as is reasonably necessary to the management of the Company's business to the extent of obtaining detailed proposals and bids from subcontractor and professionals which may be necessary to perform all work required to expedite the filing of alteration plans, obtaining municipal and utilities approvals and executing the alteration work in order to obtain a new certificate of occupancy for a mixed use residential/commercial building, as herein contemplated and provided."

88. As set forth above, Carter and Prime each and together violated their fiduciary duty to Little Hearts by, among other things:

- Improperly removing Little Hearts as Manager through false representations to the Court *ex parte* in to obtain a TRO appointing Carter and Prime as Managers without notice or a hearing to Little Hearts or any other Member.

- Placing the Company into a Bankruptcy Proceeding and thereby staying the TRO after learning that Justice Lebovits was about to issue an adverse ruling vacating the TRO.

- Stopping construction at the Building, failing to renew permits, not advancing construction during the time Defendants served as Managers, and allowing the condominium offering

plan expire so that the other Members, including Little Hearts, could not proceed with construction of their units.

- Doing unpermitted work and dangerous work against the advice of the construction manager and engineer that caused the New York City Department of Buildings to issue a stop work order and halt all work including work done by the Spa.

- Allowing the Mortgage to mature so that Members would be responsible for paying interest at the 24% default rate without calling on the Members to pay the debt and refusing to even consider the numerous commercially reasonable refinancing proposals presented by Marks.

- After the Mortgage matured, Carter and Prime refused to accept the funds Members were required to pay the Mortgage pursuant to their Subscription Agreements with the Company, Section 2 and Exhibit A of the First Amendment to the Operating Agreement, and the Notes, which were due and payable on the same day the Mortgage matured (*i.e.*, early December 2018).

- On the day that Carter and Prime placed the Company into the Bankruptcy Proceeding, forming Lazarus 5 which purchased the Mortgage from the Lender and then forced the sale of the Building to Lazarus 5 (Carter's shell company).

89. As set forth above, Carter was authorized pursuant to the TRO to act on behalf of the Company as Manager in all business matters and thereby Carter owed fiduciary duties to Little Hearts and is personally liable for the damages from violations of those fiduciary duties.

90. If Carter is not deemed to have acted personally as Manager of the Company, Carter, the sole member of Prime, treated and operated Prime as his instrumentality or alter ego and not a bona fide and separate legal entity through which Carter committed wrongful conduct that injured Little Hearts.

91. The direct, foreseeable, and proximate result of Defendants' violations of fiduciary duties injured Little Hearts and Little Hearts has incurred damages of not less than $48,052,000.

92. The damages include, but are not limited to, lost investment of capital and other costs and expenses into the Company and the rights Little Hearts was granted in the Operating Agreement to "retain, use, occupy [and] develop" the Marks Units, the loss of the Lease and

Sublease with the Spa and the total offering value of the Marks Units in the Building's condominium offering plan at the time the Building was to be completed in 2018.

93. Therefore, Defendants are liable to Little Hearts for at least $48,052,000, the amount to be determined at trial, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

SECOND CAUSE OF ACTION
AIDING AND ABETTING BREACH OF FIDUCIARY DUTYAGAINST DEFENDANT CARTER ONLY

94. Plaintiff repeats and realleges each of the allegations above as if fully set forth herein.

95. The elements of a claim for aiding and abetting a breach of fiduciary duty are (i) a breach by a fiduciary of obligations to another; (ii) that the defendant knowingly induced or participated in the breach; and (iii) that plaintiff suffered damage as a result of the breach.

96. Prime, as Member and a Manager of the Company, owed the Company's other Members, including Little Hearts, fiduciary duties.

97. Carter controlled Prime and aided and abetted Prime to violate its fiduciary duties by, among other things:

- Improperly removing Little Hearts as Manager through false representations to the Court *ex parte* in to obtain a TRO appointing Carter and Prime as Managers without notice or a hearing to Little Hearts or any other Member.

- Placing the Company into a Bankruptcy Proceeding and thereby staying the TRO after learning that Justice Lebovits was about to issue an adverse ruling vacating the TRO.

- Stopping construction at the Building, failing to renew permits, not advancing construction during the time Defendants served as Managers, and allowing the condominium offering plan expire so that the other Members, including Little Hearts, could not proceed with construction of their units.

- Allowing the Mortgage to mature so that Members would be responsible for paying interest at the 24% default rate without calling on the Members to pay the debt and refusing to even

consider the numerous commercially reasonable refinancing proposals presented by Marks.

- After the Mortgage matured, Carter and Prime refused to accept the funds Members were required to pay the Mortgage pursuant to their Subscription Agreements with the Company, Section 2 and Exhibit A of the First Amendment to the Operating Agreement, and the Notes, which were due and payable on the same day the Mortgage matured (*i.e.*, early December 2018).

- On the day that Carter and Prime placed the Company into the Bankruptcy Proceeding, forming Lazarus 5 which purchased the Mortgage from the Lender and then forced the sale of the Building to Lazarus 5 (Carter's shell company).

98. The direct, foreseeable, and proximate result of Carter aiding and abetting Prime's violations of fiduciary duties was to injure Little Hearts and Little Hearts has incurred damages of not less than $48,052,000.

99. The damages include, but are not limited to, lost investment of capital and other costs and expenses into the Company and the rights Little Hearts was granted in the Operating Agreement to "retain, use, occupy [and] develop" the Marks Units, the loss of the Lease and Sublease with the Spa and the total offering value of the Marks Units in the Building's condominium offering plan at the time the Building was to be completed in 2018.

100. Therefore, Defendants are liable to Little Hearts for at least $48,052,000, the amount to be determined at trial, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT AGAINST ALL DEFENDANTS

101. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

102. The elements of a cause of action for breach of contract are (i) the existence of a contract; (ii) the performance of one party under that contract; (iii) a breach by the other party; and (iv) resulting damages.

103. Pursuant to Paragraph 9(I) of the Operating Agreement, Prime, as Manager, was required to "discharge the Manager's duties to the Company and to the other Members in good faith and with that degree of care that an ordinarily prudent person and an experienced real estate developer in a similar position would use under similar circumstances."

104. Pursuant to Paragraph 9(F) of the Operating Agreement, as Manager of the Company, Prime was also "required to devote as much time as is reasonably necessary to the management of the Company's business to the extent of obtaining detailed proposals and bids from subcontractor and professionals which may be necessary to perform all work required to expedite the filing of alteration plans, obtaining municipal and utilities approvals and executing the alteration work in order to obtain a new certificate of occupancy for a mixed use residential/commercial, as herein contemplated and provided."

105. By ownership, domination and control, Carter caused Prime, a Member and Manager, to breach the Operating Agreement.

106. As set forth above, Carter and Prime breached the terms of the Operating Agreement by, among other things:

- Removing Little Hearts as Manager by making false representations to the Court in order to obtain the TRO, without notice or a hearing.
- Placing the Company into the Bankruptcy Proceeding, thereby staying the TRO from being vacated before Justice Gerald Lebovits issued an order vacating the TRO.
- Stopping construction of the Building, failing to renew the permits, not advancing construction at all during the entire time Defendants served as Managers, and allowing the condominium offering plan to expire so that the other Members could not proceed with construction of their units.

- Allowing the Mortgage to mature so that Members would be liable to pay interest at the 24% default rate and refusing to consider the commercially reasonable refinancing proposals presented by Marks.

- After the Mortgage matured, refusing to enforce the Company's rights to require Members to pay off the Mortgage pursuant to their Subscription Agreements with the Company, Section 2 and Exhibit A of the First Amendment to the Operating Agreement, and the Notes, which were due and payable on the same day the Mortgage matured (*i.e.*, early December 2018).

- After the Mortgage went into default in early December 2018, adding $23,000,000 in additional debt by accruing interest at the 24% per annum default rate and artificially causing a foreclosure proceeding which could have been avoided.

- On the day that Carter caused the Company to commence the Bankruptcy Proceeding, forming Lazarus 5, which was created solely for the purpose of purchasing the Mortgage from the Lender and then forcing a sale of the Building to Carter for his own personal gain, and

- Self-dealing in using Lazarus 5 to purchase the Building at the Bankruptcy sale, thereby completing Carter's strategy, relying on his vast wealth, through his domination and control of Prime to suffocate Little Hearts and wipe out its equity in order to force a sale of the Building to Carter for his own personal gain.

107. By reason of the foregoing conduct, Carter and Prime breached and failed to perform the Operating Agreement.

108. As a result, Little Hearts was injured and incurred damages of at least $48,052,000, for which Carter and Prime are liable, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

FOURTH CAUSE OF ACTION
VIOLATION OF COVENANT OF GOOD FAITH
AND FAIR DEALING AGAINST ALL DEFENDANTS

109. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

110. New York law implies that a covenant of good faith and fair dealing is in every contract whereby each party promises not to frustrate or deprive the other party of the benefits of the contract.

