**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION: FIRST DEPARTMENT**

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**Index No. 650607/12**
**(Sherwood, J.)**

**IN RE EMPIRE STATE REALTY TRUST, INC. INVESTOR LITIGATION**

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# APPELLANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION FOR A STAY PENDING APPEAL

MEISTER SEELIG & FEIN LLP
Two Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
Telephone: (212) 655-3500
*Attorneys for Appellants Mary Jane Fales, Hope Ratner, Mark Esses, Mildred Blutstein, as Trustee of the Mildred Blutstein Revocable Trust, Empire State Equity Fund LLC and Cathy Johnson*

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Appellants Mary Jane Fales, Hope Ratner, Mark Esses, Mildred Blutstein, as Trustee for the Mildred Blutstein Revocable Trust, Empire State Liquidity Fund LLC and Cathy Johnson (collectively, "Appellants"), each an investor in Empire State Building Associates, L.L.C. ("ESBA"), respectfully submit this reply memorandum of law in further support of their motion for an Order: (a) pursuant to CPLR Section 5519(c), staying enforcement of the decision and order of the Honorable O. Peter Sherwood, dated April 30, 2013 and entered in the New York County Clerk's Office the same day (the "Order"), by staying further proceedings concluding settlement of this class action, until Appellants' appeal of the Order is heard and decided by this Court; (b) granting a preference in the hearing of Appellants' appeal of the Order; and (c) granting such other and further relief as the Court deems just and proper. In the Order,[1] the lower court denied, as a matter of law, Appellants' application for a judicial declaration that the $100 forced buy-out of ESBA investors dissenting to the Proposed Consolidation is invalid and unenforceable under Section 1002 of the New York Limited Liability Company Law (the "LLC Law"), on the ground that it deprives such dissenting investors of their statutorily guaranteed right to the "fair value" of their interests.

## PRELIMINARY STATEMENT

The Order is patently erroneous and should be reversed. A stay pending appeal - or the alternative circumscribed temporary relief described below – is urgently needed in order to preserve the fundamental right of hundreds of investors of modest means to meaningful appellate

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[1] A true and correct copy of the Order is annexed as Exhibit A to the moving Affirmation of Stephen B. Meister, sworn to April 30, 2013, cited herein as "Meister Moving Aff." The accompanying Reply Affirmation of Stephen B. Meister, sworn to May 17, 2013, is cited herein as "Meister Reply Aff." Plaintiff-Respondents' Memorandum of Law in opposition to Appellants' application and the accompanying Affirmation of Lawrence P. Kolker, sworn to May 13, 2013, are cited herein as "Pl. Br." and "Kolker Aff.," respectively. Defendant-Respondents' Memorandum of Law in opposition to Appellants' application and the accompanying Affirmation of Thomas E. L. Dewey, sworn to May 13, 2013, are cited herein as "Def. Br." and "Dewey Aff.," respectively. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Meister Moving Aff.

review of an order denying them hundreds of millions of dollars in "fair value" rights guaranteed by the LLC Law.

The 1962 Participation Agreements expressly form a joint venture *among ESBA Participants* to "establish [their] ownership" of what were then partnership and (by virtue of the 2001 LLC Law conversion) are now membership interests. The Participants are explicitly declared to be the sole owners of the membership interests, holding "fractional interests" therein. The Agents, conversely, are mere fiduciaries who, as a matter of convenience only, hold the membership interests in a strictly nominal capacity on behalf of the Participants, with no power to act other than in a trivial administrative capacity, such as to receive service of process. The Agents (in their capacity as such) have no economic investment, rights or voting powers: All economic rights and tax incidents belong to the Participants and all substantive decisions are put to the vote of the Participants, with the Agents mechanically following their vote. It is true that Defendant-Respondent Malkin possesses real power and authority over ESBA's business and affairs, but that power derives solely from his capacity as contract manager, not Agent.

As if that were not enough, in a 2011 amendment to the Operating Agreement of ESBA, Malkin explicitly characterized Participants who vote against a given proposal as the "dissenting *members*." See Meister Moving Aff, Ex. I at p. 2, ¶d. (Emphasis supplied.)

Add to this, a half century of IRS K-1 forms sent by Malkin to the Participants checking the "Limited Partner or Member" box and by which indisputably the Participants – and not the Agents – received 100 cents of every dollar distributed by ESBA and paid every nickel of tax on ESBA's profits, and an overwhelming record emerges compelling reversal of the Order.

Regardless of whether the Participants are the actual owners of "fractional interests" in the membership interests or merely the beneficial owners thereof, nothing in LLC Law Section

1002 even remotely suggests that beneficial owners of membership interests are not entitled to statutory appraisal rights. Indeed for the 75 years preceding the adoption of the LLC Law by the New York Legislature in 1994, the New York courts – including this Court – had uniformly held that beneficial owners of stock were entitled to the highly related statutory appraisal rights applicable in the corporate context.

The lower court's Order stands alone in the history of New York jurisprudence holding otherwise.

Nor is it correct to say that a Participant is not a "member" because he has not been "admitted as a member of a limited liability company" (LLC Law §102(q)), as the court incorrectly held. See Meister Moving Aff., Ex. A at p. 7. Section 102(q) precludes subsequent *assignees* of membership interests who are not admitted as members under the terms of the controlling limited liability company agreement from asserting statutory appraisal rights; but many of the Participants are original Participants, and those who are not, inherited or acquired their Participations under the express terms of the controlling Participation Agreements, which provide that "[i]f the transferee [of a Participation] complies with these requirements,[2] he shall be a member of the joint venture with the same rights and obligations as the transferor." See Meister Moving Aff., Ex. F at §10(A); see also §11.

While the Order, in a single-sentence afterthought alternatively relies on a finding, without analysis, that here the transaction thousands of times called the "Proposed Consolidation" by Defendant-Respondents is not one, that likewise is manifest and reversible error. Unlike the Business Corporation Law (the "BCL"), the LLC Law simply refers to "*a*

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[2] These requirements are purely administrative in nature, such as "the transferee is an individual of full age or a trust, corporation, firm or other entity." See, e.g., Meister Moving Aff., Ex. F at §10(A)(i). There is no allegation or a shred of evidence in the record that Defendant-Respondents are contesting Appellants' ownership of their interests or, to Appellants' knowledge, that of any other ESBA Participant.

*procedure*" by which a merger or consolidation occurs. As LLC Law Section 1004(e) provides: "this subdivision shall not be construed to limit the accomplishment of a merger…by any other means… ." See LLC Law §1004(e). Thus, unlike BCL Section 910, LLC Law Section 1002 is not limited to what in the corporate world are called "statutory mergers" effected strictly by share conversions under certificates of merger. Regardless, the one New York court to address the issue whether dissenters to *de facto* mergers obtain appraisal rights under BCL Section 910 has held that they do. See Lirosi v. Elkins, 89 A.D.2d 903, 453 N.Y.S.2d 718 (2d Dep't 1982). *A fortiori*, under LLC Law Sections 1001-1005, which (unlike BCL Section 910 *et seq.*) never mention "certificates of merger or consolidation" or share conversion terms, *de facto* mergers and consolidations invoke appraisal rights for dissenters.

