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

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SBE 44 WALL, LLC and BARUCH 44 WALL, LLC,

Index No. 654038/2012

Plaintiffs,

-against-

NEW 44 WALL STREET, LLC,
KOMMERSIELLA FASTIGHETER IN NY 3 CORP,
and PAUL ELLIOTT,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page*

Statutes

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This Memorandum of Law is submitted on behalf of defendants New 44 Wall Street, LLC ("New Wall"), Kommersiella Fastigheter in NY 3 Corp. ("KFS") and Paul Elliott ("Elliott") in support of the motion to dismiss the instant Complaint ("SE-Second Complaint") as follows:

1) pursuant to CPLR 3211 (a)(4) as there is a prior action pending between these same parties covering the same allegations as the SE-Second Complaint which was served after;
2) pursuant to CPLR 3211(a)(1) on the basis of documentary evidence demonstrating that the SE- Second Complaint has no basis in law; and
3) pursuant to CPLR 3211 (a)(7) for failure to state any causes of action.

The SE-Second Complaint should also be dismissed as against Elliott as any actions taken by Elliott were in his corporate, not personal capacity. The terms are as defined in the Affirmation of Frank Franzino.

INTRODUCTION

The filing of the SE-Second Complaint is a transparent attempt by minority shareholders to force New Wall to pay more than the fair market value for their interests in that company. The following history of the transactions will demonstrate to this Court that the SE-Second Complaint is nothing more than a last ditch effort by disgruntled minority shareholders to force New Wall to pay them; this action should be dismissed. The prior appraisal proceeding filed by New Wall (defendant herein) will fully resolve all of the issues raised by plaintiffs in this SE-Second Complaint.

A. PRIOR HISTORY OF TRANSACTIONS

44 Wall Street LLC, a New York Limited Liability Company (the "Company"), was organized on November 10, 2003 to: 1) acquire 100% equity ownership and be the sole member of 44 Wall Mezz, LLC, a Delaware Limited Liability Company (the "Mezz Borrower"); 2) cause the Mezz Borrower to acquire 100% equity ownership and be the sole member of 44 Wall Owner LLC, a Delaware Limited Liability Company (the "Owner"); and 3) cause the Owner to acquire, lease, own, operate, improve and otherwise deal with an office building located at 44 Wall Street, New York, New York (the "Property"). The Property was acquired by the Owner on January 14, 2004.

In or about May 2006, SBE 44 Management LLC ("SE Management"), SBE 44 Wall LLC ("SE Wall"), Baruch 44 Wall LLC ("Baruch") (collectively the "non-KFS members"), KFS entered into the Amended and Restated Limited Liability Agreement of 44 Wall Street, LLC. The Amended and Restated Limited Liability Agreement was further amended in September 2007 and December 2010 (the "Agreement").

Pursuant to the Agreement, in May 2006, KFS was admitted to the Company with a 75% membership interest in exchange for KFS making an initial capital investment of $27,696,260.94. Once KFS made its initial investment in the Property, the non-KFS members received $10 million apiece. This more than compensated the non-KFS plaintiffs (two of which are plaintiffs in this SE-Second Complaint) for their investment in the Company. Approximately $3.5 million of the proceeds KFS invested was used to pay attorneys' fees, brokerage fees and real estate taxes. There was a $75 million first mortgage on the Property held by Lehman Brothers Holdings, Inc.

The non-KFS members (two of which are plaintiffs in this SE-Second Complaint) participated in ongoing material breaches of the Agreement as more fully detailed in the Petition annexed as Exhibit "B" to the Franzino Affirmation and the pleadings in the KFS Action annexed as Exhibit "C" to the Franzino Affirmation. As a result of these material breaches, KFS instituted an action against these members in the Supreme Court, State of New York in 2009. That initial action was settled on December 21, 2010 with SE Management resigning as Manager and Swig Equities resigning as Agent and Property Manager and SE Wall and Baruch's membership interests being reduced.