111. The Operating Agreement therefore contains an implied covenant of good faith and fair dealing in the performance of Defendants' obligations as Managers of the Company.

112. Little Hearts acted in good faith and performed all its obligations under the Operating Agreement.

113. Defendants violated their obligations to act in good faith and fair dealing required as Managers by acting in their personal interests, self-dealing and acting against the Company and other Members.

114. Defendants thereby deprived Little Hearts from the benefits of the Operating Agreement as alleged above.

115. Defendants acted in bad faith and with corrupt dealing so that Carter could purchase the Mortgage (instead of paying it off as required by the Operating Agreement), and force a sale of the Building to his shell company, Lazarus 5, and acquire the Building for his own personal gain.

116. As a result, Defendants violated the implied covenant of good faith and fair dealing in the Operating Agreement and are liable to Plaintiffs in an amount to be determined at trial, but not less than $48,052,000, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

FIFTH CAUSE OF ACTION
LIABILITY AS ALTER EGO OF PRIME AND
LAZARUS 5 AGAINST DEFENDANT CARTER ONLY

117. Plaintiff repeats and realleges each of the forego allegations as if fully set forth herein.

118. In order to hold owners liable for the acts and transactions of a company they own: (i) the owners must exercise complete control of finances and policy and business practices as to the transaction so that the corporation had no separate mind, will or existence of its own; (ii) the control must have been used to commit fraud, a wrong, or a dishonest and unjust act or violate a statutory or other positive legal duty; and (iii) plaintiff must be injured.

119. Prime is the alter ego of Carter. As a result, Carter is personally liable to Plaintiff.

120. There is a unity of interest and control between Carter and Prime such that they are indistinguishable. Carter exhibited total domination and control over Prime and its actions, which exists solely to advance Carter's personal economic interests.

121. Among other things, (i) Carter abused his control of Prime by using Prime as a mere device to further his personal interests rather than the business of Prime; (ii) Prime acted as Carter's alter ego; (iii) Carter abused the privilege of doing business in the corporate form to perpetrate wrongs against Plaintiff and others; (iv) Carter failed to maintain the indicia of separate corporate existences between Prime and Carter; (v) Carter commingled assets belonging to Prime with Carter's own funds or vice versa; and (vi) Carter completely dominated and controlled Prime so that it effectively has no separate existence apart from Carter, and that such conduct was done deliberately to perpetrate the wrongs complained of herein, thereby damaging Plaintiff and also thereby rendering Carter liable to Plaintiff under the doctrine of piercing of the corporate veil.

122. At the direction and under the control of Carter, Prime committed multiple wrongs and unjust acts by, among other things:

- Removing Little Hearts as Manager by making false representations to the Court in order to obtain the TRO, without notice or a hearing.

- Placing the Company into the Bankruptcy Proceeding, thereby staying the TRO from being vacated and avoiding an adverse ruling from Justice Lebovits which prevented Little Hearts from the Company's management, and selling the Building so that Carter could acquire it for his own personal gain.

- Stopping construction at the Building, failing to renew building permits, not advancing construction during the time Carter served as Manager, and allowing the condominium offering plan to expire so that the other Members, including Little Hearts, could not proceed with the completion of construction of their units.

- Allowing the Mortgage to mature so that Members would be responsible for paying interest at the 24% default rate, rejecting commercially reasonable refinancing options.

- After the Mortgage matured, refusing to enforce the Company's rights to require the Members to pay off the Mortgage pursuant to their Subscription Agreements with the Company, Section 2 and Exhibit A of the First Amendment to the Operating Agreement, and the Notes, which were due and payable on the same day the Mortgage matured (*i.e.*, early December 2018); and

- On the very same day that the Company commenced the Bankruptcy Proceeding, forming Lazarus 5, for the purpose of purchasing the Mortgage from the Lender and then forcing a sale of the Building to Lazarus 5 for Carter's own personal gain.

123. Courts consider all facts of a transaction in determining whether to pierce the corporate veil and impose alter ego liability on owners such as Carter. Facts present here include:

- Carter owned, managed and controlled 100% of Prime.

- Prime failed to adhere to basic record-keeping formalities.

- Prime shared the same office space as Carter's other sibling shell companies, including Lazarus 5.

- Carter negotiated the terms of the Operating Agreement, and subsequent amendments, Subscription Agreements, and Construction and Acquisition Notes and signed all of these documents.

- Carter personally guaranteed repayment of the entire Mortgage on Prime's behalf.

- Prime's refusal to call for payment of the Mortgage which resulted in $23,000,000 in default interest had no corporate benefit, except to force a foreclosure and subsequent bankruptcy in furtherance of Carter's plan to sell the Building to Lazarus 5 which Carter formed on the same day he placed the Company into bankruptcy.

- Through Carter's actions, Prime was forced to commit business suicide by not paying its share of the Mortgage ($18,750,000) and allowed the Mortgage to default, thereby adding $23,000,000 in additional debt on the Mortgage that was guaranteed by Prime and Carter.

- Carter did not deal with Prime at arm's length; no company acting in its own interests would allow the Mortgage to default, thereby adding $23,000,000 in additional debt to the Mortgage where the Notes were due and payable on the Mortgage maturity date.

- Carter did not treat Prime as an independent profit center.

- Prime was inadequately capitalized and unable to pay its debts as they became due, but Carter has an estimated net worth of at least $300,000,000; and

- In the TRO hearing, Carter moved to be personally authorized to act on Prime's behalf in all corporate matters so that Carter and Prime were treated as one party, giving Carter sole authority to manage the Company's affairs.

124. It would be unjust and inequitable for Carter to use the corporate form of Prime to perpetrate the wrongs complained of herein.

125. As a matter of law, the doctrine of piercing the corporate veil applies to limited liability companies, such as Prime.

126. Prime therefore should be treated as an alter ego and an instrumentality of Carter which used to perpetrate the wrongs alleged herein.

127. As a result, Carter is liable to Plaintiff for damages in an amount to be determined at trial of at least $48,052,000, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

SIXTH CAUSE OF ACTION
UNJUST ENRICHMENTAGAINST ALL DEFENDANTS

128. Plaintiff repeats and realleges each of the foregoing allegations as if fully set forth herein.

129. The elements of an unjust enrichment claim are (i) the defendant was enriched; (ii) at plaintiff's expense; and (iii) it is against equity and good conscience to permit the other party to retain what is sought to be recovered.

130. Defendants engaged in wrongful and inequitable conduct that caused, and will continue to cause, injury to Plaintiff.

131. As a result, Defendants have been unjustly enriched. It would be inequitable and unjust to permit the Defendants to retain the Marks Units and profits from their wrongful conduct.

132. Equity and good conscience require that Little Hearts be compensated for the Defendants' unjust enrichment, in an amount to be determined at trial of at least $48,052,000, together with statutory interest, attorneys' fees and the costs and disbursements of this action.

WHEREFORE, the Court should grant judgment to Plaintiff:

A. On the First Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action.

B. On the Second Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action.

C. On the Third Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action.

D. On the Fourth Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action.

E. On the Fifth Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action.

F. On the Sixth Cause of Action, for damages totaling not less than $48,052,000, plus statutory interest, attorneys' fees and the costs and disbursements of this action; and

G. For such other and further relief as the Court deems just.

Dated: New York, New York
April 12, 2021

GOLDENBERG LAW, P.C.

By: _____
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Attorneys for Plaintiff

EXHIBIT A

OPERATING AGREEMENT
OF
305 EAST 61ST STREET GROUP LLC

THIS OPERATING AGREEMENT (the "Agreement") of 305 East 61st Street Group LLC is entered into by and among Little Hearts Marks Family II, L.P., ("Marks LP" or "Initial Member") a New York limited partnership, with an office at 488 Madison Avenue, New York, New York 10022 (Marks LP is also hereinafter referred to as the "Manager"), 61 Prime LLC New York limited liability company, having an office c/o Carter Management Corp., 445 Park Avenue, 9th Floor, New York, NY 10022 ("Prime") and the entities and individuals set forth on Exhibit "A" and such other members of the Company, as hereinafter defined, (the "Other Members" or "Class A Members") who may subsequently cause this Operating Agreement to be executed who shall be identified on Exhibit "A" hereto upon such execution. Marks LP and Prime are hereinafter referred to collectively as the "Class B Members". The Class A Members and Class B Members are hereinafter referred to collectively as the "Members"

RECITALS

The Initial Member has heretofore caused to be formed 305 East 61st Street Group LLC, (the "Company") a New York limited liability company, pursuant to, and in accordance with, the Limited Liability Company Law of the State of New York, as amended from time to time (hereinafter also referred to as the "LLCL"). A copy of the articles of organization ("Articles") of the Company is annexed hereto as Exhibit "B".