The lower court was just plain wrong when it called the proposed transaction an "asset exchange." Meister Moving Aff., Ex. A at p. 8. Exchanging the Empire State Building for the Chrysler building is an exchange of assets; exchanging the Empire State Building for stock in a company that owns the Chrysler Building so that that company ends up owning both buildings and the two sets of shareholders own the surviving company – is a merger.

Appellants' fundamental right to meaningful appellate review can only be preserved through a stay (or the alternative circumscribed relief herein sought). Indeed, the lower court explicitly recognized this when, at the May 2, 2013 fairness hearing on the settlement, it asked Appellants' counsel whether he had and obtained a stay pending appeal. Kolker Aff., Ex. F at 31:19-18. This only makes sense given that the lower court recognized early on that if the forced buy-out is adjudged to be illegal, all the votes previously obtained are "irrelevant and void." Meister Moving Aff., Ex. D at 53:22-26. If the settlement is consummated before this appeal is decided, there will be no effective relief for Appellants or other ESBA Participants who want to

exercise their statutory appraisal rights. The vote has been irremediably tainted by the explicit threat in the Registration Statement of an illegal confiscation of Participants' valuable interests if they vote no or abstain. If the appeal is successful, the vote must be retaken, and that can only happen if the settlement is not consummated before this Court decides the appeal and that in turn can only happen if a stay (or alternative relief) is granted.

The appeal can be resolved quickly and well within the outside deadlines under which Defendant-Respondents are laboring – the Consolidation can be consummated as late as the end of 2015.

It is no answer that delay will be costly – Defendant-Respondents are paying for the consent solicitation process with funds stolen from the Participants anyway – or that now is a "good time" to go public. Defendant-Respondents should have thought of that before publishing a Registration Statement threatening to force dissenting members into taking $100 for their $350,000 participations unless they vote in favor of the Proposed Consolidation.

## CURRENT POSTURE AND ALTERNATIVE CIRCUMSCRIBED RELIEF SOUGHT

As a preliminary matter, this application could have been obviated had Respondents agreed to the limited carve-out proposed by Appellants when the parties appeared before this Court on May 1, 2013 for an interim stay. Appellants proposed that the appraisal rights guaranteed to dissenters by LLC Law Section 1002 be carved out of the sprawling release granted to Defendant-Respondents under the Settlement Stipulation so that the thousands of ESBA Participants bound by the class action settlement (merely because they failed to opt out) are able to seek the fair value of their Participations (in lieu of taking REIT stock) if Appellants are successful on appeal. That limited carve out struck a careful balancing of all parties' interests and yet it was flatly refused by Respondents. They want to make sure Participants'

appraisal rights are not protected precisely because they fear this Court will reverse the Order. Had they agreed, Appellants' would have withdrawn this application.

Instead, Defendant-Respondents argue that "to the extent Movants seek to stay the Settlement hearing the application is moot since the hearing took place on May 2." Def. Br. at 10. (At that hearing, the court indicated it intended to approve the Settlement.) Similarly, Plaintiff-Respondents argue that the stay should be denied because Appellants' "application for interim relief staying the May 2, 2013 settlement in this action was denied by this Court, and Justice Sherwood approved the Settlement and finally certified the Settlement Class at the May 2, 2013, hearing." Pl. Br. at 10. Class Counsel therefore claims to be "unclear what proceedings Appellants seek to stay." Id.

To be clear, Appellants are no longer seeking a stay of the fairness hearing that took place on May 2, 2013; rather, Appellants request a stay of *further* proceedings on the settlement – including the lower court issuing an order approving it (not yet issued) or consummating the settlement. Such a stay only makes sense because the objector-Appellants will be appealing any forthcoming order approving the settlement, and that appeal as well (obviously) requires a stay.

Alternatively, and at a minimum, if a stay is not granted, Appellants respectfully request that this Court exercise its inherent power of review to direct the lower court to condition its order approving the settlement on Respondents agreeing to the limited carve-out from the Settlement Stipulation release described above. Appellants requested that the lower court do this in the proceedings below. See Kolker Aff., Ex. F at 30:3-33:2. In that event, if this Court ultimately reverses the Order, originally dissenting ESBA Participants (whether or not they subsequently changed their vote) may avail themselves of their statutorily guaranteed dissenter's rights. To do any less would deprive Appellants – and hundreds of other ESBA (and non-ESBA)

Participants – of their "fundamental right" to meaningful appellate review. See Grisi v. Shainswit, 119 A.D.2d 418, 421, 507 N.Y.S.2d 155, 158 (1st Dep't 1986).

On May 16, 2013, Defendant-Respondents filed with the SEC a letter to the ESBA Participants announcing that they had achieved votes in favor of the Proposed Consolidation averaging 79.6 percent of the three classes of ESBA Participants, with one class at or above the 80 percent threshold. See Meister Reply Aff, Ex. B. The Participants in the latter class will be forced to change their vote - or suffer the non-compensatory confiscation of their interests - even if the remaining two classes never achieve the 80 percent threshold and the Proposed Consolidation never goes forward. A stay would also ameliorate this egregious and wholly unnecessary prospect as well.

If the Court grants either the requested stay or the alternative circumscribed relief requested, it should be mindful that an eventual ruling that dissenting ESBA Participants are entitled to the fair value of their interests under LLC Law Section 1002, would not be limited to either the six Appellants or to the thirteen Participants who opted out of the Settlement, as Defendant-Respondents repeatedly (and disingenuously) contend. Def. Br. at pp. 3, 28-33. That is so because this is, after all, a class action, and, regardless, if this Court reverses the Order and holds that the LLC Law guarantees an appraisal remedy for dissenting ESBA Participants, Section 1002(c) requires that a plan of merger or consolidation – one that fully discloses the Participants' right of appraisal – be submitted to the ESBA Participants at a meeting called on a minimum of twenty days' notice. See LLC Law §1002(c). Because Defendant-Respondents' SEC Form S-4 Prospectus/Consent Solicitation (the "Registration Statement") explicitly disclaims the availability of an appraisal remedy for dissenting ESBA Participants, the Section

1002(c) meeting must be held, in the event this Court reverses the Order, a minimum of twenty days after a corrected Registration Statement is disseminated.

Appellants originally sought a preference in the hearing of their appeal under CPLR 5521 so as not to unduly delay the final judicial determination of the Participants' rights under the LLC Law or the consummation of the proposed settlement. In a continuing effort to oppose every single request from Appellants, no matter how logical or mutually beneficial the relief requested, Class Counsel nonsensically argues that Appellants "fail to offer any compelling reason why a preference should be granted, particularly now that their request for interim relief was denied an the May 2, 2013 hearing they sought to stay has already taken place," and that therefore, Appellants' request for a preference should be denied.

In light of the above, Appellants hereby withdraw their request for a preference (but certainly will abide by any briefing schedule ordered by the Court).

