

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK****SBE 44 WALL, LLC and BARUCH 44 WALL, LLC,****Index No.****Plaintiffs,****-against-****COMPLAINT****NEW 44 WALL STREET, LLC, KOMMERSIELLA  
FASTIGHETER IN NY 3 CORP, and PAUL ELLIOTT,****Defendants.**

Plaintiffs, by their attorneys, Nesenoff & Miltenberg, LLP, as and for their Verified Complaint, allege as follows:

**NATURE OF THE ACTION**

1. This action is in furtherance of the New York Limited Liability Company Law, specifically, LLCL 1002 (g), and the Court of Appeals decision in Walter J. Schloss Associates v Arkwin Industries, 61 NY 2d 700 (1984), and the decision in Hall v Wood Wentworth, 2011 NY Slip Op 30631(U) (Supreme Court, Nassau County, 2011) and other cases, asserting equitable causes of action for relief by minority members of a domestic limited liability company known as 44 Wall Street, LLC ("44 Wall"), arising from certain events, an alleged capital call, alleged "merger" of 44 Wall into New 44 Wall Street, LLC ("New 44 Wall"), also a domestic limited liability company, a certain offer to pay "zero" to Plaintiffs for their membership interests in 44 Wall, and an appraisal proceeding commenced in this Court by New 44 Wall to determine that Plaintiffs should be paid "zero" for their membership interests in 44 Wall.

2. The equitable causes of action asserted are based upon the Operating Agreement of 44 Wall, and/or unlawful or fraudulent actions of each of the Defendants as to each of the Plaintiffs, seeking the following: a) to enjoin the contribution of the assets of 44 Wall to New 44

Wall, the further encumbrance or the transfer, in whole or in part, of the real estate, or any interest in New 44 Wall, to enjoin the recordation of a deed transferring the real estate to New 44 Wall, and to direct the Defendants, or authorize the Plaintiffs, to cause the execution and filing of a termination of the Agreement of Merger, b) for declaratory relief, c) directing KFS to specifically perform under the Operating Agreement, or, alternatively, to remove KFS as manager of 44 Wall and to otherwise declare the rights of Plaintiffs with regard to the management and operation of 44 Wall, d) to impress a constructive trust or equitable trust upon the real estate and/or membership interests of New 44 Wall, and e) for an accounting in equity.

3. Ancillary to the equitable causes of action, and in furtherance of rights granted under the 44 Wall Amended and Restated Operating Agreement, dated May 16, 2006, as amended by the Second Amendment, dated December 21, 2010, (hereinafter jointly, the "Operating Agreement") Plaintiffs are also asserting certain limited legal causes of action, for damages for the following: a) breach of fiduciary duties, self-dealing, and inducing and/or aiding and abetting a breach of fiduciary duties, c) fraud.

### **PARTIES AND THEIR RESPONSIBILITIES**

4. Plaintiffs are minority members of 44 Wall.
5. Plaintiff, SBE 44 Wall, LLC ("SBE") is a domestic limited liability company and a 12.2 % member of 44 Wall.
6. SBE provided capitalization to 44 Wall of approximately 3.5 million dollars.
7. Baruch provided capitalization to 44 Wall of approximately 4.3 million dollars.
8. Plaintiff Baruch 44 Wall, LLC ("Baruch") is a Delaware limited liability company and a 9.6% member of 44 Wall.
9. 44 Wall was organized on or about November 10, 2003.

10. Defendant, Kommersiella Fastigheter in NY 3 Corp. (“KFS”), is a domestic corporation, and the majority member of 44 Wall.

11. KFS has a single purpose, that being to own and manage its interest in 44 Wall and the real estate, and KFS is the 78.2 % equity holder in 44 Wall and the 100% equity holder in New 44 Wall. KFS represented in the Operating Agreement that its sole material asset was and would be its membership interest in 44 Wall and that the representation was a “continuous covenant” of KFS. Section 6.2 (g). KFS breached the covenant in advance of the purported merger when it formed New 44 Wall and came to own 100% of its membership interests.