That pursuant to the terms of this Agreement, the Class A Members have the right to acquire a specifically designated condominium unit in the Property, as hereinafter defined, in a condominium regime to be formed by the Company, all as hereinafter provided for.

EXHIBIT C

THIS RIGHT TO ACQUIRE A CONDOMINIUM UNIT UPON THE FILING OF AN OFFERING PLAN FOR THE 305 EAST 61ST STREET CONDOMINIUM IS NOT AT THE PRESENT TIME AN OFFERING OF A COOPERATIVE INTEREST IN REALTY. NO SUCH OFFER WILL BE MADE UNTIL THE FILING OF AN OFFERING PLAN WITH THE NEW YORK STATE DEPARTMENT OF LAW. INVESTORS MAY CHOOSE NOT TO EXERCISE SAID RIGHT WITHOUT PENALTY OR ADDITIONAL EXPENSE.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained and such other and further good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Initial Member, Class A Members, Class B Members, and the Other Members, subsequently executing this Agreement hereby agree as follows:

DEFINITIONS

For purposes of this Agreement, unless the context clearly indicates otherwise, the following terms shall have the following meanings:

A. **Act.** The New York Limited Liability Company Law and all amendments thereto, also referred to herein as "LLCL".

B. **Additional Contribution.** The Subsequent Contribution as defined in definition SS.

C. **Agreement.** This Limited Liability Company Operating Agreement including all amendments adopted in accordance with the Agreement and the Act.

D. **Articles.** The Articles of Organization of the Company, as amended from time to time, and filed with the Department of State of New York.

E. **Building.** The land and Building known thereon known as 305 East 61st Street, New York, New York 10065 intended to be conveyed to the Company.

F. **Capital Account.** The account maintained for a Member determined in accordance with Treasury Regulation section 1-7041(b) 2(iv) as in effect, on the effectiveness hereof.

G. **Capital Contribution.** Any contribution of money, Property or services made by or on behalf of a Member or a Member's Assignee hereunder and designated by the Manager as a Capital Contribution.

H. **Class A Member.** The individuals and entities set forth on Exhibit "A" hereof.

I. **Class B Member.** The individuals and entities set forth on Exhibit "A" hereof.

J. **Closing.** The simultaneous conveyance by the Property Seller of the Property to the Company and the Lender making the Loan to the Company.

K. **Commitment.** The payments that Members are obligated to make hereunder, including, without limitation, a Member's Initial Capital Contribution, any Subsequent Capital Contribution and all monthly maintenance payments provided for in paragraph 20 hereof.

L. **Common Elements.** The common portions of the Building, which will be the common elements under the condominium regime for the Building contemplated hereunder, which the Members hereby acknowledge and agree consist of the common lobby, elevator and fire escapes only.

M. **Conditions.** The Closing of title under the Purchase Contract and conveyance of the Property to the Company and all other conditions hereunder.

N. **Condominium Act.** Article 9-B of the New York General Business Law.

O. **Condominium Unit.** One of the ten (10) condominium units intended to be created in the Property and to be subjected to the Condominium Act. The Declaration of Condominium, as hereinafter provided, shall provide that each such condominium unit may be subdivided into not more than two (2) units.

P. **CO.** A Certificate of Occupancy, permanent or temporary, certifying that a particular unit, and/or all of the Units in the Building, may be used for residential or commercial occupancy, as the case may be.

Q. **Construction Contract.** A Contract with a Contractor, or Construction Manager with the Company, a copy of which construction contract shall be provided to the Members upon request.

R. **Default Interest Rate.** The Prime rate published by The Wall Street Journal from time to time, plus 12% per annum, but in no event greater than 16%.

S. **Delinquent Member.** A Member who has failed to meet the Commitment of that Member.

T. **Development Parcel.** The Land and the Building thereon known as 305 East 61st Street, New York, New York 10065, intended to be renovated and converted to a form of condominium ownership, as herein provided, as more particularly described in Exhibit "C".

U. **Disposition (Dispose)**. Any sale, assignment, exchange, mortgage, pledge, grant, hypothecation, or other transfer, absolute or as security or encumbrance (including dispositions by operation of law).

V. **Dissociation**. Any action which causes a Person to cease to be a Member.

W. **Dissolution Event**. An event, the occurrence of which will result in the dissolution of the Company.

X. **DOB**. The New York City Department of Buildings.

Y. **DOL**. The New York State Department of Law.

Z. **Effective Date**. The date of execution of this Agreement by the Initial Members listed on Exhibit "A" annexed hereto and as to each of the Other Members, on the date of execution thereof by the Other Members, if any.

AA. **Fiscal Year**. The calendar year.

BB. **Initial Capital Contribution**. The Initial Capital Contribution heretofore made and agreed to be made by the Initial Members and the Other Members as described in Exhibit "A" hereof, as same may be revised and completed from time to time with the Initial Capital Contribution of such additional Members upon execution of this Agreement by such Member, and the making of such payment.

CC. **Initial Member**. Marks LP.

DD. **Interior Unit Work.** All alterations, renovations and construction inside any space in the Property intended to be demised as a discrete unit, including, without limitation, any Designated Unit, as hereinafter defined, shall be completed at the sole cost, expense and discretion of the Member to which such Designated Unit is assigned, as herein provided, and as more particularly described on Exhibit "D" annexed hereto.

EE. **Lender.** The institution making the Loan, or the seller under the Purchase Contract, if such financing is elected at Manager's sole and unrestricted discretion.

FF. **Loan.** An acquisition and/or a construction loan to be made to the Company to defray in part the cost of acquisition of the Property and the cost of the Work.

GG. **Manager.** The Person who is a member selected to manage the affairs of the Company specified in Paragraph 9 hereof. Without limitation of the foregoing, the sole initial Manager of the Company shall be Marks LP.

HH. **Member.** A Person executing the Agreement as a Member, inclusive of the Initial Members Other Members, Class A Members and Class B Members.

II. **Membership Interest.** The rights of a Member to Distributions (liquidating or otherwise) and allocations of the profits, losses, gains, deductions, and credits of the Company. The respective Membership Interests of the Members shall be set forth on Exhibit "A", which shall be revised and completed from time to time with the name of each Member upon execution of this Agreement by such Member and the payment of the Initial Capital Contribution.

JJ. **Other Members.** The Class A Members.

KK. **Percentage Interest** shall have the meaning ascribed in paragraph 5.

LL. **Person.** An individual, trust, estate, or any organization permitted to be a member of a limited liability company under the laws of the State of New York.

MM. **Plan.** The condominium offering plan submitted to the New York State Department of Law ("DOL") with respect to the Property.

NN. **Project Architect.** Such registered architect as the Manager may engage to design and plan the alteration and Work.

OO. **Project Contractor.** Such General Contractor, or Construction Manager, as the Manager may select to perform the Work, or any other alteration in the building.

PP. **Property.** The land and building bearing street address 305 East 61st Street, New York, New York 10065 to be conveyed to the Company.

QQ. **Purchase Contract.** That certain contract of sale dated as of February 3, 2016 by and between 10 LLC and ALSC Realty LLC, seller (collectively "Property Seller") and the Company, purchaser, covering the purchase and sale of the Property. A copy of the Purchase Contract is annexed hereto as Exhibit "E".

RR. **Purpose.** The Company is formed specifically for the purposes of acquiring the Property pursuant to the terms of the Purchase Contract. In the event that, for any reason, the Company does not close upon the purchase of the Building as

provided in the Purchase Contract and the Purchase Agreement terminated, the Company agrees within ten (10) days thereafter, to return, or cause to be return, to each Member all sums paid on account hereof and remaining in the Capital of the Company, whereupon no party shall have any other and further liability hereunder. Following the closing of the Property pursuant to the Purchase Contract, the purpose of the Company shall further include completion of the renovation and development of the Property, as herein provided, the creation of condominium regime and the sale of condominium units in accordance with the Plan and the terms hereof.

SS. **Subsequent Capital Contribution.** The additional capital contributions Class A members must make which the Manager may amend from time to time.

TT. **Subsequent Members.** Persons admitted to the Company as Members subsequent to the Initial Members, including, without limitation, the Other Members.

THE SUBSCRIBERS HERETO AGREE:

(such Agreement includes the Recitals and Definitions above)

1. Company Organization

A. The Initial Members have heretofore organized the Company as a New York Limited Liability Company. The name of the limited liability company formed is 305 East 61st Street Group LLC (the "Company").

B. For and in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Members executing this Agreement (both Initial Members and Other Members) hereby agree to the terms and conditions of this Operating Agreement (also referred to as the "Agreement"). It is

the express intention of the Members that the Agreement and the Subscription Agreement signed by each Member shall be the sole source of agreement of the parties.

C. Notwithstanding anything to the contrary contained herein, the obligations of the Members under this Agreement and the Subscription Agreement, shall cease and terminate, if on the Closing Date all of the Conditions have not occurred whereupon the respective Contributions of the Members to the Capital of the Company shall be promptly remitted to them, together with all interest earned thereon, if any.