## ARGUMENT

### I. APPELLANTS ARE ENTITLED TO A STAY PENDING APPEAL

A motion for a stay pending appeal pursuant to CPLR 5519(c) is addressed to the sound discretion of the Court. See, e.g., Grisi, 119 A.D.2d at 421, 507 N.Y.S.2d at 158 (noting the "fundamental rights to which a litigant is entitled, including the opportunity for appellate review of certain orders, cannot be ignored, no matter how pressing the need for the expedition of cases.") The factors governing a court's decision whether to grant a stay pending appeal include "the presumptive merits of the appeal and any exigency or hardship confronting either party." David D. Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York, CPLR C5519:4. Where, as here, a stay pending appeal is sought to preserve the relief sought in the order appealed from in the event the movant ultimately prevails, a court is well advised to stay

proceedings pending appeal to preserve the movant's rights. See In re Agency for Deposit Insurance, Rehabilitation, Bankruptcy and Liquidation of Banks, 2004 WL 414831, at * 3 (S.D.N.Y. March 4, 2004) ("it is patent that if Petitioner ultimately prevails...it will have been severely, and quite possibly irretrievably, harmed" absent stay of enforcement of judgment); In re Sphere Holding Corp., 162 B.R. 639 (E.D.N.Y. Bankr. 1994) (granting stay pending appeal of dismissal of Chapter 11 proceeding where, absent stay, debtor would be irreparably harmed). Indeed, declining to impose a stay places a litigant's fundamental right to meaningful appellate review perilously at risk. See, e.g., Huntington Hebrew Congregation of Huntington v. Tanenbaum, 62 A.D.3d 704, 704, 877 N.Y.S.2d 899 (2d Dep't 2006) (noting that appellant's failure to obtain a stay pursuant to CPLR 5519 rendered its appeal academic).

It is no answer to argue as Respondents do, that Appellants are not seeking to stay the enforcement of the Order appealed from. They certainly are: Respondents have now achieved the requisite 80 percent consent threshold in at least one ESBA class, and are a whisker away in the other two classes. They will soon send the 80 percent forced buy-out notices. See Meister Reply Aff., Ex. B. The requested stay thus is necessary to stay enforcement of the Order. Regardless, in this unique class action context, where the proposed transaction is dependent on achieving the requisite consent level from Participants, and the settlement and consolidation cannot be reversed in any practical sense once they are effected, the fact that the consent solicitation prospectus contains what, if the Order is reversed, constitutes an incorrect, illegal and undoubtedly coercive disclaimer, ineluctably leads to the conclusion that the votes thus obtained are, in such event, as the trial court has already noted, "irrelevant and void." Consequently meaningful appellate review can only be achieved by staying the consummation of the settlement for the brief period needed for this Court to decide the appeal.

Appellants alternatively seek a limited carve-out to the settlement's release solely to preserve ESBA Participants' statutory appraisal rights should the Court reverse the Order. Respondents have failed to refute the merits of Appellants' appeal or the irremediable harm that would befall all ESBA Participants in the absence of a stay (or the alternative relief) if the Order is ultimately reversed. In contrast, the prejudice to Respondents if the relief sought by Appellants is granted is either non-existent or comparatively minor. Appellants are therefore entitled to a stay pending appeal under CPLR 5519(c).

## A. Appellants' Appeal is Meritorious

### 1. The Participants are Members; and They Hold Membership Interests in ESBA

In the Order, the lower court explicitly framed its analysis of Section 1002 as follows:

> If Applicants are "members" *or* have "membership interests," they have statutory appraisal rights even though such rights are not provided for in the Buy Out Provision. If Applicants are not "members" *and* have no "membership interests" under the LLC Law, they have no appraisal rights and the application must be denied.

See Meister Moving Aff, Ex. A, p. 3. (Emphasis supplied.)

Appellants agree with the lower court that the ESBA Participants are entitled to the protections of Section 1002 if *either* they are "members" or hold "membership interests." The ESBA Participants satisfy both definitions.

In the first instance, the court erred by finding that a Participant is not a "member" because he has not been "admitted as a member of a limited liability company" (LLC Law §102(q)). See Meister Moving Aff., Ex. A at p. 7. Section 102(q) clearly precludes *assignees* of membership interests who are not admitted as members under the terms of the controlling limited liability company agreement from asserting statutory appraisal rights; but many of the Participants are original Participants, and those who are not, inherited or acquired their

Participations under the express terms of the controlling Participation Agreements, which provide that "[i]f the transferee [of a Participation] complies with these requirements, he shall be a member of the joint venture with the same rights and obligations as the transferor." See Meister Moving Aff., Ex. F at §§10(A) and 11. Thus, the carve-out for (unadmitted) "mere assignees" of membership interests is not controlling here.

Participants are in fact "members" because the ESBA Participants own the aggregate rights attendant to the membership interests in ESBA. The term "membership interests" is defined in Section 102(r) of the LLC Law as follows:

> "Membership interest" means a member's aggregate rights in a limited liability company, including, without limitation: (i) the member's right to a share of the profits and losses of the limited liability company; (ii) the member's right to receive distributions from the limited liability company; and (iii) the member's right to vote and participate in the management of the limited liability company.

See LLC Law §102(r).

Though the lower court apparently did not dispute the fact that the ESBA Participants – and not the Agents – are entitled to "a share of the profits and losses" of ESBA and the "right to receive distributions from" ESBA, it nonetheless concluded that the ESBA Participants do not hold "membership interests" in ESBA based on its finding that they "do not possess 'a member's aggregate rights in a limited liability company' or a 'member's right to vote and participate in the management of the limited liability company." See Meister Moving Aff., Ex. A, p. 7.

This was patent error, as is amply demonstrated by the controlling documents and notwithstanding Respondents' fallacious arguments to the contrary. Under the 1962 Participation Agreements, the term "The Property" is defined in a recital as follows:

> WHEREAS, the Agent owns a one-third (1/3) interest in the partnership, which was organized pursuant to an agreement among Lawrence A. Wein, Henry W. Klein and Peter L. Malkin, dated July 11, 1961, and which partnership interest is herein called "The Property."

See Meister Moving Aff., Ex. F, p. 1. Though that recital states that that "Agent owns" The Property, the Participation Agreement immediately goes on to clarify that the Participants "wish to *establish the ownership of The Property* and to define their rights and obligations with respect thereto." Id. (emphasis supplied). Under each of the three Participation Agreements, the numerous Participants who were parties thereto agreed that "a joint venture is hereby formed for the ownership of The Property." Id. The joint venturers – that is, the Participants – are therefore the sole and true owners of the partnership interest (which, upon conversion, became a membership interest). Indeed the Participation Agreements provide that "for all purposes of this agreement, the contribution of each Participant *to the capital of the Partnership* (herein called the "capital contribution") and *his fractional interest in The Property* are as set forth below opposite his signature." Id. The signature pages only list the Participants – not the Agents – as having made a "capital contribution" to the Partnership and as having a "fractional interest" in the partnership interest. The fractional interests of the Participants add up to 100 percent. Id. at ¶1 and p. 9.

Thus, it is undeniable that the Participation Agreements evidence an agreement by the Participants to jointly own a partnership interest, which for administrative convenience, is held for their benefit by the Agent as a fiduciary. Upon Defendant-Respondents' unilateral conversion of ESBA to a limited liability company in 2001, the partnership interests formerly held by the Agents were converted into membership interests, in which each of the ESBA Participants own a fractional interest under the Participation Agreements. See Meister Aff, Ex. H, ¶1.

It is likewise undeniable that the September 30, 2001 Consent and Operating Agreement (the "Operating Agreement") executed in connection with ESBA's conversion reaffirmed the

Participation Agreements and that therefore the joint venture among Participants remained in effect, albeit with the object of the joint venture having been converted to a one-third membership interest. The Operating Agreement provides:

> The terms of Associates' participating agreements which the undersigned serve as agents for the participants are hereby confirmed and remain fully in effect without change.