12. On and after March 1, 2009, KFS was and is the manager of 44 Wall.

13. Pursuant to the Operating Agreement, Section 4.1, KFS has the “obligation and responsibility” to manage 44 Wall.

14. Pursuant to case law, KFS has fiduciary duties to Plaintiffs, may not engage in self-dealing, and has duties to Plaintiffs akin to those of a partner in a partnership.

15. KFS is the Managing Manager of New 44 Wall, subject to removal as set forth in the Operating Agreement.

16. Defendant, Paul Elliott (“Elliott”), is the President and controlling individual of KFS.

17. New 44 Wall is a single member limited liability company formed for the benefit of KFS and Paul Elliott, only, and for one purpose only, that being to receive the assets, business and interests of 44 Wall, by merger of the two limited liability companies (44 Wall and New 44 Wall).

18. Each Plaintiff and each Defendant is engaged in business in New York, New York, maintains offices in New York, New York, the business and interests of this litigation is

real estate located in New York, New York, and each party is subject to the jurisdiction of this Court.

19. 44 Wall operates real estate known as 44 Wall St, 43-49 William St, and 41-45 Pine St., New York, New York, which is owned by 44 Wall Owner, LLC (“Owner”).

20. The Operating Agreement includes the implied covenants of good faith and fair dealing.

### **FACTS**

21. On or about December 19, 2011, KFS, as manager of 44 Wall, purported to make a capital call.

22. Upon information and belief, the capital call was not supported by a legitimate business purpose and was not explained or supported by documentation, and violated the Operating Agreement, which required that any capital call be in accordance with the Annual Plan or based upon an Emergency Situation, both as defined therein (Section 3.2), and which also violated the cooperation provision (Section 4.10). Neither circumstance existed: the Capital call was not in accordance with the Annual Plan, and no Emergency Situation existed.

23. On or about January 30, 2012, KFS purported to declare Plaintiffs in Monetary Default, as defined in the Operating Agreement, and stated that it “may exercise its rights under Article 11 of the LLC Agreement as well as the rights it has at law and equity.”

24. KFS never exercised its claimed rights.

25. On or about February 10, 2012, each of the Plaintiffs demanded the 2012 Annual Plan and other materials and declared KFS to be in breach of the Operating Agreement.

26. KFS never cured its breach under the Operating Agreement.

27. On or about July 11, 2012, KFS, as manager of both 44 Wall and New 44 Wall, purported to execute and make effective a certain Agreement of Merger, dated July 9, 2012.

28. The Agreement of Merger referred to an attached Exhibit "A" being the Operating Agreement of New 44 Wall, but same was not attached and never produced by Defendants. Accordingly, the Agreement of Merger was of no force or effect.

29. KFS effectuated same without a meeting of members, utilizing a purported Written Consent of Members in Lieu of a Meeting of 44 Wall.

30. The Written Consent of Members in Lieu of a Meeting, erroneously, was executed on July 9, 2012 by KFS as purported "sole member" and was of no force or effect. On that date, KFS was not the sole member of 44 Wall.

31. Defendants purported to cause the merger to "enable it to raise equity capital to continue its existence" as per the Written Consent of Members in Lieu of a Meeting, and to "enable it to raise needed capital" as per the appraisal proceeding.

32. Upon information and belief, the reason given was a sham, incorrect and inappropriate. 44 Wall had access to capital markets to no less a degree than did New 44 Wall. New 44 Wall was capitalized with merely \$10,000 from KFS.

33. Upon information and belief, New 44 Wall has not taken any steps to raise capital since the date of the purported merger.

34. The purported merger by KFS was a "freeze-out" merger which sought to force Plaintiffs to lose their membership interests and equity in 44 Wall in exchange for money, while KFS retains all of the equity and control over the real estate.

35. On or about July 10, 2012, KFS delivered written notices to Plaintiffs of the purported merger, which were not supported by a legitimate business purpose and which were

not explained or supported by documentation, and violated the Operating Agreement, as later set forth herein, and which also violated the cooperation provision (Section 4.10).