2. Term

The term of the Company shall continue until December 31, 2114, unless dissolved before such date in accordance with the provisions of this Agreement, or with the LLCL.

3. Purpose

The Company is formed for the purpose of engaging in any lawful act or activity for which limited liability companies may be formed under the LLCL and specifically to engage in any and all activities necessary or incidental to the acquisition, development, rehabilitation and to act as sponsor in connection with the ultimate conversion to condominium ownership of the land and building known as 305 East 61st Street, New York, New York, and to own, renovate, convert to active or alternative uses, maintain and dispose of such Property as provided in this Agreement.

4. Members

A. There shall be two (2) class of Members of the Company, as more particularly set forth on Exhibit "A". The time of admission of persons as Members of the Company shall not detract from the foregoing statement. As additional Persons are admitted as Subsequent Members, Exhibit "A" shall be amended by

the Manager to reflect such Members respective names, percentage of Membership Interest and Initial Capital Contributions.

B. Meetings of the Members shall not be held unless the Class B Members, or any of them, in their sole discretion, decide(s) to call a meeting of the Members for any purpose, which meeting shall be scheduled upon reasonable notice and shall be attended by the Manager.

C. Each Member represents and warrants: that he, she or it, is acquiring a membership in the Company for such Member's own account as an investment and without an intent to distribute such membership. Each acknowledges that the membership in the Company has not been registered under the United States Securities Act of 1993 or any New York State or other State Blue Sky Law and may not be resold or transferred without appropriate registration or under an applicable exemption from such registration requirement.

D. (i) Each Member acknowledges that the Managers have advised that to the extent deemed reasonably necessary by the Manager, the Company intends to submit an application to the office of the DOL under (x) DOL Policy Statement 105 and (y) the DOL's Memorandum dated June 19, 2013 entitled Real Estate Syndication Offerings That Include Rights to Acquire Condominium Units, for a "No Filing Letter" from the DOL providing that the DOL will take no action with respect to the Manager's non-filing of an offering statement, failure to register as broker-dealer or obtain an exemption from registration pursuant the pertinent provisions of the New York General Business Law.

(ii) Each Member understands that the foregoing Policy Statement 105 provides for issuance of a No Filing Letter under circumstances, where among other things, investors are deemed to be "sophisticated" and, "have sufficient means for the

investment" and have a "pre-existing relationship" with one or more of the principals of the Manager".

E. Each Member acknowledges that each such Member in considering acquiring a Membership in the Company has been represented by counsel and has availed him/herself of counsel's interpretation of this Agreement, advice as to the risks, of the investment in the Company, and of entering this Agreement. Each such Member acknowledges that he, she or it is a "sophisticated investor" and has "sufficient means for the investment" as those phrases are defined in the following excerpts from said Policy Statement 105 and each had a pre-existing social or business relationship with one of the Manager.

(i) "Sophisticated investor: a person having experience in real estate investments, investments in securities or other substantial business or financial experience, or a person having a personal advisor with such experience who is neither a principal of the issuer nor receiving commissions from the issuer for the sale of interests in the issuer. An Accredited Investor as defined by SEC Regulation D, Rule 501 is assumed in every case to be a sophisticated investor.

(ii) "Sufficient Means for the Investment: a combination of net worth and income of the prospective investor measured in comparison to the size of the investment (also known as the suitability standard). A person with a net worth minus home, home furnishings and automobile equal to three times the total investment plus an annual adjusted gross income equal to the total investment, or a net worth minus home, home furnishings and automobile equal to five times the total investment without regard to income, will in most instances be considered as having sufficient means for the investment. A person's net worth and income may be aggregated with that of his or her spouse. An Accredited Investor as defined by SEC Regulation D, Rule 501 is

assumed in every case to have sufficient means for the investment."

F. (i) In consideration of the good and valuable services furnished by Marks LP in connection with the formation and capitalization of the Company, the acquisition of the Property, the funding of the $2,000,000.00 Purchase Contract deposit, the obtaining of acquisition mortgage financing and the execution and delivery of a guarantee thereof, all as herein provided and contemplated, subject to the terms hereof, Marks LP shall and is hereby granted a 20% Percentage Interest in the Company, together with the right to retain, use, occupy, develop and acquire the condominium units consisting of the (i) basement/cellar and first floor, and (ii) 10th floor and roof, of the Building, which Percentage Interest, shall be set forth on Exhibit "A" annexed hereto.

(ii) In consideration of the good and valuable services furnished by Prime in connection with the formation and capitalization of the Company, the acquisition of the Property, the funding of the $1,000,000.00 Additional Deposit, as defined and provided for in the Purchase Contract, which Additional Deposit shall be funded out of the $2,000,000.00 payment to be made by Prime simultaneously with the execution hereof as more particularly provided in Exhibit "A" hereof, the obtaining of acquisition mortgage financing and the execution and delivery of a guarantee thereof, all as herein provided and contemplated, subject to the terms hereof, Prime shall and is hereby granted a 50% Percentage Interest in the Company, together with the right to retain, use, occupy, develop and acquire the condominium units consisting of the fourth, fifth, sixth, seventh and ninth floors of the Building, which Percentage Interest, shall be set forth on Exhibit "A" annexed hereto.

G. Except as herein otherwise provided, Class A Members shall have no right to, nor shall they take any part in or interfere in any manner with the conduct, control or management of the Company's business and shall have no right or authority to act for or bind the Company, said powers being vested solely and exclusively in the Manager(s), subject to the rights of the Class B Members, as herein provided for. Except as otherwise expressly provided herein, the Class A Members shall have only those rights granted to members pursuant to the laws of the State of New York.

5. Percentage Interests

The respective percentage interest of the Members ("Percentage Interests") of the Company shall be as set forth in Exhibit "A". Each Member's Initial Capital Contribution consists of the amount described on Exhibit "A" as "Initial Contribution", and as to the Others Members, the payment of such Initial Contribution shall be made simultaneously with the execution hereof. Each Member further commits and agrees to timely make any required Subsequent Capital Contribution as provided in paragraph 17 hereof, all monthly maintenance and operation expenses as provided for in paragraph 19 hereof and well as all payments required under the Subscription Agreement, all of which payments shall be credited to each Member's respective Capital Account hereunder. Each Member has made an Initial Capital Contribution to the Company's capital in the amount set forth on Exhibit "A".

6. Taxation

It is intended that the Company be characterized and treated as a partnership for, and solely for, federal, state and local income tax purposes.

7. Records and Reports

A. The company shall maintain all records required under law and to perform this Agreement at its Principal office which shall be open to inspection by the Members or their agents at reasonable times. The Manager shall provide reports, including a balance sheet, statement of profit and loss and changes in Members' accounts, and a statement of cash flows, at least annually to the Members at such time and in such manner as the Manager may determine to be reasonable. Prime's accountants and professionals shall, upon notice to the Manager, have the right to review all financial statements and reports and shall further have the right to provide all tax reporting jointly, on behalf of the Class B Members and share participation in the treatment of expenses.

B. (i) The Manager, at Company expense, shall cause to be prepared and timely file income tax returns of the Company in all jurisdictions where such filings are required, and shall prepare and deliver to each Member, within ninety days after the expiration of each Fiscal Year, all information returns and reports required by the Code and Tax Regulations and Company information necessary for the preparation of the Members, federal income tax returns.

(ii) At the request of any Class B Member, the Manager will at Manager's expense deliver written reports, not more frequently that once a month, to the Members summarizing construction and development progress with respect to the construction items set forth in Schedule 7B (ii), which summary shall further include narrative statements with respect to the general status of the project as well as the filing and submission of the Plan, as hereinafter defined.

8. Member's Other Activities

A. A Member, including the Manager, shall be entitled to enter into transactions that may be considered to be

competitive with the Company, it being expressly understood that Members may enter into transactions that are similar to the transactions into which the Company may enter.

B. A Member, including the Manager, does not violate a duty or obligation to the Company merely because the Member's conduct furthers the Member's own interest. A Member or an entity in which a Member has an interest may lend money to, and transact other business with the Company. The rights and obligations of a Member who lends money to or transacts business with the Company are the same as those of a person who is not a Member, subject to other applicable law. No transaction with the Company shall be voidable solely because a Member has a direct or indirect interest in the transaction if the transaction is fair and reasonable to the Company.

9. Management

A. Except as otherwise provided in the Agreement, the management of the Company shall be at the sole cost and expense of the Company and all decisions concerning the business affairs of the Company shall be exclusively made by the Manager, subject to the prior written consent of Prime, in accordance with and subject to paragraph 9K, hereof. The sole Manager of the Company shall initially be Marks LP.

B. The Manager(s) shall serve until his Dissociation or resignation. Upon the Dissociation or resignatin of any Manager, the replacement Manager(s) shall be elected by a majority vote of all Members.