See Meister Aff, Ex. H, p. 2.

That the ESBA Participants are the true owners of the membership interests in ESBA is evidenced by other documents authored by Defendant-Respondents. For example, the SEC Form 8-K filed by Defendant-Respondents on November 30, 2011, which announced that Defendant-Respondents had (once again, without the Participants' consent) amended the Operating Agreement of ESBA:

> [T]o create three new series (series A-1, A-2 and A-3) of a new class of ***equity membership interests (the "new series")*** which provide protections similar to those under a shareholder rights plan for a corporation. Each new series corresponds to a participating group for which a member acts as agent. In general terms, the Amendment works by imposing a significant penalty upon any person or group that acquires 6% or more of the outstanding participation interests in a participating group.
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> * * *
>
> a. *Distribution.* Each new series will be distributed to the members of the Company who act as agents for the corresponding participating group ***and hold their membership interest for the participants who hold a beneficial ownership interest in the membership interest held by the member***. The members will be deemed to have distributed each new series ***immediately*** thereafter to the ***participants in its corresponding participating group***.
>
> b. *Restrictions on Acquiring Person.* Any interest owned by an Acquiring Person ("AP") in a new series which corresponds to a participation group in which an Acquiring Person acquired more than 6% of the participation interests will not have the right to receive distributions or have any voting rights.

c. *Economic rights.* Each ***new series will have economic rights*** to receive three times the distributions payable from time to time on the ***participation interests*** in the corresponding participating group. Because each participant other than an AP will be entitled to distributions on the new series, the distribution of the new series will not reduce the ***distributions of any participant*** other than an AP.

d. *Voting rights.* Each new series will vote only on actions as to which the participants in the corresponding participating group have voting rights. For the new series to approve an action, the action must be approved by the required percentage (which is the same as the existing required percentage for the participating groups) of the holders of the new series. ***Membership interests in each new series*** will be subject to the same buyout provisions with respect to ***non-consenting members*** as the existing participation interests in the corresponding participation group. Because each ***participant*** other than an AP ***will be entitled to voting rights in connection with the new series***, the distribution of the new series will not alter the voting rights of any participant other than an AP.

See Meister Moving Aff., Ex. I at pp. 2-3, Item 5.03. (Emphasis supplied.)

Thus, in Defendant-Respondents' own words, it is the Participants who hold the economic, distribution and voting rights attendant to the membership interests in ESBA. Indeed, when discussing the voting rights of Participants in reiterating the applicability of the forced buy-out, Defendant-Respondents refer to Participants who vote against a given proposal as the "non-consenting *members*." Id. at p. 2, Item 5.03, ¶(d). (Emphasis supplied). That is, Defendant-Respondents have agreed that it is the dissenting Participants (and not dissenting Agents) who are the members of ESBA subject to the $100 forced buy-out set forth in the Participation Agreements.

Therefore, even if the 2001 conversion did not put fractional interests in "membership interests" in the hands of the ESBA Participants, certainly the 2011 Amendment (creating three new classes of "equity membership interests") did. These classes were created (by Defendant-Respondents) under Section 418(a) of the LLC Law, which authorizes an LLC's Operating Agreement to provide for "classes or groups of ***members*** having such relative rights, powers,

preferences and limitations as the operating agreement of such limited liability company may provide." (Emphasis supplied.) Indeed, LLC Law Section 418(a) also provides that "[t]he operating agreement may grant to or withhold from all or one or more classes of ***members*** the right to vote upon any matter on the basis of capital contributions, capital commitments or capital accounts or on a per capita, class or other basis." (Emphasis supplied.) Thus, Respondents' argument that the Participants are entitled to vote only with respect to certain fundamental transactions does not relegate them to non-member status; rather, at most it means that the Agents are one class of members and the Participants are another. Regardless, it cannot be disputed that all classes of members are entitled to the protections of LLC Law Section 1002.

The lower court's ruling is utterly untenable light of these documents, all of which were presented to the court. Specifically, the lower court's ruling that the ESBA Participants "do not possess 'a member's aggregate rights'" in ESBA was patent error. Meister Moving Aff., Ex. A at p. 7. Defendant-Respondents' disingenuous claim that the true "members" of ESBA are the Agents simply cannot be sustained in light of the Participation Agreements and 2011 Amendment to the ESBA Operating Agreement; rather the former partnership, currently membership, interests are owned fractionally by the Participants (and only the Participants), with such interest being held strictly as a matter of administrative convenience nominally by the Agents as fiduciaries for the owner-Participants.

The lower court's reliance on Cordts-Auth. v. Crunk, LLC, 815 F. Supp.2d 778, 800 (S.D.N.Y. 2011) demonstrates that it misapprehended the nature of the Participants' interests in ESBA. In Cordts-Auth, the plaintiff was a former employee of Crunk, LLC who was granted "performance units," which entitled her to share in the post-grant date appreciation of Crunk in the event of a sale of the company. Id. at 782. In other words, as a portion of her compensation,

the plaintiff was granted an employment performance incentive which would entitle her to a share of that value enhancement. After the plaintiff resigned from the company, it was sold at loss and after being told that she was not entitled to a portion of the sale proceeds, she commenced an action asserting derivative claims, and seeking access to Crunk's books and records. Id. at 784. The court agreed that plaintiff lacked standing to bring derivative claims:

> In short, contrary to what Plaintiff may believe, she did not become a member in Crunk merely by receiving her Performance Units. Rather, Plaintiff was an "Assignee," defined by the Crunk Operating Agreement as "a transferee or holder of Units that is not a Member." (Am. Compl. Ex. B, at Ex. A.) While it is indisputable that Plaintiff has adequately pled that she was a Performance Unit holder until Crunk was dissolved, by her own allegations (including the documents attached to the Amended Complaint) Plaintiff did not meet any of the conditions of section 9.2. Therefore, Plaintiff has failed to adequately plead that she ever attained membership in Crunk, and the Court dismisses her derivative claims on this ground alone.

Cordts-Auth., 815 F. Supp.2d at 789.

Here, in the first instance, it should be noted that the Participants are asserting statutory appraisal rights and do not seek to bring derivative claims. Thus, Cordts-Auth. is facially inapposite.

Regardless, as stated above, many of the Participants are original Participants, and those who are not, inherited or acquired their Participations under the express terms of the controlling Participation Agreements. See Meister Moving Aff., Ex. F at §§10A and 11. In contrast to the plaintiff in Cordts-Auth., here, under the governing documents, the ESBA Participants hold fractional interests in a membership interest in ESBA, along with the economic, distribution and voting rights attendant to those interests. And all of them are either original Participants or duly acquired the full panoply of rights owned by Participants under the controlling Participation Agreements. None are "mere assignees." Cordts-Auth. simply has no application here.