36. On or about July 11, 2012, KFS asserted that a value of “zero” for the membership interests of Plaintiffs represented the “fair consideration of said membership interests.”

37. In connection with the purported merger, Defendants purported to have evaluated the “financial condition of 44 Wall Street.”

38. In connection with the purported merger, Defendants purported to have procured independent appraisals of the building and independent appraisals of the membership interests.

39. Defendants did not provide Plaintiffs with any explanation or support of the assertion in paragraph 28, or any of the materials referred to in paragraphs 29 and 30.

40. On or about July 11, 2012, the purported effective date of the merger, KFS asserted that all membership interests in 44 Wall were converted to membership interests in New 44 Wall.

41. On or about July 11, 2012, KFS asserted that all membership interests of the Plaintiffs in 44 Wall or New 44 Wall were “cancelled for no consideration.”

42. On or about July 17, 2012, KFS offered each of the Plaintiffs “zero” for their membership interests in 44 Wall or New 44 Wall.

43. The offer of “zero” was rejected by each of the Plaintiffs.

44. Upon information and belief, the offer of “zero” for Plaintiffs’ membership interests is unreasonable, insufficient and a wrongful taking of Plaintiffs’ property. Defendants then caused the commencement of a purported appraisal proceeding under LLCL 1005 and BCL

623, alleging that Plaintiffs were entitled to “zero” and that their rejection of the offer of “zero” was “arbitrary, vexatious and not in good faith.”

### **OPERATING AGREEMENT**

45. The Operating Agreement contains exhaustive provisions relating to prohibited and permitted transfers of membership interests (Section 10), buy/sell of membership interests (Section 10.2), and dissolution (Section 9).

47. New 44 Wall is an “Affiliate” of KFS and 44 Wall, as defined in the Operating Agreement. Article I, Definitions

48. The purported merger agreement between 44 Wall and New 44 Wall, directed and controlled by KFS, is an “Affiliate Agreement,” as defined in the Operating Agreement. Article I, Definitions

49. The merger agreement could not and cannot be effective in the absence of the express written consent of SBE (the successor in interest to “SE Management”). Section 4.3

50. SBE’s consent to the merger agreement was never formally sought in accordance with procedures set forth in the Operating Agreement. Section 4.6

51. SBE does not consent to the merger agreement. Plaintiffs do not consent to the merger.

52. SBE may withhold consent under the Operating Agreement in its “reasonable discretion.” Section 4.6

53. The merger agreement is void ab initio or voidable at the request of SBE and/or Plaintiffs.

54. Upon information and belief, at the time of the Second Amendment to the Operating Agreement, at which time the parties were also settling litigation involving 44 Wall

and its members, it was agreed that KFS would manage and fund 44 Wall as set forth therein, and Plaintiffs relied upon the absence of authority of KFS to merge or consolidate 44 Wall with another entity, which reliance was known to and allowed by Defendants.

55. KFS lacked and lacks authority to merge 44 Wall into New 44 Wall. The purported merger is an attempt to do indirectly what KFS cannot do directly, which is to avoid the prohibited transfer, buy/sell, dissolution, withdrawal, purpose and other provisions of the Operating Agreement.

56. The purported merger violates the purpose of 44 Wall. “i) investing in, acquiring, holding, owning, leasing, operating, managing, maintaining, improving, subdividing, developing, selling, financing, re-financing and otherwise using or dealing with the Property, for profit and as a n investment; ii) borrowing money...iii) doing any and all other acts...incidental or necessary to carry on the business..”). Section 2.4.

57. The Operating Agreement expressly provides Plaintiffs with the right to assert equitable and legal causes of action upon Default, as defined therein. (“In the event of a Member’s Default hereunder, the Non-Defaulting Member, in addition to all other claims for damages, rights and remedies provided herein, or otherwise available at law or in equity, including, without limitation, specific performance, shall have all the rights and remedies set forth in this Article 11.”). Section 11.