C. Only the Manager(s) and agents authorized by the Manager(s) shall have the authority to bind the Company, subject to the prior written consent of Prime, in accordance with and subject to paragraph 9K, hereof. The Manager(s) has the power, on behalf of the Company, to do all things necessary or

convenient to carry out the business and affairs of the Company, without limitation (other than the limitations stipulated in this Agreement) including, but not limited to:

(i) mortgage, pledge, lease, exchange, and to encumber the Company's fee ownership of the Property, but he specifically may not dispose of the Property nor, of the units to be created therein which are reserved for conveyance to the Members, as to which units, when the same come into being, only the Member for whom such unit(s) is reserved may dispose, unless the said Member is disassociated from the Company;

(ii) to cause the preparation and filing of the Plan with the DOL to create the condominium regime for the Property.

(iii) to enter into contracts; to incur liabilities; to borrow money, to issue notes, bonds, and other obligations, and to secure any of the Company's obligations by mortgage or pledge of the Company's Property or income in order to, in the judgment of the Manager, advance the Purposes as provided in this Agreement, of the Company; with respect to the development of the Property, Manager will not charge for overhead and management office expenses. Printing and DOB expenses shall be paid by all Members, including, without limitation, Marks LP, in accordance with their respective Percentage Interests;

(iv) the investment and reinvestment of the Company's funds;

(v) the conduct of the Company's business, the establishment of Company offices, and the exercise of the powers of the Company;

(vi) the hiring and, appointment of employees and agents of the Company, the defining of their duties and the establishment of their compensation, and dealing with tradespeople, accountants and attorneys, on such terms as the Manager shall determine; the purchase of liability and other insurance to protect the Company's business and Property;

(vii) the establishment of reserve funds of the Company to provide for future requirements for operations, contingencies or any other purpose that the Manager deems necessary or appropriate; and

(viii) the making of such elections under the Internal Revenue Code (IRS) and Tax Regulations and other relevant tax laws as to all relevant matters as the Managers and to revise this Agreement to comply with the requirements of the IRC as the Manager deems necessary or appropriate.

(ix) consenting to the admission of a substitute member and the assignment of a Membership Interest.

D. The prior written consent of Prime shall be required for the Manager(s) to bind the Company as provided in this paragraph 9. No person dealing with the Company shall have any obligation to inquire into the power or authority of the Manager(s) acting on behalf of the Company.

E. Without limitation of the foregoing, upon the prior written consent of Prime, the Manager's power and authority includes the right to apply so much or all of the Capital Contributions and other sums paid hereunder toward payment of the following: (i) the acquisition of the Property; (ii) the payment of all due diligence services engaged by the Manager including, without limitation, engineering, architecture and consulting services; (iii) the payment of all closing costs and expenses

associated with the acquisition of the Property, including, without limitation, title insurance, loan fees including origination fees and mortgage brokerage commissions, mortgage recording tax, Company formation and publication fees, legal fees, etc.; (iv) the acquisition or any air and/or development rights; and (v) all fees with respect to the submission of the Plan to the DOL, including, without limitation, offering plan and "blue sky" filing fees, printing costs, legal fees, etc.

F. Subject to the prior written consent of Prime, the Manager(s) shall promptly be reimbursed for all reasonable expenses incurred in managing and operating the Company, including, any expenses incurred prior to the acquisition of the Property, and or prior to the execution hereof, but shall not be entitled to compensation, other than specified in this Agreement, unless consented to by all of the Members. Subject to the limitations in this Agreement, Marks LP shall be entitled to perform any alterations to the basement/cellar, first and tenth floors and/or to sell all or any part thereof, to lease, sublease, assign, and use, without consent and without the payment of any fees or expenses to the Company or when in Condominium Ownership, to the Board of Managers and (ii) Prime shall be entitled to perform any alterations to the fourth, fifth, sixth, seventh and ninth floors and/or to sell all or any part thereof, to lease, sublease, assign, and use, without consent and without the payment of any fees or expenses to the Company or when in Condominium Ownership, to the Board of Managers. Anything herein to the contrary notwithstanding, any alteration of the basement/cellar, first floor and tenth floor (including any penthouse structure, which Marks LP may construct on the roof of the Building subject to the terms hereof) may be financed, by the capital of the Company, including, without limitation any excess Loan proceeds. Without limitation of the foregoing, the Members hereby consent to the completion by Marks LP of any alterations whatsoever to any part of the Property,

which work may be financed by capital of the Company, including, without limitation, any excess Loan proceeds. The rights given to Marks LP shall be included in the By-Laws and the Condominium Declaration. The Manager shall not be required to devote full time to the management of the Company business, but only so much time as it determines shall be necessary or appropriate for the proper management of such business, including, without limitation, the development of the Property, as herein provided. However, notwithstanding anything to the contrary, Manager shall be required to devote as much time as is reasonably necessary to the management of the Company's business to the extent of obtaining detailed proposals and bids from subcontractor and professionals which may be necessary to perform all work required to expedite the filing of alteration plans, obtaining municipal and utilities approvals and executing the alteration work in order to obtain a new certificate of occupancy for a mixed use residential/commercial building, as herein contemplated and provided.

G. The Members hereby acknowledge that Marks LP has, and will furnish, various services for and on behalf of the Company, including, without limitation, finding the Property, negotiating the terms of the acquisition thereof substantially in accordance with the terms of the Purchase Contract, arranging for acquisition mortgage financing, delivering a several personal guarantee of the obligations thereunder to the extent of Marks LP's Percentage Interest, as and to the extent required by the mortgage lender, and structuring the capital of the Company. The Members further acknowledge that Marks LP paid the $2,000,000.00 deposit under the Purchase Contract, which amount shall be credited toward Marks LP's, in its capacity as the Initial Member, Initial Capital Contribution and Capital Account hereunder. In consideration with the payment of such deposit as well as the other good and valuable services furnished to the Company, as herein set forth, the Company further agrees,

simultaneously with the closing of the acquisition of the Property, as herein provided and contemplated, to enter into a lease ("Ground Floor Lease"), as landlord, with Marks LP, as tenant, to the premises consisting of the basement/cellar and first floors of the Property. The form of Ground Floor Lease is annexed hereto as Exhibit "F".

H. In further consideration of the of the Capital Contribution paid by Marks LP, as more particularly described in Exhibit "A", and the other good and valuable services furnished to the Company, as herein set forth, the Company hereby grants and conveys to Marks LP the exclusive right to develop, use and occupy the roof of the Building, at the Manager's sole cost and expense, and without the consent of the Company, provided, however, that any structures installed and constructed on the roof, or any other uses thereof, including, without limitation, the use of the roof as a private roof terrace, shall be completed in accordance with all applicable law. Without limitation of the foregoing, the cost of any such alterations of the roof may be financed by the capital of the Company, including, without limitation any excess Loan proceeds, without the consent of the Class A Members, but shall require the consent of the Class B Members. The Company and the Members hereby acknowledge and agree that the roof of the Property is an integral part of the 10^{th} floor unit, which unit is the designated floor of Marks LP pursuant to paragraph 5 and Schedule A hereof. Without limitation of the foregoing Marks LP shall have the right, without the consent of the Company, to subdivide the 10^{th} floor into not more than two (2) separate units as herein provided for, provided that any such subdivision complies with applicable law, and that in performing any such work, Marks LP shall perform the same at such time and in such manner as shall not (i) unreasonably interfere with any Work being performed by the Company or any individual Member, which individual work shall be done at the sole cost and expense of such Member, or (ii) would

subject the Property to the filing of a mechanic's lien. Notwithstanding the foregoing, no changes shall be made to the roof which materially impede access, maintenance or service to multiple systems or Common Elements of the Property including, without limitation, communications, fire escape access, elevator room, HVAC equipment and supplementary rooftop units.

I. The Manager shall discharge the Manager's duties to the Company and to the other Members in good faith and with that degree of care that an ordinarily prudent person and an experienced real estate developer in a similar position would use under similar circumstances. In discharging the Managers, duties, the Manager shall be fully protected in relying in good faith upon the records required to be maintained under this Agreement and upon such information, opinions, reports or statements by any person as to matters the Manager reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care, by or on behalf of the Company. The Company shall indemnify and hold harmless the Manager against any loss, damage or expense (including reasonable attorneys' fees) incurred by the Manager as a result of any act performed or omitted on behalf of the Company or in furtherance of the Company's interests without however, relieving the Manager of liability for failure to perform his or her duties in accordance with the standards set forth herein, and except for fraud, willful misconduct, gross negligence or bad faith.

J. The Manager(s) shall have a right to resign and may not be removed by the Members, except for cause, at a duly called meeting of the Members and only by a vote of not less than 50 percent of all Members.