Defendant-Respondents' contentions that the Agents "are anything but 'nominal' parties to the ESBA Operating Agreement," that they exercise "virtually complete management authority over ESBA" and that the "only restriction on their authority is the requirement that they obtain Participant approval for the few fundamental transactions listed in the Participating Agreements" are entirely without merit. Def. Br. at p. 20. This fallacious argument is contradicted not only by Participation Agreements and Defendant-Respondents' own SEC filings, but it is also belied by the express terms of the 1961 Partnership Agreement, which, upon Defendant-Appellants' conversion of ESBA to an LLC in 2001, became the Operating Agreement of ESBA LLC. Under the 1961 Partnership Agreement the Agents do not exercise *any* management authority over ESBA in their capacity as members of ESBA, let alone "virtually complete management" authority.

Indeed, under the Partnership Agreement, the authority of the Agents to bind ESBA is expressly limited to mere administrative functions, such as acceptance of service of process, acceptance of notices under the Master Lease and performance of matters relating to arbitration under the Master Lease. See Meister Moving Aff, Ex. E, ¶6. In contrast, the substantive functions of ESBA as an entity owning real property – renewing, modifying or mortgaging the Master Lease or the Operating Sublease, for example – require the consent of effectively 80 percent of the Participants because only then can the Agent, as nominee, cast a vote in favor of any transaction or action and even then only after buying out dissenting Participants under the forced buy-out. Id. at ¶3; see also Meister Aff, Ex. F, ¶¶4, 7.

Defendants-Respondents' sole source of management authority over ESBA is derived from separate management agreements held by the so-called "management companies" – Malkin Holdings LLC, Malkin Properties and Malkin Construction Corp. By contrast, the Agents are

(and have always been) individuals – currently, Anthony Malkin, Peter L. Malkin and Thomas Keltner. That is, Defendant-Respondents' status as "contract manager" of ESBA and not Malkin's status "Agent" is what confers management authority.

Though the lower court did not address it in the Order, it is indisputable that only the Participants – and not the Agents –possess a "member's right to a share of the profits and losses of the limited liability company" and it is only the Participants who enjoy "the member's right to receive distributions from the limited liability company." See LLC Law §102(r)(i) and (ii). The Participation Agreements explicitly provide that "the Participants shall share proportionately in the profits and losses arising from the ownership of the Property," whereas the Agents "shall act, without compensation, as agent for the joint venture in the ownership of the Property." See Meister Moving Aff., Ex. F, ¶3.

The IRS Form K-1s that Defendant-Respondents have been distributing to the ESBA Participants every year since ESBA's LLC conversion in 2001 (and the earlier K-1s distributed since 1962) are further, powerful evidence that the ESBA Participants are the only true owners of the ESBA membership interests. See Meister Moving Aff, Ex. J. On these K-1s, Defendant-Respondents have for the last fifty years consistently checked the box captioned "Limited Partner or Other LLC Member" to describe the status of the Participant to whom the form is addressed. Given that the Defendant-Respondents have been sending K-1 forms filled out in this manner to approximately 3,000 ESBA Participants every year for over a half century, that means they have checked the "LLC member box" and/or the predecessor "partner box," approximately 150,000 times to describe ESBA Participants. And since the three Agents who hold (nominal) title to the former partnership/currently membership interests do not receive K-1 forms (except to the extent they happen to also be Participants), that means the Agents (in their capacity as such)

have not been declared as members (or partners) and have not been receiving distributions or paying taxes on any share of ESBA's income, for a half century.

This indisputable documentary evidence overwhelmingly demonstrates patent error and that Appellants' appeal is meritorious.

### 2. Even if the ESBA Participants Are Mere Beneficial Owners of Membership Interests, They Are Entitled to Statutory Appraisal Rights

Even if the ESBA Participants are not deemed the actual holders of fractional interests in membership interests in ESBA, they would nonetheless be entitled to the protections of Section 1002. While it is true that Section 1002(f) references the "dissenting member,"[3] nothing in the statute prohibits enforcement by a beneficial owner of the membership interest, let alone suggests a legislative intent to undo nearly a hundred of years of caselaw uniformly holding that beneficial owners of stock get statutory appraisal rights.

In the exactly parallel context of dissenter's rights where corporations are merging, New York courts have squarely, uniformly, and emphatically held for nearly a century – starting long before the modern dissenter's right statute, BCL Section 910, was even enacted – that dissenter's rights may be invoked by beneficial owners of stock. In Matter of Rowe, 107 Misc. 549, 176 N.Y.S. 753 (Sup. Ct. Steuben Cnty 1919), which was later cited approvingly by this Court, the New York Supreme Court, construing dissenter's rights under the Stock Corporation Law (a predecessor to the BCL), squarely held that beneficial owners of shares, even if not registered in the name of the owner, could enforce dissenter's rights. Id. at 552, 176 N.Y.S. at 754. In 1945, in Matter of Friedman, 184 Misc. 639, 54 N.Y.S.2d 45 (Sup. Ct. N.Y. Cnty 1945), the court considered the rights of where a beneficial owner of stock (whose shares were "registered in the

[3] Regardless, in Defendant-Respondents' own words, dissenting ESBA Participants *are* "non-consenting members." Meister Moving Aff., Ex. I at p. 2, Item 5.03, ¶(d).

names of other persons") sought to enforce dissenter's rights under the Railroad Law. In permitting a beneficial owner of stock to enforce his appraisal rights, the court observed:

> The aim of the appraisal statute is crystal clear...The object ... is to prevent the forcing of a dissenting stockholder, through the medium of a merger, to transpose his investment in one corporation into another. It achieves this objective by providing [a] procedure [for] the valuation and payment of the dissenter's stock. *Nothing should be read into the statute that would limit or frustrate this salutary purpose.*

Id. at 644, 54 N.Y.S.2d at 50. (Emphasis supplied).

This Court, in construing dissenter's rights under the Stock Corporation Law where the plaintiff was a beneficial owner, in In re Deutschmann, with Judge Breitel concurring, similarly held: "it is enough to enable [Plaintiffs] to prosecute the proceedings that they were beneficial owners of the shares." 281 A.D. 14, 23 (1st Dep't 1952).

When the modern BCL was adopted, it contained a reference similar to the one in LLC Law 1002(e) to the member "entitled to vote." Some commentators argued that that signaled a change – and that in so saying the Legislature was limiting dissenter's rights to shareholders of record, since only they are entitled to vote. But the New York courts long ago rejected that argument.

In Matter of Bowman, 98 Misc.2d 1028, 414 N.Y.S.2d 951 (Sup. Ct. N.Y. Cnty. 1978), the court held that beneficial owners of stock whose shares are "registered in the name of a nominee or fiduciary" were entitled to appraisal rights, noting that BCL Section 623 "does not limit the right to an appraisal to shareholders of record." Id. at 1034. The BCL's reference to shareholders "entitled to vote" was not intended to limit the appraisal rights to record owners *but rather to deny protection to holders of non-voting stock.* Of course, here ESBA Participants are entitled to vote (and are the only persons entitled to vote).

If such a drastic change had been intended – overturning decades of consistent rulings to the contrary – it is reasonable to assume that the change would be reflected in the legislative record upon the enactment of the BCL. But to the contrary, the comment in Legislative Studies and Reports (McKinney's Cons Laws of NY, Book 6, Business Corporation Law, § 910, p 97) declares that BCL Section 910 "retains *the same right currently available* to dissenting shareholders to receive payment for their shares from domestic corporations upon merger, consolidation or disposition of assets otherwise than within the regular course of business." (Emphasis supplied.) Of course, the same applies to LLC Law Section 1002. It perpetuated the "entitled to vote" language appearing in the BCL. Section 1002 was enacted in 1994. By then New York courts had been construing dissenter's rights contained in the Stock Corporation Law, the Railroad Law and BCL, for 75 years, to protect beneficial owners of stock.