B. KFS ASSUMES CONTROL OF COMPANY

The new property manager retained by KFS, ABS Partners Real Estate ("ABS"), informed KFS in December 2011 that $5 million had to be immediately invested into the Company to pay operating expenses, leasehold expenses, and outstanding promissory notes. By letter dated December 19, 2011, notice was given to all members of the Company that pursuant to the terms of the Agreement, KFS, the Manager, made a call for additional capital contribution to the Company for "the purpose of (i) funding shortfalls in the cash flow of the Building to enable the Building to discharge its ongoing obligations, (ii) funding tenant improvements, (iii) funding real estate brokerage commissions, and (iv) funding landlord work on three floors of the Building."

Both Baruch and SE Wall failed to make their additional capital contributions. Both were informed by letters dated January 30, 2012 that they had failed to make these capital contributions. As a result of these failures and with an urgent need to meet ongoing property management expenses, KFS was alone forced to make the entire $5 million capital contribution.

By letters, both Baruch and SE Wall requested certain information with respect to the Property. On February 17, 2012, John Finley, Esq. sent a letter to Baruch and SE Wall with information with respect to the Property, including the Company's 2011 Annual Report and detailed financial information.

An appraisal of the Property was done by Realogic as of June 30, 2012. The Estimate of the Value of the Property was from $57,000,000 to $63,000,000, which is substantially below the current principal amount of the mortgage on the property ($73,678,071). An appraisal of the market value of a 21.8% interest in the Company as of March 16, 2012 was performed by James L. Levy, State of New York Certified General Appraiser. That appraisal determined that the market value is zero dollars. Respondents' attorneys have been provided with both of these appraisals.

Given the size of the existing mortgage and the fact that it was due and owing in 2016, KFS, as Manager of the Company, sought to refinance this debt. However, KFS was advised that financial institutions are unwilling to refinance this debt based on the low appraised value of the Property and the fact that Messrs Swig (of SE Wall) and Zamir (of Baruch) are minority members of the Company. ABS, the property manager of the Property, has informed KFS that an additional $5 million capital contribution must be made immediately to maintain the Property and make necessary repairs. KFS was informed that substantial monies would also be needed to be invested.

The non-KFS members of the Company failed to respond to the initial capital call, thereby putting the Company at risk. KFS made the entire original $5 million capital call and will have to make the second entire $5 million contribution (as well as any additional funds). SE Wall and Baruch were unwilling to put up any capital thereby putting the Company in financial

peril. As a result, the only alternative for KFS was to implement the Merger creating a new entity, without respondents.

C. KFS INSTITUTES PROCEEDING WITH PETITION IN AUGUST 2012

The merger of 44 Wall into New Wall was accomplished pursuant to and following a meeting on or about July 9, 2012. Following the Merger, as provided in N.Y. Bus. Corp. Law § 623, New Wall sent each of the plaintiffs herein a letter informing them of the appraisals and the value of their interests. Both SE Wall and Baruch sent letters objecting to the appraisal amounts but neither provided alternate appraisals as to the worth of their minority interests. This rejection left New Wall with no choice but to institute a proceeding to fix the fair market value of SE Wall and Baruch's interest in New Wall pursuant to N.Y. BCL §623 ("First Action").

D. SE WALL AND BARUCH FILE COMPETING ACTION

After service of a copy of the Petition commencing the First Action in August 2012 and after requesting several adjournments of the time to answer which were granted by New Wall, SE Wall and Baruch then made a motion to dismiss the First Action claiming that they were instituting a plenary action. At the time SE Wall and Baruch made their motion to dismiss the First Action, the SE-Second Complaint had been filed but not serve upon New Wall, KFS and Elliott. New Wall, KFS and Elliott had not seen the SE-Second Complaint until December 7, 2012, right before their opposition papers to the motion to dismiss in the First Action were due. The First Action by New Wall was thus filed and served before the SE-Second Complaint. All of SE Wall and Baruch's causes of action in the SE-Second Complaint may be determined in the context of the previously filed First Action. For this reason alone, the SE-Second Complaint should be dismissed or in the alternative stayed pending a decision by this Court on the motion to

dismiss the First Action, and a determination by this Court of the fair market value of SE Wall and Baruch's minority interests in the Company in the First Action.