K. Anything herein to the contrary notwithstanding, the Company, and the Manager acting on behalf of the Company, may not make any decision without the prior written consent of Prime,

except with respect to the following matters, it being the intention of the parties hereto, that the Manager may take all or any of the following actions without the consent of Prime: the attorney engaged by the Company to prepare and submit the Plan to the DOL; the attorney engaged by the Company to prepare and submit any No Filing Letter or similar application to the DOL; the architect engaged by the Company in connection with development of the Property; the location of the new elevator to be installed in the approximate center of the Property; the right to utilize and access all Capital raised by the Company to perform and pay for any work in any portion of the Property, which for this purpose shall not include any sums deposited by any of the Members with the mortgage lender to secure and finance any Interior Unit Work; and any Capital Call affecting any other Members of the Company, it being the intention of the parties that the veto right conferred upon Prime in this paragraph 9 (K) shall only apply to the Capital Call to be paid by Prime and not by any other Members. In no event shall Prime have the right to veto any portion of the of the Initial Capital Contribution and any Capital Contribution made under paragraph 13A hereof. Except as otherwise provided herein, nothing herein contained shall affect the Manager's rights to enter into agreements, contracts and other obligations with respect to development of the Property, as herein contemplated.

L. Without limitation of the foregoing, Prime has the right to review all contracts, subcontractors, plans shop drawings site personnel, insurance documents, policies and coverages, all of which shall be subject to Prime's rights pursuant to paragraph 9K hereof. In addition, Prime agrees that in each instance where its consent to a decision by the Manager is requested, that it will exercise reasonable judgment consistent with the purposes of the Company as herein contemplated and provided, which consent, anything herein to the contrary notwithstanding may be made by direct email

communication between the Manager and Prime, without copies delivered to any other parties or their respective attorneys.

M. In the event Marks LP either resigns as Manager, is removed and/or fails to discharge its duties as Manager hereunder after thirty (30) days written notice, Prime shall have the right to assume the duties of Marks LP as Manager hereunder or to designate a Manager in the place and stead of Marks LP. Any such substitute or replacement Manager shall assume in writing the obligation of Manager hereunder. In addition, and without limitation of the foregoing, Prime may at any time herein, upon reasonable notice to the Company and all Members may designate Prime as a Manager of the Company and shall serve with Marks LP as the two (2) Managers of the Company, in which event all decisions shall be made by the unanimous approval of all of the Managers.

L. The Manager shall with reasonable promptness bring to the attention of Prime the cessation of work at the Building, all accident reports, insurance claims, DOB notices, fines, violations, and change work orders and/or extras, which must be approved by Prime, subject to the terms hereof.

10. Property Acquisition

The Company shall acquire the Property substantially in accordance with the Purchase Contract.

11. Manager's Duties

Without limitation of the foregoing, the Manager(s), at the cost and expense and on behalf of the Company, and subject to the prior written consent of Prime, shall perform its obligations under the Purchase Contract; shall apply for mortgage financing to partially defray the acquisition of the Property and the cost of any of the alterations contemplated; to retain counsel for the efficient and legal operation of the Company and

to prepare and submit to the DOL the Plan in accordance with the General Business Law and the DOL rules and regulations.

12. Acquisition and Construction Financing

A. The Manager(s), without any surcharges for overhead at the office or markup for professional consultations or brokerage refferals, at the cost and expense of the Company, among other things, shall: apply for the acquisition and construction loan financing, to lending institutions for a Loan to be secured by the Property, the terms of which must first be approved by Prime in writing. If required by a Lender, the Manager and all Members covenant to personally guarantee payment and performance of the Loan, to the extent of their respective Membership Interests. The Members, if required by the Lender, shall consent to the pledge of their respective interests in the Company to the Lender as collateral security for the repayment and performance of the Loan.

B. Each of the Members including the Initial and the Other Members guarantee and covenant each to the other that they shall indemnify and save harmless the Company and each such other Member, from any cost, claim, damage or expenditure, that the Company, or any Member, may sustain as a result of such Member's breach hereunder, if such breach causes a default under the Loan and mortgage financing obtained by the Company.

C. Each of the Other Members agree to furnish upon request to the Manager their respective net worth and financial statements for disclosure to the lending institutions to which application for the Loan shall be made and, to furnish to the Manager for delivery to such institutions such other written data respecting their creditworthiness as may be requested by the institutions. Neither the Company nor Manager will charge Prime for any of Marks LP's overhead, company profit, construction management, brokerage fees, office administration or personnel.

13. Closing Costs and Expenses

A. The Manager has estimated that the total cost and expenses of acquisition of, the Property, to be as set forth in the said Schedule 13.A, with the understanding that this is only an estimate, which each Member hereby promptly agrees to pay to the Company, or to such payees as the Manager shall direct, three (3) days prior to the closing of the acquisition of the Property. Such costs shall include, but not be limited to title insurance, mortgage fees including mortgage recording tax and brokerage commissions, legal fees and all other expenses required to consummate the acquisition of the Property, as herein provided and contemplated. The failure of a Member to timely make any such payment shall be a default in the payment of capital pursuant to paragraph 16 hereof, enforceable as such by the Company and the Manager.

B. The Class A Members including the Manager agree to contribute in accordance with their respective Membership Interests, such additional capital ("Additional Capital") to the Company in such amounts and at such times as determined by the Manager, to fulfill the purposes provided and contemplated hereunder, including, any capital required to complete any work in the Property, including without limitation, any work affecting any individual floor thereof, which are the obligations of the Company hereunder, which work obligation is limited to the alteration and renovation of the lobby, only. Without limitation of the foregoing, the Members hereby acknowledge and agree that the Manager, may use such amounts of the capital hereunder as may be required to complete any such work.

C. Each Member agrees to subordinate and subject his or her respective Membership Interest in the Company to the lien of an acquisition and construction loan, and each Member hereby irrevocably appoints the Manager as the Members' respective

attorney-in-fact, coupled with an interest, to execute on behalf of such Member such reasonable documents as may be required by the Lender to subject the Member's interest in the Company and the unit(s) reserved for each Member, to the lien of such mortgage.

14. Insurance

The Manager shall cause the Company or the Contractor to insure the Property against fire with extended coverage for not less than 100% of the full replacement value of the Building inclusive of so-called "builders risk" insurance against damage or destruction by fire and full extended coverage including vandalism and material mischief covering all improvements to be made and all materials for the same, in an amount equal to the full insurable value of the improvements and materials, such insurance to be made payable to the Company and the contractor as their respective interests may appear, with standard mortgagee endorsements in favor of the Lender. All insurance proposals will be shared with Prime and are subject to its insurance agent's reasonable review and modifications.

15. Manager's Time

Except as otherwise set forth in paragraph 9(F) herein, the Manager shall not be required to devote full time to the management of the Company business, but only so much time as shall be necessary and appropriate for the proper management of such business.

16. Member's Subsequent and Additional Capital Contributions; Default by Members

A. Prime shall not be obligated to make any additional contribution to the Company's capital ("Additional Contribution" or "Subsequent Capital Contribution")without the prior unanimous written consent of all Class B Members. Class A Members hereby commit to making such Additional Contribution to the capital of

the Company in an amount equal to the Member's Percentage Interest in the Company multiplied by the total Additional Capital that the Manager determines shall be required or necessary to achieve the purposes of the Company, to wit, the acquisition and development of the Property, or such additional amounts as may be required, in the Manager's discretion, for the operation and management of the Property. Each Member shall remit, his, her or its share of Additional Capital within ten days following receipt of a notice (an "Additional Capital Notice") from the Manager requesting Additional Capital Contributions. The Additional Capital Notice and shall specify the item or items of Work or the need for the additional Capital Contribution which the Manager determines is necessary. All such Additional Capital payments shall be included in each Member's respective Capital Account.

B. In the event any Member, other than Prime if Prime vetoes a Capital Call, which veto shall only affect Prime's portion thereof, fails to perform a Member's Commitment (a "Delinquent Member") the Manager shall give the Delinquent Member written notice of such failure (the "Delinquent Notice"). If the Delinquent Member fails to perform the commitment (including the payment of any cost associated with the failure to pay timely as determined by the Manager, and interest at the default interest rate) on or before the close of business as of such fifth business day of the giving of such Delinquent Notice, the Delinquent Member shall be deemed to have withdrawn from the Company, his, her or its Percentage Interest which shall be deemed to have been reduced to zero, and the Delinquent Member shall thereafter not be entitled to a return of, and shall be deemed to have forfeited to the Company, any remaining positive balance in the Delinquent Member's capital account.