#### **WRITTEN CONSENT OF MEMBERS IN LIEU OF A MEETING**

58. The Operating Agreement, prior to its amendment in 2010, required that certain Major Decisions, as defined therein, be accomplished only with the initiation of a representative of Plaintiff, SBE Wall 44, LLC (“SBE” the SBE members a/k/a SE Management, affiliates of



SBE, then acting as manager) and the subsequent consent of KFS, and established a process to obtain that consent.

59. Upon information and belief, in identifying the events which would be Major Decisions, the Operating Agreement, prior to its amendment, described both authorized and unauthorized events, arguably, to make clear that unauthorized events could not occur in the absence of origination by SBE and consent of KFS.

60. At the time of the amendment in 2010, KFS had become manager, but the members did not cancel the Major Decisions section. Section 4.5.

61. The Operating Agreement requires the agreement of both SBE and KFS as to a merger. ("The term "Major Decisions" as used in this Agreement, shall mean any decision with respect to the Company or the Property which involves: (i) any matters specifically stated in this Agreement to require the consent of both KFS and SE Management, or (ii) any of the following matters:... (i) ...any merger or consolidation of the Company with or into any other entity or Person..." Section 4.5.

62. At no time was KFS authorized to cause a merger, without a duly constituted meeting of the members (including SBE, whose consent was required under the Operating Agreement as to the unauthorized action) as required by LLCL 1002. ("LLCL 1002 (c) The agreement of merger or consolidation shall be submitted to the members ...at a meeting called on twenty days' notice or such greater notice as the operating agreement may provide. ...")

63. KFS alleges in its appraisal proceeding that each of the Plaintiffs dissented before a meeting was held, but Plaintiffs had the statutory right to attend a meeting and vote and any member who had dissented was empowered to rescind his dissent by voting in favor of merger. ("LLCL 1002 (e) ...notice of dissent may be withdrawn by the dissenting member at any time

prior to the effective date of the merger or consolidation and shall be deemed to be withdrawn if the member casts a vote in favor of the proposed merger or consolidation.”)

64. The Written Consent of Members in Lieu of a Meeting, executed solely by KFS, purportedly as “sole member” on July 9, 2012, was and is unauthorized and was and is ineffective to merge 44 Wall into New 44 Wall.

65. In addition to other authority for the commencement of this action, Plaintiffs are authorized to bring this action under LLCL 1002 (g). (“LLCL 1002 (g) A member of a domestic limited liability company who has a right under this chapter to demand payment for his or her membership interest shall not have any right at law or in equity under this chapter....except in an action or contest with respect to compliance with the provisions of the operating agreement or subdivision (c) of this section.”)

66. LLCL 409 requires KFS as manager to “perform his duties in good faith and with a degree of care that an ordinarily prudent person in a like position would use under similar circumstances.”

#### **CONTROL AND ALTER EGO/PIERCING THE VEIL**

67. Upon information and belief, Elliott controls, manages, directs and operates KFS and New 44 Wall.

68. Upon information and belief, Elliott is directly and indirectly responsible for the satisfaction of the contractual, statutory, equitable and other duties and responsibilities of KFS to each of the Plaintiffs.

69. Upon information and belief, Elliott exercised complete domination over KFS and New 44 Wall in respect of the matters herein.

70. Upon information and belief, Elliott exercised complete domination and control over 44 Wall in purportedly causing it to merge into New 44 Wall and in asserting that each of the Plaintiffs was entitled to “zero” for their membership interests.

71. Upon information and belief, such domination was used to commit wrongs and/or fraud against each of the Plaintiffs, which resulted in injury and loss to each of them. Upon information and belief, Elliott caused KFS to be formed specifically for this purpose.

72. Upon information and belief, the acts and omissions of Elliott were in the course of engagement or as agent of KFS and New 44 Wall, and KFS and New 44 Wall are responsible and liable therefore, and have ratified and/or approved same.

73. Upon information and belief, the acts and omissions of KFS were in the course of engagement or as agent of New 44 Wall, and New 44 Wall is responsible and liable therefore, and has ratified and/or approved same.