POINT I

THE FIRST ACTION PRECLUDES THE SE-SECOND COMPLAINT

Pursuant to CPLR 3211 (a)(4), a motion to dismiss may be granted where there is prior action pending between the same parties over the same subject matter as the new action. See Chang v. Zapson, 67 A.D.3d 435, 890 N.Y.S.2d 463 (1st Dept. 2009) (dismissing a second in time action filed by a 50% owner alleging malfeasance against successor receiver where the first filed action was the same as the new action); see also Ten Best Bar Rest. Group, Inc. v. Roche, 278 A.D.2d 27, 717 N.Y.S.2d 522 (1st Dept. 2000) (dismissing a second filed action where the first action requested similar relief).

The rule of CPLR 3211 (a)(4) is designed to protect litigants against having to defend against the same claims in two separate actions. See North Fork Bank v. Grover, 3 Misc.3d 341, 773 N.Y.S.2d 231 (Dist. Ct. 2004); see also Maroney v. Hawkins, 24 Misc.3d 1227, 897 N.Y.S.2d 670 (Sup. Ct. Nassau Co. 2006) (dismissing an action for the breach of a shareholder's agreement where the ultimate relief sought- a fair appraisal of the value of shares was the same in both actions. In the second action, plaintiff had alleged that defendants failed to buy him out at the price predetermined in the shareholders' agreement. Since the first action would include such a determination, the Supreme Court found that two actions were not necessary).

In Clarity Connect, Inc. v. AT & T Corp., 15 A.D.3d 767, 788 N.Y.S.2d 870 (3d Dept. 2005), the Third Department affirmed the dismissal of a declaratory judgment action where there was prior action pending for a money judgment. The Third Department found that "[i]nasmuch as defendants' action for a money judgment, in which plaintiff has answered and counterclaimed,

will permit a full resolution of plaintiff's rights and obligations under its account with defendants, including its demand for certain credits and offset, we agree with Supreme Court that plaintiff's action seeking only declaratory relief as to those same issues would be of little, if any, utility or necessity" Id., 15 A.D.3d 767, 767, 788 N.Y.S.2d 870, 871 (3d Dept. 2005); see also JC Mfg, Inc. v. NPI Electric, Inc., 178 A.D.2d 505, 577 N.Y.S.2d 145, (2d Dept. 1991) (affirming the dismissal of a second action where "[t]he pleadings in both actions show that both are based upon the same contractual agreements and arise out of the same actionable wrongs. Additionally, there is substantial identity of the parties, and the nature of the relief sought is substantially the same. We see no good reason for two actions rather than one" Id., 178 A.D.2d 505, 506, 577 N.Y.S.2d 145, 146 (2d Dept. 1991)).

Here, it is undisputed that New Wall instituted the appraisal proceeding first- after the initiation of a capital call which was ignored by SE Wall and Baruch and after learning that any attempt to obtain new financing for the Company would be barred by the presence of SE Wall and Baruch as minority shareholders in the Company. New Wall provided SE Wall and Baruch with all of the documents related to the value of their minority interests and all of the financial documents they requested. Neither SE Wall nor Baruch has provided this Court or New Wall with any appraisal demonstrating that their minority interests are worth more than New Wall contends.

Instead, this plenary action is merely an attempt by SE Wall and Baruch to obtain more than the fair value for their minority interests. Both have claimed that this plenary action is necessary because their allegations of fraud and breach of fiduciary duty cannot be determined in the context of an appraisal proceeding. That is not the case. As the Supreme Court held in Direct Media v. Rubin, 171 Misc.2d 505, 654 N.Y.S.2d 986 (Sup. Ct. NY Co 1997), "[t]he remedy of

shareholders dissenting from a merger or a sale of all of the assets of a corporation is to obtain the fair value of their stock through an appraisal proceeding...This does not mean that claims of breach of fiduciary duty by majority shareholders may not be asserted in the appraisal proceeding." Id., 171 Misc.2d 505, 508, 509, 654 N.Y.S.2d 986, 988, 989 (Sup. Ct. NY Co 1997); see also Grace v. Rosenstock, 228 F.3d 40 (2d Cir. 2000).