### 3. Prior to the Order, the $100 Forced Buy-out Never Faced, Let Alone Withstood, a Challenge Under LLC Law Section 1002

Defendant-Respondents repeated assertions that "[e]very court that has reviewed the legality of these buy out provisions, including the buy-out provisions in the ESBA agreements, has found them lawful" are not even remotely relevant. Each of the cases four cited by Defendant-Respondents – Koppel v. 4987 Corp., 1999 WL 608783 (S.D.N.Y. Aug. 11, 1999) ("Koppel I"), Koppel v. 4987 Corp., 2001 WL 47000 (S.D.N.Y. Jan. 19, 2001) ("Koppel II"), Schneider v. Malkin, No. 605710/01 (Sup. Ct. N.Y. Cnty. Feb. 14, 2002) and Studley v. Empire State Bldg. Assoc., 249 A.D.2d 7 (1st Dep't 1998) – have absolutely nothing to do with LLC Law Section 1002 and not one involved a merger or consolidation, but rather involved purchases or sales of the properties there at issue.

In Koppel I, the district court held that because the $100 forced buy-out "figures prominently in the Participation Agreements," it did not "amount to an allegation that [the

plaintiff] relied on a purported misrepresentation by defendants" sufficient to sustain his common law claim for fraud. 1999 WL 608783, at * 3. Plainly, that ruling has no application to Appellants' claim that the buy-out violates Section 1002 by depriving dissenting Participants of fair value. Likewise, the district court's observation in Koppel II that the $100 forced buy-out "allowed decisions supported by an overwhelming majority of the participants to be implemented," is irrelevant. 2001 WL 47000, at * 2. Appellants' challenge relates to the buy-out price, not to the 80 percent threshold; all Appellants seek is that dissenters get fair value as guaranteed by LLC Law Section 1002, instead of $100. For the same reason, the Schneider court's observation that "[t]he purpose of the 'buy-out' is to aid in the implementation of the decision of a majority of the Participants" has no bearing on Appellants' statutory challenge. Defendant-Respondents' reasoning or motivation for including the $100 forced buy-out in the Participation Agreements is of no relevance to this appeal.

Lastly, Studley, decided in 1998, three years prior to ESBA's conversion to an LLC, simply held that the plaintiff had no standing to bring a derivative action because he was neither a general nor a limited partner of the partnership. 249 A.D.2d at 8. Standing is a technical concept limiting the universe of potential plaintiffs who can bring lawsuits to those holding nominal title to the affected interest. Just because the Participants cannot bring a derivative action in the name of ESBA, does not mean they do not get dissenter's rights under LLC Law Section 1002.

**4. The Proposed Consolidation is a Consolidation under the LLC Law**

Notwithstanding the thousands of references to the "proposed consolidation" in the Registration Statement, the lower court in a single sentence at the tail end of the Order, adopted, as an alternative basis for its ruling, Defendant-Respondents' argument that the appraisal

proceeding set forth in Section 1002 applies only to a "statutory merger or consolidation" and that because Defendant-Respondents have elected to structure the consolidation as an "asset exchange," that the ESBA Participants are not entitled to appraisal rights under Section 1002. See Meister Moving Aff., Ex. A at p. 8; see also Def. Br. at pp. 20-22. This too was error.

LLC Law Section 1001 defines a "consolidation" as simply "a procedure in which two or more limited liability companies... consolidate into a single LLC..." Merriam-Webster's dictionary defines "consolidate" to mean "to join together (separate parts) into one whole; unite; to form into a compact mass." Here, the assets of ESBA – interests in the Empire State Building - and the other consolidating companies are being transferred to the REIT in exchange for various REIT securities, which are then being distributed to Participants (and the other equity holders) in liquidation of ESBA (and the other consolidating companies).

The net effect of the transaction is a consolidation of all the properties under one corporate roof. That is undoubtedly why Defendant-Respondents call the transaction the "proposed consolidation" thousands of times. Indeed, while the BCL limits the mergers and consolidations that qualify for dissenter's rights under BCL Section 910 to so-called statutory mergers and consolidations effected via share conversions described in certificates of merger or consolidation, the LLC Law does not contain such a limitation.

The hallmark of a "statutory" merger of corporations appears in BCL Section 902, which specifies the contents of the "plan of merger or consolidation" that must adopted by the boards of the combining corporations. BCL Section 902(a)(3) states that the plan must set forth "the terms and conditions of the proposed merger or consolidation, including the manner and basis of *converting* the shares of each constituent corporation into shares, bonds or other securities of the surviving or consolidated corporation..." BCL §902(a)(3). While LLC Law Section 1003

specifies that there likewise must be a certificate of merger or consolidation, it notably does not state, as BCL Section 902(a)(3) does, that the certificate must set forth the share conversion terms.

Said differently, *de facto* and share-conversion type mergers and consolidations both qualify as "a procedure" effecting a merger or consolidation under LLC Law Section 1001(a).

Corroborating this conclusion, LLC Law Section 1004(e) provides: "*[t]he provisions of this subdivision shall not be construed to limit the accomplishment of a merger or of any of the matters referred to herein by any other means... .*" *See LLC Law §1004(e).* As the official practice commentary has recognized, Section 1004(e) addresses consolidations "involving LLCs by means other than those detailed in the Act, provided such means are lawful and are detailed by the operating agreement or some other agreement." See Abbott, James E. and Farrell, Raymond R., 1 N.Y. Prac., N.Y. Limited Liab. Companies and Partnerships, §11:14.

While the practice commentary goes on to acknowledge that it is an issue of first impression as to whether so-called *de facto* mergers and consolidations are brought under LLC Law Section 1002, the authors nonetheless recognize:

> In light of the above, it is probable that business combinations involving domestic and foreign LLCs having the same effect as a merger or consolidation under the Act must comply with the Act's merger provisions. Business combinations that do not comply with the Act may nevertheless be subject to its provisions.

See Abbott, James E. and Farrell, Raymond R., 1 N.Y. Prac., N.Y. Limited Liab. Companies and Partnerships, §11:14.

This makes sense. The doctrine of *de facto* mergers and consolidations is deeply embedded in New York jurisprudence. Surviving corporations which engage in asset for stock exchange transactions, resulting in *de facto* mergers or consolidations, are not only liable for the contractual debts of the non-surviving company, they are also liable for the torts of the non-

surviving company. As the Second Circuit observed in Cargo Partner AG v. Albatrans, Inc., "[a] de facto merger occurs when a transaction, although not in form a merger, is in substance" one. 342 F.3d 41, 46 (2d Cir. 2003). Thus, the purpose of the doctrine of *de facto* merger is to "avoid the patent injustice which might befall a party simply because a merger has been called something else." Id. As this Court has observed:

> A transaction structured as a purchase-of-assets may be deemed...a "de facto" merger, even if the parties chose not to effect a formal merger if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and dissolution of the selling corporation as soon as possible after the transaction; (3) assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation.