74. Upon information and belief, each of the Defendants is the alter ego of the other and each act and acted as one, for the wrongful purpose of acquiring the real estate of 44 Wall, and avoiding the duties and obligations of KFS under the Operating Agreement.

#### **FIRST CAUSE OF ACTION**

**(to enjoin the contribution of the assets of 44 Wall to New 44 Wall, the further encumbrance or the transfer, in whole or in part, of the real estate, or any interest in New 44 Wall, to enjoin the recordation of a deed transferring the real estate to New 44 Wall, and to direct the Defendants, or authorize the Plaintiffs, to cause the execution and filing of a termination of the Agreement of Merger)**

75. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

76. Upon information and belief, Defendants have engaged in wrongful conduct toward each of the Plaintiffs, for which the remedy of injunctive relief is appropriate.

77. Each of the Plaintiffs lacks an adequate remedy at law.

78. The wrongful conduct includes, without limitation, each of the following: failure to make a proper capital call based upon standards established in the Operating Agreement, failure to make a capital call based upon an Annual Plan or Emergency Situation, declaring Plaintiffs in default for alleged failure to meet the capital call, failure to provide proper notice of a meeting to vote upon a merger of 44 Wall into New 44 Wall, absence of legitimate business basis for a merger, basing a merger upon a purported need to raise capital, which was a sham, incorrect and unreasonable basis for a merger, purporting to compel a merger through the use of a written consent of members in lieu of a meeting, causing a merger which was unauthorized under the Operating Agreement, violating and breaching the prohibitions and limitations upon transfer of membership interests/units in 44 Wall as stated in the Operating Agreement, purporting to have complete and sole authority to cause a merger when such action required the consent of SBE, causing a merger to “freeze out” Plaintiffs from the business and assets of 44 Wall, causing the purported termination of Defendants’ continuing and unavoidable duties and responsibilities under the Operating Agreement, causing the termination of the Operating Agreement before its date to terminate, failing to perform the duties and responsibilities of KFS, individually, and as manager under the Operating Agreement, violating and breaching the New York LLCL and BCL 623 in numerous respects, including, without limitation, purporting that each of the Plaintiffs was entitled to “zero” for their membership interests, failing to hold a meeting to vote on merger, and denying Plaintiffs the right to rescind any alleged dissent to a merger, and breaching the cooperating clause of the Operating Agreement, failing to provide Plaintiffs with any of the materials identified in the various letters, notices and the appraisal proceeding, including, but not limited to financial reports and appraisals, breaching the implied covenants of good faith and fair dealing, acting in concert and conspiring to take the assets and

business of 44 Wall to the damage and detriment of each of the Plaintiffs, causing the loss of Plaintiffs' initial capital in 44 Wall of approximately 8 million dollars, and otherwise denying each of the Defendants their rights, benefits and privileges under the Operating Agreement.

79. Upon information and belief, title to the real estate remains vested in Owner, not 44 Wall, and Owner has not consented to the merger, nor has its consent been sought.

80. The purported merger should be terminated and cancelled, and Defendants should be directed to prepare and file the appropriate termination certificate restoring 44 Wall as a separate and independent operating entity.

81. Defendants should be preliminarily and permanently enjoined from contributing or transferring the assets of 44 Wall into New 44 Wall.

82. Defendants should be preliminarily and permanently enjoined from encumbering, hypothecating or causing any lien to be placed or suffered upon the real estate.

83. Defendants should be preliminarily and permanently enjoined from raising capital or funds in New 44 Wall, utilizing the real estate as collateral and/or security.

84. Defendants should be directed to account for any and all acts and omissions which occurred during the period of time that the merger was purported to be effective, and judgment should be entered accordingly.

85. Defendants should be enjoined from the further encumbrance or the transfer, in whole or in part, of the real estate, or any interest in New 44 Wall.

86. Defendants should be enjoined from the recordation of a deed transferring the real estate to New 44 Wall.

87. The Certificate of Merger should be cancelled and terminated of record by the execution and filing of a judgment of the Court or an appropriate document.