C. If the Delinquent Member, as provided in the preceding subparagraph C of this paragraph 16, shall be deemed to

have withdrawn from the Company, the Manager may offer to the remaining Members (including to the Manager) the right within ten (10) business days following notice of such offer, to acquire the membership and Percentage Interest of the former Member, by contributing and paying to the Company, the amount of the Delinquent Member's Subsequent Capital Contribution, Additional Capital Contribution or monthly maintenance obligation pursuant to paragraph 19 hereof, as the case may be. If more than one Member opts to acquire such interest, the Manager shall conduct a lottery to determine the Member that will be permitted to acquire such interest. Upon acquisition of such interest, the Member (the "Acquiring Member") acquiring the Delinquent Member's interest, the unit theretofore reserved for conveyance to the Delinquent Meniber shall be reserved for such Acquiring Member. If none of the Members opt to acquire the interest of the Delinquent Member, the Manager shall either use his best efforts to procure a third party to acquire such interest together with a right to conveyance of the reserved condominium unit or the Manager shall acquire the same. The person or persons agreeing to the Manager's terms of for acquisition of the Delinquent Member's Percentage Interest at an Acquisition Price determined by the Manager, and remits the Acquisition Price therefor, shall succeed to the interest of the Delinquent Member and the right to conveyance of the reserved unit of the Delinquent Member. If the contribution made by such third party shall exceed the Subsequent or Additional Capital Contribution or or monthly maintenance obligation the Delinquent Member failed to make, the sum in excess thereof shall continue as capital of the Company attributable to all of the Members thereof, in accordance with their respective Percentage Interests, subject to the terms hereof. In the event Prime vetoes any such Capital Call, Prime shall not have the right to pay the Capital Call of any Delinquent Member and/or acquire any of the Membership Interests thereof.

D. Each Member agrees to indemnify, and each agrees to hold harmless each other Member from and against any and all claims, demands, liabilities, costs, damages and causes of action of any nature whatsoever arising out of or in connection with the occurrence of any default by any Member, of the provisions of this Agreement. The indemnification provided for herein shall include, without limitation, payment of reasonable attorneys fees or other expenses incurred in connection with settlement or in defense of any legal proceeding without limitation. The indemnification rights contained in this paragraphs shall be cumulative of, and in addition to, any and all rights, remedies and recourse to which the Members may be entitled, whether pursuant to the provisions of this Agreement, at law or in equity.

17. Alteration of Designated Units

A. Each Member shall have the right, but not the obligation, to perform, at such Member's sole cost and expense, the Interior Unit Work in such Member's Designated Unit or Designated Portion, as hereinafter defined, as the case may be, and such other work as the Member deems reasonable advisable, as more particularly described in Exhibit "D" annexed hereto. Without limitation of the terms thereof, the Members hereby agree that in performing any such work, each Member shall perform the same at such time and in such manner as shall not (i) interfere with the Company's contractor or contractors performing the Work to the Property; (ii) interfere with any contractor or contractors performing the Work to other portions of the Property for or on behalf of any other Member; (iii) so as not to delay or interfere with the issuance of a permanent certificate of occupancy for each of the Units to be created in the Property; or (iv) that would subject the Property to the filing of a mechanic's lien. All Interior Unit Work shall be completed in a good and workmanlike manner, in accordance with all applicable law. In addition, all such Members shall obtain such insurance

coverage(s) as the Company may reasonably request, including, workmens compensation coverages.

B. If a Member causes the Property of the Company to be made subject to a mechanic's lien filed by a contractor, materialmen or potential lienor hired by any such Member, the Member shall be obliged to cause the lien to be discharged or bonded within ten days following notice thereof to the Member. A Member's failure to bond or cause a mechanic's lien to be discharged within ten days of notice thereof to the Member shall be deemed to constitute the Manager the attorney-in-fact for such Member, coupled with an interest, to cause the mechanic's lien to be bonded at the cost and expense of such member, (inclusive of the Company's reasonable attorneys fees) which cost and expense plus interest at the Default Interest Rate, shall be added to, and be deemed to be part of such Member's Capital Contribution and shall be paid at the time for payment upon demand. Notwithstanding anything to the contrary, this paragraph shall not apply to Prime unless Prime has directly procured the contractor, materialmen or potential lienor without the assistance or participation of Mark LP.

18. Condominium Structure, Conveyance of Units

A. The Condominium Offering Plan (the "Plan") shall be caused to be prepared under the supervision of the Manager at the cost and expense of the Company which shall be paid out of the Company's capital, and each of the Members agree to furnish all reasonable cooperation to the Manager in effectuating a regime of condominium ownership of the Property; the creation, operation, governance, maintenance and management of the condominium shall be substantially in accordance with Declaration of Condominium and By-laws, copies of which are annexed hereto as Exhibits "G" and "H", respectively. The principals of each Class B Member shall be designated in the Plan as the "Principals of the Sponsor", as such term is defined under applicable law, and shall

19. Maintenance and operation

A. Annexed hereto as Schedule 19.A is a projection of the monthly cost of the maintenance and operation of the Property. The projections on Schedule 19.A are not intended to be, and should not be taken by Members to be a representation or assurance of the actual maintenance and operation expense to operate and maintain the Property.

B. Each Member acknowledges that his or her portion of the actual maintenance and expenses, including real estate taxes, will be determined by the Company's actual operating expenses, and that the sums set forth on Schedule 19.A, are only estimates of future expenses, and that actual expenses may vary significantly.

C. From and after the Date of Closing each Member shall be liable to the Company for his or her share of the cost of maintenance and operation of the Property in proportion to his or her Percentage Interest in the Company, and shall be obligated to pay the same on a monthly basis upon being billed therefor by the Manager. The monthly maintenance expenses under this paragraph 19 shall be deemed Capital Contributions hereunder and shall be included in the Member's respective Capital Account.

20. Investments

The Capital Contributions of the Members shall held by the Manager(s), until such time as such funds shall be used by the Manager for Company purposes. Notwithstanding anything to the contrary contained in this or any other agreement, it is specifically agreed and consented to Marks LP, as Manager, may use any portion of such Capital Contributions for reasonable attorneys fees, reasonable architectural fees and the Work, except for the fee of Marks LP's personal attorneys, if any.

21. Distributions

21.1 Class A Members

A. Commencing upon the date that the Plan is accepted for filing by the DOL ("Acceptance Date") through and including the date which is thirty (30) days after the Acceptance Date ("Acquisition Period"), the Members set forth on Schedule 21.A, provided they are not then in default hereunder after notice and expiration of any grace period, shall have the the right, but not the obligation, upon notice to the Company ("Acquisition Notice"), to acquire a condominium unit in the Property (the "Designated Unit"), as more particularly described in Schedule 21.A ("Acquisition Right"). In such event, the Member shall have the right to credit such Member's respective Capital Account to the purchase price of the Designated Unit, and the balance of the purchase price for the Designated Unit shall be due at closing, less any deposit required under the purchase agreement, as set forth below. The Designated Unit shall be conveyed and transferred to the Member, subject to the terms and conditions hereof and to the Permitted Encumbrances (as hereinafter defined).

B. In addition to the Acquisition Notice, a Class A Member exercising the Acquisition Right, shall deliver to the Company, a purchase agreement, substantially in the form included in the Plan, together with a contract deposit in the amount of $1,000.00. Without limitation of the foregoing, such purchase agreement shall provide the following: (i) the purchaser thereunder shall pay all costs and expenses relating to the purchase of the Designated Unit under the Plan, including, without limitation, New York City and New York State transfer tax, New York State Additional Tax Due on the Conveyance of Residential Real Property of $1,000,000 or more (the 1% so-called "Mansion Tax", if applicable, legal fees, two (2) months common charges working capital fund contribution and other costs and expenses; (ii) the closing shall occur no later than sixty (60) days from the later of (x) the issuance by the DOB of a CO, or

(y) the date on which any lender holding a mortgage lien on the Designated Unit releases the Designated Unit from the mortgage lien (the "Closing Period"); (iii) the purchaser thereunder shall indemnify the Company from all loss, cost, or expense (including, without limitation, reasonable attorneys' fees) that the Company may suffer as a result of any claim or action brought by any Person claiming to have represented such purchaser as a broker in connection with the transaction contemplated by the purchase agreement; (iv) the Company shall convey fee simple title to the Designated Unit to the Member by bargain and sale deed with covenants subject to all liens, encumbrances and violations now or hereafter encumbering the Designated Unit, provided that the Company shall cure (x) any mortgage or monetary lien created by the Company and (y) any other encumbrances created by the Company after the date hereof unless such encumbrance has been consented to by the Member or does not materially and adversely interfere with the use of the Designated Unit for its then permitted use (collectively the "Permitted Encumbrances"); and (v) no Designated Unit shall be conveyed to a Member who is then in default hereunder or the purchase agreement, after notice and the expiration of any grace or notice period.

C. In the event the affected Class A Member does not notify the Company of its exercise of the Acuisition Right under this paragraph 21, such Member shall retain his or her respective Membership Interest in the Company, with all rights and obligations hereunder, subject to the terms hereof, including, without limitation, the rights of any other Member to acquire his or her respective Designated Unit, it being the intention of the undersigned that any Class A Member electing not to exercise their Acquisition Rights hereunder, shall not participate, or receive any distribution, in connection with sale, lease, use or occupancy of any of the Designated Units acquired by such other Members or retained by the Manager hereunder.