In re N.Y. City Asbestos Litig., 15 A.D.3d 254, 256, 789 N.Y.S.2d 484, 486 (1st Dep't 2005); see also Fitzgerald v. Fahnestock & Co., Inc., 286 A.D.2d 573, 574, 730 N.Y.S.2d 70, 71 (1st Dep't 2001).

Here, each of the four factors evidencing a *de facto* merger is indisputably present: after the proposed consolidation is effected, the ESBA Participants and Defendant-Respondents will continue to be owners of the REIT; upon the consolidation of ESBA into the REIT, ESBA's ordinary business operations will cease and the REIT will assume ESBA's liabilities; and ESBA's management, personnel, physical location, assets and general business operations will remain the same upon its consolidation into the REIT. Thus, the proposed consolidation is a quintessential *de facto* consolidation and permitting Defendant-Respondents' to deem it an "asset exchange" to escape the LLC Law's protections is precisely the type of "patent injustice" that the *de facto* merger doctrine was designed to prevent.

Defendant-Respondents' contention that no New York court has applied the *de facto* merger doctrine in the context of appraisal rights is simply untrue. In Lirosi v. Elkins, 89 A.D.2d

903, 907, 453 N.Y.S.2d 716, 723 (2d Dep't 1982), the Second Department held that a shareholder whose interests were merged in a *de facto* merger obtains appraisal rights under BCL Section 910 (in addition to right to bring a plenary action challenging a fraudulent transaction). Given that the LLC Law, unlike the BCL, does not reference share conversions (the hallmark of a so-called statutory merger or consolidation) it follows, *a fortiori*, that if, as a matter of equity in construing a remedial statute, *de facto* mergers invoke dissenter's appraisal rights under the BCL, they must as well under LLC Law Sections 1001-1005.[4]

Which is why, on June 8, 2012, a reviewing agent at the SEC, wrote to defendants: "Please clarify your disclosure as to why participants who do not consent ... will not have appraisal rights under NY LLC Law 1002(e). Section 1002(e) *appears* to provide for a right of appraisal in circumstances such as *the consolidation*, and the agents *appear* to be holding their membership interests ... as fiduciaries. Disclose any relevant case law that supports the position you are taking. If state law is unclear... please so state..." (emphasis added). See Meister Moving Aff., Ex. L.

### B. Absent the Requested Stay, Appellants' Appeal of the Order Could be Rendered Academic

Neither Plaintiff-Respondents nor Defendant-Respondents dispute that the appraisal proceeding contemplated by LLC Law Section 1002 and 1005, and, by reference, BCL Section 623(h)-(k), is encompassed in the sprawling release granted to Defendant-Respondents under the Stipulation of Settlement. It expressly provides that "any claim arising under federal or state statutory law...relating to...limited liability companies..." See Meister Moving Aff., Ex. C, p. 12. That is, Respondents do not dispute that the relief sought by Appellants and to which all

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[4] Defendant-Respondents disingenuously claim Appellants "abandoned" their *de facto* merger argument. (Def. Br. at 24.) That is untrue. Appellants merely clarified that *de facto* mergers were covered under the LLC Law and as such in that context should be considered "statutory."

dissenting Participants are entitled if the Order is reversed is among the "Released Claims" covered by the Stipulation of Settlement. Nonetheless, Respondents posit numerous fallacious arguments as to why Appellants will not be harmed if this Court declines to grant the stay of enforcement of the settlement until their appeal is heard and determined. Each of these arguments fails, and thus the stay should issue.

Defendant-Respondents first argue that "most fundamentally,' Appellants bring their appeal not on behalf of all Participants, but on their own behalves.[5] Def. Br. at p. 29. This, of course, is untrue. If the Order is ultimately reversed on appeal, all of the ESBA Participants – indeed, the membership interest holders in any of the constituent properties sought to be consolidated into the REIT – are entitled to appraisal rights, not just Appellants. This is, after all, a class action. Moreover, as Defendant-Respondents are well aware, a dissenter's right to the fair value of his or her interests– guaranteed by Section 1002 – is not contingent on anything other than the dissenter's dissent to the proposed consolidation and compliance with the statutory requirements therefor. See LLC Law §1002. And, in any event, as Defendant-Respondents acknowledge, Appellants were expressly granted the right, under CPLR 907(2), to "*join the [class action] case* by separate counsel for the purpose of supporting their allegation that *the ESBA Participants* who elect not to consent to the proposed transactions, where 80 percent of the ESBA Participants in their class do consent thereto, will be deprived of 'fair value' in violation of the New York Limited Liability Company Law." Id. at 29 n. 7 (Emphasis supplied). CPLR 907(2) is contained within the Class Action Article of the CPLR, and the trial court's ruling

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5 Defendant-Respondents did not even attempt to argue in the proceedings before the trial court that a judicial declaration that the $100 forced buy-out is illegal and unenforceable under the LLC Law would only extend statutory appraisal rights to the six individual Appellants and not to all Participants subject to such a buy-out. On the contrary, counsel for Appellants has repeatedly asserted that the reach of such a ruling would extend to all Participants subject to the same or a similar buy-out. Neither Respondents nor the lower court ever took issue with these statements. Of course, if as Respondents disingenuously claim, the present appeal were so limited, they would not be fighting this hard.

granting Appellants the right to intervene, albeit for a limited purpose, in no way limited the reach of the claims sought to be asserted or the relief that would have been awarded had the lower court ruled in Appellants' favor.

Defendant-Respondents also argue that should this Court reverse the Order, only the twelve Class Members who opted out of the settlement would be able to pursue the appraisal remedy guaranteed by Section 1002 because the Class Members were given "full notice of this action and the attendant arguments about appraisal rights" in the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing mailed to the Class Members in connection with the lower court's preliminary approval of the Settlement. Id. at 29. In other words, Defendant-Respondents insist that Participants who failed to opt out of the Settlement cannot assert their fair value rights even if this Court reverses the Order.

This argument is not only indicative of Defendant-Respondents' bad faith, but it plainly violates the Legislature's mandate set forth in Section 1002(c), which provides that an "agreement of merger or consolidation ***shall*** be submitted to the members of each domestic limited liability company who are entitled to vote with respect to a merger or consolidation ***at a meeting called on twenty days' notice*** or such greater notice as the operating agreement may provide." See LLC Law §1002(c). (Emphasis supplied.) Because the Registration Statement explicitly disclaims the existence of an appraisal remedy for dissenting ESBA Participants, should this Court reverse the Order, the clock on the minimum twenty-day notice for all ESBA Participants – and not just those who opted out of the Settlement – has not yet begun to run.

Defendant-Respondents also assert that the Participants' votes in favor of the proposed transaction will nonetheless remain valid if this Court reverses the Order and holds that the Participants are entitled to appraisal rights under LLC Law Section 1002. Def. Br. at 30.

Apparently, Defendant-Respondents are arguing that they should be permitted to solicit the consents of the Participants using a Registration Statement that explicitly disclaims the Participants' entitlement to the appraised value of their interests in the event they do not consent to the Proposed Transaction even if that disclaimer is held to be illegal. This contention flies in the face of common sense, as well as the trial court's explicit ruling– when it granted Appellants' permission to appear in this action to assert their LLC Law claim:

> MR. MEISTER: So, I don't understand how this all works. How can the vote continue to be solicited under a provision, or at least I argue, that is patently in violation of the LLC Law? And where preliminarily approving --
>
> THE COURT: Very easy. Because, what would happen, the solicitation goes forward. If I decide that you're correct with respect to the Limited Liability Law, then whatever responses there were to that, to those solicitations, *would be irrelevant and void.* So, I'm not concerned about that.