88. To enforce the judgment of this Court, in the event that Defendants delay in or fail to take the steps required under the judgment, Plaintiffs seek leave of Court to cause the execution and filing of a termination of the Agreement of Merger.

89. In addition, a mandatory injunction should issue, as necessary, to effectuate the foregoing remedies.

**SECOND CAUSE OF ACTION**  
**(for declaratory relief)**

90. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

91. Upon information and belief, each of the Plaintiffs is entitled to a declaratory judgment having the effect of a final judgment of this Court as to the rights and other legal relations of the parties.

92. Upon information and belief, there exists a justiciable controversy between the parties.

93. The purported merger should be declared to be of no force or effect, null and void, terminated and cancelled.

94. The contribution or transfer of the assets of 44 Wall into New 44 Wall should be declared to be unlawful and in violation of the Operating Agreement and/or the LLCL.

95. The encumbering, hypothecating or causing any lien to be placed or suffered upon the real estate should be declared to be unlawful and in violation of the Operating Agreement and/or the LLCL.

96. The raising of capital or funds in New 44 Wall, utilizing the real estate as purported collateral and/or security should be declared to be unlawful and in violation of the Operating Agreement and/or the LLCL.

97. A declaration should issue directing Defendants to account for any and all acts and omissions which occurred during the period of time that the merger was purported to be effective, and judgment should be entered accordingly.

98. A declaration should issue that 44 Wall is the owner of 44 Wall St, New York, New York.

99. A declaration should issue that the 44 Wall Operating Agreement remains in full force and effect.

100. The Court should otherwise fully declare the rights, benefits, interests and remedies of the Plaintiffs, including but not limited to, any alternative rights and remedies of appraisal and recovery of the value of their membership interests in 44 Wall and the real estate.

### **THIRD CAUSE OF ACTION**

**(to direct KFS to specifically perform under the Operating Agreement, or, alternatively, to remove KFS as manager of 44 Wall and to otherwise declare the rights of Plaintiffs with regard to the management and operation of 44 Wall)**

101. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

102. The Operating Agreement requires KFS to perform its duties and responsibilities to 44 Wall and its members until the end of the term and prohibits KFS from withdrawing or retiring.

103. KFS assumed the duties and responsibilities of manager and is bound thereby.

104. KFS assumed a financing role in 44 Wall and is bound thereby.

105. KFS has ongoing duties and obligations to Plaintiffs, the minority members, which KFS cannot avoid.

106. Upon information and belief, in equity, the Court should compel KFS to specifically perform the Operating Agreement as written.

107. Alternatively, KFS should be removed as manager of 44 Wall.

108. The grounds for removal of KFS as manager exist by reason of the failure and bad faith refusal of KFS to perform the duties and responsibilities of manager, resulting in waste, the purported merger, the offer of “zero” to Plaintiffs for their membership interests, the occurrence of material defaults, which have adverse effect which is more than de minimus on 44 Wall, the defaults being incurable, and the purported assignment, or other disposition of membership interests in violation of the Operating Agreement, and on the grounds that KFS has incapacitated itself from acting as manager of 44 Wall. Since Defendants took over management and supervision of the leasing business for the 44 Wall real estate, occupancy in the building has dropped significantly and the business – which had been profitable until that point – began to post losses.

109. The Operating Agreement, Section 4.4 (a) provides for the removal of KFS as manager by “any SE member.” Plaintiff, SBE is such a member.

110. The removal section anticipates the giving of a notice for removal under the Operating Agreement, which can no longer be given, as Defendants posture that 44 Wall is no longer in existence, and posture that the Operating Agreement is no longer in effect. Thus, the giving of a notice of removal would be futile.

111. The removal section allows KFS to contest any removal of it as manager only “in Court.”

**FOURTH CAUSE OF ACTION**  
**(to impress a constructive trust or equitable trust upon the real estate  
and/or membership interests of New 44 Wall)**

112. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.