As demonstrated in Direct Media and Grace, any and all claims by SE Wall and Baruch that they were somehow "frozen" out of the Company by the actions of New Wall and KFS are claims which can be addressed in the context of the appraisal proceeding instituted first by New Wall. There, in the appraisal proceeding, SE Wall and Baruch may interpose counterclaims against New Wall based upon any alleged breach of fiduciary duty. The value of their minority interests will be ascertained. Should this Court determine that they were offered less than fair value for their minority interests, this would be accounted for in the determination of the fair market value. There is no need for the plenary action embodied in the SE-Second Complaint as it is duplicative of the First Action.

The motion to dismiss should be granted in all respects.

POINT II

CPLR 3211 (a)(1) PRECLUDES THIS PROCEEDING

Pursuant to CPLR 3211 (a)(1), a party may move to dismiss an action based upon documentary evidence which disposes of all of the claims in that action. CPLR 3211 provides as follows: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence..."

"In view of the documentary evidence, to wit, deeds signed by plaintiff Igarashi at the closings of the four properties in question indicating that both Igarashi and defendant Higashi are the owners of the properties, dismissal of the first four causes of action, which essentially claims that plaintiff was the sole owner of the property was appropriate. While pleadings should be liberally construed on a motion to dismiss, claims 'flatly contradicted by documentary evidence should be rejected.'" Igarashi v. Higashi, 289 A.D.2d 128, 735 N.Y.S.2d 33, 34 (1st Dept. 2001). See also Hicksville Dry Cleaners, Inc. v. Stanley Fastening Systems, LP, 37 A.D.3d 218, 830 N.Y.S.2d 530 (1st Dept 2007) (holding that "[p]laintiff's allegation that it purchased the allegedly defective product from defendant is flatly contradicted by defendant's sales records, and absent any evidence in plaintiff's opposition tending to substantiate such allegation, the cause of action for breach of contract was properly dismissed." Id., 37 A.D.3d 218, 830 N.Y.S.2d 530, 531 (1st Dept 2007)).

In Morgenthow & Latham v.Bank of NY Co., 305 A.D.2d 74, 760 N.Y.S.2d 438 (1st Dept. 2003), the First Department held that prior informal judicial admissions in another action between the parties may be the basis for a motion to dismiss based upon documentary evidence. See also Info Mgt. Network, LLC v. O'Connor, 07-601881 N.Y. Slip Op 309600 (Sup. Ct. N.Y. Co. 2008).

In the case at bar, the documentary evidence presented by New Wall demonstrates to this Court that SE Wall and Baruch do not have any claims herein. KFS was compelled to institute the 2009 action against, inter alia, SE Wall and Baruch, for their obvious failures to follow proper procedures in dealing with the Company and their misappropriation of corporate assets for themselves. SE Wall and Baruch cannot now contend that they did appropriate such assets for themselves as this issue was previously litigated against them in the KFS Action.

As noted in Morgenthow, the issue of SE Wall and Baruch's malfeasance directed against KFS and against the Company has already been determined in the 2009 action. It was the very actions of SE Wall and Baruch in misappropriating corporate assets which caused the dire financial condition of the Company when KFS assumed control.

Once KFS assumed control of the Company, it retained an independent property manager. KFS was compelled to finance improvements to the Property without the financial assistance or cooperation of SE Wall and Baruch. In addition to the original $25 million investment in the Company, KFS had no choice but to invest $5 million more required to manage the Property as both SE Wall and Baruch conveniently ignored capital calls.

When KFS was informed that another $5 million was required, it again sought the cooperation of SE Wall and Baruch, but again was ignored. Prior to applying for new financing, KFS was told that the presence of Swig and Baruch in the Company would result in denial of any application.