See Meister Moving Aff., Ex. D at 53:18-54:2. (Emphasis supplied).

The lower court thus recognized before issuing the Order, that if the forced buy-out was adjudicated illegal and unenforceable under LLC Law 1002, then all the votes must be regarded as "irrelevant and void." Id. The only way to avoid rendering ineffectual a decision of this Court reversing the Order is to order a stay pending appeal, or otherwise ensure that the dissenting Participants' right to a fair value hearing is carved out of the release contained in the Settlement.

### C. Respondents Will Not Be Prejudiced by a Stay

Under the Stipulation of Settlement, Defendant-Respondents have until December 15, 2015 to consummate the Proposed Consolidation and IPO. See Meister Moving Aff., Ex. C at p. 18, §E(10)(d). Their claims to prejudice – that they will be forced to incur additional IPO expenses and that now is a "good time" to buy the IPO to market – should be given short shrift.

In the first instance, Defendant-Respondents have been stealing from ESBA to pay the IPO expenses. As of March 8, 2013 they have stolen $19 million. See Meister Reply Aff, Ex. C. Nor should market timing issue be used to override the Legislature's mandate. It cannot be determined now whether future market conditions will be better or worse; regardless, the Legislature did not guarantee appraisal rights only if market conditions were not subject to future deterioration. In all events, Defendant-Respondents' dilemma is of their own making.

In addition, the Court should note that the while release from the Class Members is effective upon the entry of an order finally approving the settlement, the consideration to be paid by Defendant-Respondents for that release will not be distributed to the Class Members until years later when the Proposed Consolidation is consummated and the IPO goes forward.

Finally, the Court should not require the absurd $300 million bond demanded by Defendant-Respondents. Def. Br. at p. 33-35. The Order did not result in a money judgment payable to Defendant-Respondents. A bond is discretionary and courts routinely issue a stay pending appeal without one, especially where such an imposition would be prohibitive. See, e.g., Silverman v. Nat'l Union Fire Ins. Co. of Pittsburgh (In re Suprema Specialties, Inc.), 330 B.R. 93, 96 (S.D.N.Y. 2005) ("The posting of a bond, however, is discretionary and is not a prerequisite to obtain a stay pending appeal.") (citing In re Sphere Holding Corp., 162 B.R. 639, 644 (E.D.N.Y. 1994)). Here, compelling a bond is the same as denying the stay.

## II. APPELLANTS HAVE STANDING TO PROSECUTE THIS APPEAL AND THEIR APPLICATION IS PROCEDURALLY PROPER

CPLR Section 5511 provides that "[a]n aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." See CPLR §5511. To be "aggrieved" a person or party "must have a direct interest in the controversy which is affected by the result, and the adjudication must have a

binding force against the rights, person or property of the party." DiMare v. O'Rourke, 35 A.D.3d 346, 347, 825 N.Y.S.2d 273, 274 (2d Dep't 2006) (internal citations omitted); see also Auerbach v. Bennett, 47 N.Y.2d 619, 628, 419 N.Y.S.2d 920, 925 (1979) ("[W]e have no difficulty in recognizing one of the stockholders, who is within the class whose benefit a derivative action has been instituted, as a party aggrieved by whom a notice of appeal may be filed under CPLR 5511.")

Appellants are Participants in ESBA and members of the Settlement Class and thus they undeniably have "a direct interest in the controversy." Moreover, the Order is binding on Appellants in that if they are not permitted to prosecute their appeal of the Order, the lower court's ruling that they are not entitled to the statutory protections of LLC Law Section 1002 will "have a binding force" against Appellants' rights and property. Thus, Appellants are an "aggrieved party" under CPLR Section 5511 and they have standing to prosecute this appeal.

Indeed at the May 2nd hearing, the lower court expressly recognized the propriety of a stay pending appeal, under the circumstances:

> THE COURT: Well, let's stop for a minute and consider this dilemma that you just raised.
>
> I guess having the Court provide for this carveout is one option. That's available to you. Are there any others?
>
> MR. MEISTER: Well, one was to ask the parties to agree. That option has been foreclosed by declining.
>
> THE COURT: I suppose you could go up to 25th Street and ask for a stay of some sort.
>
> MR. MEISTER: We already tried that, your Honor.
>
> THE COURT: Pardon?
>
> MR. MEISTER: We tried that. That's exactly what I did.
>
> THE COURT: And what happened?
>
> MR. MEISTER: Well, the stay by the en banc panel has not been decided, but the interim stay in advance of the stay pending appeal has been declined.

See Kolker Aff., Ex. F at 31:11-32:2.

## CONCLUSION

The Order is patently erroneous. The 1962 Participation Agreement, 1961 Partnership Agreement, 2011 Amendment to the ESBA Operating Agreement and thousands of K-1s establish an overwhelming record proving that ESBA Participants are owners of "fractional interests" in the "membership interests" in ESBA. Participants are either original Participants or were duly transferred Participations under the express terms of the Participation Agreements. None of the Participants are "mere assignees." As such they are entitled to statutory appraisal rights under the LLC Law. Even if they are merely beneficial owners of membership interests, under controlling law, they are equally so entitled.

Appellants are aggrieved by the Order and have standing to prosecute this application to preserve their fundamental right to meaningful appellate review. This can only be achieved if a stay is granted, or if the Court exercises its inherent power of review to direct the lower court to condition its order approving the Settlement upon Respondents carving out of the release dissenting ESBA Participants' statutory appraisal rights.

If the Court reverses the Order, the votes must be retaken after a revised Registration Statement is disseminated to Participants properly disclosing their statutory appraisal rights and the meeting specified by LLC Law Section 1002(c) is held, such that Participants can make a properly informed decision.

It would seem the lower court took solace in the fact that its manifestly erroneous ruling would not work a substantial injustice. In a footnote in the Order, the court noted that the confiscation resulting from the "oppressive" forced buy-out would not occur because dissenting ESBA Participants can change their votes and "obtain the same benefits as the Participants who voted in favor of the transaction." See Meister Moving Aff., Ex. A at p. 7, fn. 1. This amounts

to a judicial repealer of Section 1002. The Legislature stripped dissenters of their right to enjoin an unfair merger or consolidation and relegated them to an appraisal proceeding in which the fair value of their interest would be paid to them in cash so that they would not become members of the surviving company. See LLC Law §1002(g). Thus, the court's notion that dissenting Participants are protected because they will get REIT securities (which are locked out to resale for at least six months) eviscerates the statute.

Hundreds of millions of dollars' worth of statutorily guaranteed fair value rights belonging to hundreds of persons of modest means hang in the balance. Defendant-Respondents efforts to bludgeon Participants into voting yes by illegally threatening them with the confiscation of their valuable Participations should not be countenanced. Neither should Class Counsel's transparent efforts to collect its $15 million fee at the expense of their supposed clients.

Dated: New York, New York
May 17, 2013

MEISTER SEELIG & FEIN LLP

By: Stephen B. Meister, Esq.
Remy J. Stocks, Esq.
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
*Attorneys for Appellants*