113. Defendants wrongfully control, possess, dominate and claim the sole and exclusive rights to 44 Wall and the real estate of 44 Wall.

114. Defendants misused their confidential and fiduciary relationship with and toward Plaintiffs, and their fiduciary duties as members and as manager of 44 Wall, to effectuate the control, possession, and domination, to the damage and detriment of Plaintiffs.

115. Such acts by Defendants violate the rights of Plaintiffs, who have all of the rights of membership in 44 Wall under the Operating Agreement and by law.

116. KFS became manager of 44 Wall under an amendment to the Operating Agreement on Dec 21, 2010, which also related to the settlement of certain claims in litigation, under the express or implied promise by KFS that it would manage 44 Wall as a going concern, for the sole benefit of its members, including Plaintiffs, its minority members.

117. Had KFS revealed that it sought, planned or desired to cause a merger of 44 Wall into an entity owned and controlled solely by Defendants, or otherwise to squeeze out Plaintiffs, and posture the termination of the Operating Agreement, Plaintiffs would certainly not have consented to KFS assuming the duties of manager of 44 Wall or settled the litigation.

118. At all times, Plaintiffs relied upon KFS meeting its fiduciary, contractual and other duties to Plaintiffs. These include but are not limited to the duty of care, duty of loyalty, duty of honesty, duty of full disclosure, duty to refrain from self-dealing, duty to avoid conflicts of interest, duty to minority members, and duty of good faith and fair dealing.

119. Defendants have been and continue to be improperly and unjustly enriched by the purported merger, and their control, possession and domination of 44 Wall and the real estate.

120. In equity, the court should impose a constructive trust or equitable trust upon the membership interests of New 44 Wall and the real estate, and all revenues, income and cash flow therefrom ("Income"), and any and all interests of the Defendants, for the benefit of Plaintiffs.

**FIFTH CAUSE OF ACTION**  
**(accounting)**

121. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

122. By reason of the confidential and fiduciary relationship of Defendants to Plaintiffs, the implied covenants of good faith and fair dealing, and the express provisions of the Operating Agreement, and applicable law, Defendants must account to Plaintiffs for their receipt, control, domination, use and enjoyment of 44 Wall and the real estate, and all income. Ancillary to the grant of equitable relief, upon such accounting, KFS should be surcharged and found liable for the acts and omissions stated herein which caused and continue to cause damage and detriment to Plaintiffs, and judgment should be entered accordingly.

123. In addition, and by case law, Plaintiffs are entitled to an equitable accounting under common law.

**SIXTH CAUSE OF ACTION**  
**(breach of fiduciary duties, self-dealing, inducing and/or**  
**aiding and abetting a breach of fiduciary duties)**

124. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

125. KFS owed and still owe fiduciary duties to Plaintiffs.

126. The remaining Defendants owed and still owe fiduciary duties to Plaintiffs, as the alter ego of KFS, or by reason of their domination and control of KFS and "piercing the veil."

127. KFS has not been performed, and has not been permitted to perform its fiduciary duties to Plaintiffs by the remaining Defendants, who seek to and have benefited and profited by the failure of KFS to do so.

128. The Defendants have been motivated in their breach of fiduciary duties by self-dealing, greed and avarice.

129. The purported merger was and is unauthorized in the Operating Agreement and the alleged basis offered for the merger (to raise capital) was and is a sham; the purported merger was and is beneficial solely to Defendants, who failed to allow a vote of members as to the purported merger and who purported to complete the merger by a written consent of members which egregiously, falsely and fraudulently lists KFS as sole member of 44 Wall.

130. Defendants' conduct was and is wanton and intentional.

131. To the extent that Defendants other than KFS are not the alter ego of KFS (or liable by "piercing the veil"), said Defendants had and have actual knowledge of the breach of fiduciary duties and directly caused them.

132. Ancillary to the grant of equitable relief, Plaintiffs seek damages against each of the Defendants for both breach of fiduciary duties and, as to the Defendants other than KFS, for inducing and/or aiding and abetting the breach of fiduciary duties.