21.2 Class B Members

In addition to the Class B Members right to renovate, at such Member's sole cost and expense, each Member's Designated Portion, each Member shall also have the right, provided that any such Member is (i) not then in default hereunder after notice and the expiration of any applicable cure period, (ii) has paid all required Contributions hereunder, and (iii) so long as same does not adversely interfere with efficient operations and systems of the Property, to market, in the name and on behalf of the Company, Condominium Units consisting of the floors in the Property, as more particularly set forth in Schedule 21.2 ("Designated Portion"). In connection therewith, each such Member may direct that the Company, as seller, enter into purchase agreement(s), in the form set forth in the Plan, with such purchasers as the Members may designate, in accordance with applicable law. All net sales proceeds realized from the sale of any Condominium Unit comprised of any part of the Designated Portions shall be applied and paid as follows, and in the following priority: first to the amount of the Loan allocated to such floor, as set forth on Schedule 21.2 hereof; next to the payment of all closing expenses for the sale of such individual condominium unit, as set forth herein, the Plan and the underlying purchase agreement; next to the payment of all sums due hereunder; and the balance, if any, to such Member. In no event shall any Condominium Unit be conveyed unless all costs set forth above are paid.

22. Net Cash Flow

Net Cash Flow, if any, shall be distributed to the Members, in the discretion of the Manager, in proportion to their respective Percentage Interests allocated to each of them for the period during which such Net Cash Flow is to be distributed. Notwithstanding the foregoing, a Member exercising an Acquisition Right, will not be entitled to any distribution of Net Cash Flow.

23. Tax Matters

The Class B Members shall select and designate a Tax Matters Member of the Company pursuant to the Code. The Tax Matters Member is authorized to employ such accountants, attorneys and agents as he or she, in her or his sole discretion, determines is necessary or useful in the performance of its duties. In addition, the Tax Matters Member shall serve in a similar capacity with respect to any similar tax related election or tax related matter provided by state or local laws. In determining the amount of any Company tax liability, Member's Capital Account, allocation of profit and loss, the Manager shall comply with all pertinent IRC provisions and any applicable provisions of the Regulations.

24. Transfer of Membership

Subject to the terms of this Agreement, each Member's Membership Interest, the right to receive allocations of Profits and Losses and all other rights, privileges and obligations hereunder, may not be transferred in whole or in part unless the following terms and conditions have been satisfied:

The Manager and Prime shall have consented to such transfer and the Transferee shall have:

(a) assumed all costs incurred by the Company in connection with the transfer;

(b) furnished the Company with a written opinion of counsel, satisfactory in form and substance to the Manager that such transfer complies with applicable federal and state securities laws and the Agreement;

(c) any such transfer shall have occurred after the Company closed upon the purchase of the Property; and

(d) complied with such other reasonable conditions as the Manager may require from time to time.

Any transfer in contravention of this paragraph 24 and any transfer which if made would cause a termination of the Company for federal income tax purposes under the Code shall be void ab initio and ineffectual and shall not bind the Company or the other Members.

Notwithstanding the foregoing, Marks LP and Prime shall have the right, without requiring any consent and without having the obligation to make any payment to the Company or to any other Member, to sell, lease or assign its Membership Interest and all of rights and privileges thereunder, and all of the sales and transfer proceeds thereof shall belong solely to such Class B Member.

25. Member Incapacity

Upon the death, dissolution, adjudication of bankruptcy or adjudication of incompetency of a Member, such Member's successors, executors, administrators or legal representatives shall have all the rights of a Member for the purpose of settling or managing such Member's estate, including such power as such Member possessed to substitute a successor as a transferee of such Member's interest in the Company and to join with such transferee in making the application to substitute such transferee as a Member.

26. Disassociation

A. Subject to the provisions of paragraph 28 a Person shall cease to be a Member upon the happening of any of the following events:

(i) the failure of a Delinquent Member to comply within the time reserved in a notice of delinquency served, as set forth in paragraph 17;

(ii) the withdrawal of a Member;

(iii) the bankruptcy of a Member;

(iv) in the case of a natural person, the death of the Member or the entry of an order by a court of competent jurisdiction adjudicating the Member incompetent to manage the Member's personal estate;

(v) in the case of a Member that is an estate, the distribution by the fiduciary of the estate's entire interest in the Company.

B. In the event any Member dissociates prior to the expiration of the term of this Agreement, if the Dissociation causes a dissolution and winding up of the Company, except in the case of a disassociation by reason of a Member's delinquency, the Member shall be entitled to participate in the winding up of the Company to the same extent as any Other Member, except that, if such Dissociation results from a withdrawal of a Member in violation of this Agreement, any Distributions to which such Member would have otherwise been entitled shall be reduced by that portion of the damages, if any, (as determined by the then accountants for the Company, the determination of which by said accountants shall be conclusive) sustained by the Company as a result of the Dissolution Event and winding up that is chargeable to the Capital Accounts of the other Members;

C. If such Dissociation does not cause a dissolution and winding up of the Company, the Disassociating Member, shall be deemed to have withdrawn from the Company and failed to comply with a commitment and such Member's capital account shall be deemed to have reduced to zero and the Manager shall dispose of such Member's interest as provided in paragraph 17-D.

27. Dissolution

A. The Company shall be dissolved and its affairs wound up, upon the first to occur of any of the following events (each of which shall constitute a Dissolution Event):

(i) the conveyance by the Company of all of the Condominium Units at the Property, subject to any requirements to maintain the viability of the Company under applicable law, including, without limitation, the regulations promulgated by the DOL covering the Sponsor of condominium offering plans.

(ii) the expiration of the term of the Agreement, unless the Company is continued with the consent of all of the Members;

(iii) the unanimous written consent of all of the Members;

(iv) the Dissociation of any Member, unless at the time of such Dissociation there are at least two Remaining Member and such Members admits a successor Member(s) and the Company is then continued with the consent of a majority in interest, i.e., of the Percentage Interests of the remaining Members within 180 days after such Dissociation;

(v) at any time when there is but one Member, the Dissociation of such Member, or the transfer of all or part of the Membership Interest of such Member and the admission or attempted admission of the transferee of such interest as a Substitute Member.

B. Upon dissolution, the Company shall not be terminated and shall continue until the winding up of the affairs of the Company is completed and a certificate of dissolution has been issued by the Secretary of State of New York.

C. Upon the winding up of the Company, the Manager (or, if there is no Manager then remaining, such other Person(s) designated by the Members representing at least a majority of the Members' Percentage Interests (either, a "Liquidating Agent") shall take full account of the assets and liabilities of the Company, shall liquidate the assets (unless the Liquidating Agent determine that a distribution of any Company Property in-kind would be more advantageous to the Members than the sale thereof) as promptly as is consistent with obtaining the fair value thereof, and shall apply and distribute the proceeds therefrom in the following order:

(i) first, to the Payment of the debts and liabilities of the Company to creditors, including Members who are creditors, and to the payment of necessary expenses of liquidation; second, to the setting up of any reserves which the manager may deem necessary or appropriate for any anticipated obligations or contingencies of the Company arising out of or in connection with the operation or business of the Company;

(ii) second, to the setting up of any reserves which the Manager(s) may deem necessary or appropriate for any anticipated obligations or contingencies of the Company arising out of or in connection with the operation or business of the Company;

(iii) then, to the Members in accordance with positive Capital Account balances taking into account all Capital Account adjustments for the Company's taxable year in which the liquidation occurs. Such distributions shall be in cash or Property (which need not be distributed proportionately) or partly in both, as determined by the Manager.

Exhibit B

NYSCEF

New York County Supreme Court

Document List

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Case Caption: **LITTLE HEARTS MARKS FAMILY II L.P. v. JASON D CARTER et al**

Judge Name:

Doc#	Document Type/Information	Status	Date Received	Filed By
1	SUMMONS + COMPLAINT - *Corrected*	Processed	04/12/2021	Goldenberg, A.
2	EXHIBIT(S) Operating Agreement	Processed	04/12/2021	Goldenberg, A.
3	AFFIRMATION/AFFIDAVIT OF SERVICE Affidavit of Service on Jason Carter	Processed	04/19/2021	Goldenberg, A.
4	AFFIRMATION/AFFIDAVIT OF SERVICE Affidavit of Service on 61 Prime LLC	Processed	04/19/2021	Goldenberg, A.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2021, the foregoing *Notice of Removal* was served upon counsel for Plaintiff by e-mail and overnight mail to:

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I certify that the foregoing statements made by me are true.

Dated: May 13, 2021

/s/ Gerard C. Catalanello
Gerard C. Catalanello