**SEVENTH CAUSE OF ACTION**  
**(fraud)**

133. Plaintiffs repeat and re-allege each and every allegation as if fully set forth herein at length.

134. KFS and the other Defendants, expressly or impliedly, represented to Plaintiffs that KFS would manage 44 Wall for the benefit of its members, including Plaintiffs who are minority members, as a going concern and consistent with the Operating Agreement.

135. Such representations were made with intent that Plaintiffs rely thereon, and Plaintiffs reasonably relied thereon in settling litigation and amending the Operating Agreement and consenting to KFS' role as manager, to their damage and detriment.

136. KFS and the other Defendants concealed from Plaintiffs, their intention to cause a merger and to squeeze out Plaintiffs from 44 Wall and their ownership of the real estate and interests in income.

137. KFS and the other Defendants concealed from Plaintiffs the alleged basis for a merger, as well as each and every document upon which it is allegedly based; KFS and the other Defendants used the self-created need to raise capital as a sham reason for the purported merger, but such reason was false, and a contrived cover story for the outright taking and conversion of the assets of 44 Wall and real estate by Defendants.

138. KFS and each of the Defendants allege to have procured certain appraisals and certain expert opinions in support of merger, none of which it shared with Plaintiffs, and which Defendants have concealed and continue to conceal.

139. KFS and the other Defendants allege to have caused a merger on the basis of a Written Consent of Members in Lieu of a Meeting, which falsely and wrongfully states that KFS was the sole member. At the time of the execution of said document by KFS, Plaintiffs were members of 44 Wall.

140. KFS and the other Defendants falsely and wrongfully purport that Plaintiffs' interests in 44 Wall and the real estate are "zero."

141. Defendants have conspired to breach the Operating Agreement, the fiduciary duties owed Plaintiffs, the statutory rights of Plaintiffs, the implied covenants owed Plaintiffs,

and each and every equitable and legal right of Plaintiffs in 44 Wall and the real estate and Income.

142. Defendants were and are engaged in a scheme and fraud, the purpose of which is to create superficially arguable legal positions for a sham merger transaction, but the true purpose of which is to collapse and terminate 44 Wall, deprive Plaintiffs of their rights and interests in 44 Wall, and their rights under the Operating Agreement, and procure for themselves the assets of 44 Wall and the real estate and Income.

143. Defendants used their capacity as manager of 44 Wall to withhold the facts of this scheme from Plaintiffs.

144. Upon information and belief, this scheme was created, approved, ratified and effectuated by Defendant, Paul Elliott, with callous indifference to Plaintiffs' rights.

**WHEREFORE**, Plaintiffs demand judgment against Defendants as follows:

- a) First Cause of Action, to enjoin the transfer or contribution of the assets of 44 Wall to New 44 Wall, the further encumbrance or the transfer, in whole or in part, of the real estate, or any interest in New 44 Wall, to enjoin the recordation of a deed transferring the real estate to New 44 Wall, and to direct the Defendants, or authorize the Plaintiffs, to cause the execution and filing of a termination of the Agreement of Merger, and
- b) Second Cause of Action, for declaratory relief and judgment accordingly, and
- c) Third cause of Action, to direct KFS to specifically perform under the Operating Agreement, or, alternatively, to remove KFS as manager of 44 Wall and to otherwise declare the rights of Plaintiffs with regard to the management and operation of 44 Wall), and

- d) Fourth Cause of Action, to impress a constructive trust or equitable trust upon the real estate, and/or membership interests of New 44 Wall, and
- e) Fifth Cause of Action, for an accounting and judgment accordingly, and
- f) Sixth Cause of Action, ancillary to equitable relief, for damages for breach of fiduciary duties, self-dealing, inducing and/or aiding and abetting a breach of fiduciary duties, and
- g) Seventh Cause of Action, ancillary to equitable relief, damages for fraud, and
- h) An award of counsel fees and expenses, as appropriate, such other and further relief as to the Court is just and proper, and the costs and disbursements of this action.

**Dated:** New York, New York  
November 20, 2012

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