Requiring new financing, KFS sought to merge the Company with a new entity which had no ties to SE Wall and Baruch. KFS then followed all of the required formalities before instituting this Merger. SE Wall and Baruch were given information on the value of the Company as a whole and the value of their individual interests. According to independent appraisers retained by KFS, the value of SE Wall and Baruch's interests in the Company were zero. While SE Wall and Baruch contend that their interests are worth more than zero, they have presented this Court with no extrinsic evidence to back up their contentions. They could have retained an appraiser to value the Company and to value their interests but they did not bother to do so.

The sum total of the documentary evidence herein- SE Wall and Baruch's prior defalcations with regard to KFS in 2009, the 2009 proceeding instituted by KFS which was settled with SE Wall and Baruch relinquishing part of their interests in the Company, the capital calls, the independent appraisals obtained by New Wall and KFS and shared with SE Wall and Baruch, and the failure of SE Wall and Baruch to present alternative appraisals demonstrate to this Court that SE Wall and Baruch do not have any viable claims herein. The motion to dismiss should be granted in its entirety.

POINT III

THE FRAUD CLAIMS HEREIN ARE NOT VIABLE

Several of the claims against New Wall, KFS and Elliott sound in fraud. None of these claims are viable and should be dismissed pursuant to CPLR § 3211 (a)(7).

Since fraud is an intentional tort, SE Wall and Baruch must prove the following by clear and convincing evidence: that defendants made statements which were false when made, that defendants intended to make the statements so that SE Wall and Baruch would rely upon these statements in determining that their minority interests were worthless, that SE Wall and Baruch relied upon these appraisals to their detriment and suffered damages as a result. See also New York City Transit Authority v. Morris J. Eisen, P.C., 276 A.D.2d 78, 715 N.Y.S.2d 232 (1st Dept. 2000) (holding that "an actionable fraud claim requires proof that defendant made a misrepresentation of fact which was false and known to be false. It also requires a showing that the misrepresentation was made with the intent to induce another party's reliance upon it" Id., 276 A.D.2d 78, 85, 715 N.Y.S.2d 232, 237 (1st Dept. 2000)).

A party pleading fraud must show that the victim of the fraud did not have access to the correct information and thus, relied upon misinformation. See East End Cement & Stone, Inc. v.

Carnavale,73 A.D.3d 974, 903 N.Y.S.2d 420 (2d Dept. 2010) ("if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transactions by misrepresentations") (citations omitted) Id., 73 A.D.3d 974, 975, 903 N.Y.S.2d 420 (2d Dept. 2010); See also Perez-Faringer v. Heilman, 95 A.D.3d 853, 944 N.Y.S.2d 170 (2d Dept. 2012). Here, SE Wall and Baruch were not denied access to corporate accounts and were given the appropriate financial documents and the appraisals.

Secondly, SE Wall and Baruch will be unable to prove as a matter of law another essential element of fraud- reliance. In Gomez-Jimenez v. New York Law School,, 36 Misc.3d 230, 943 N.Y.S.2d 834 (Sup. Ct. N.Y. Co. 2012) (dismissing a class action against a law school by graduates who claimed they were induced to matriculate by false job placement statistics). See also Onanuga v. Pfizer, Inc., No 03 Civ. 5405, 2003 WL 22670842 (S.D.N.Y. 2003) (holding that absence of allegations that plaintiff relied upon statements to their detriment is fatal to a claim sounding in fraud).

In the case at bar, SE Wall and Baruch had full and fair access to all of the corporate documents should they have chosen to review them. KFS provided a full set of accounting documents and the appraisal documents to them. Without a separate appraisal showing that New Wall and KFS used a faulty means to determine the value of the minority interests, SE Wall and Baruch will be unable to prove any reliance or prove that their interests were worth more than zero. The fact that SE Wall and Baruch have failed to annex an alternate appraisal showing that

their interests were worth more than the zero propounded by New Wall, demonstrates that there is no fraud here. The motion to dismiss should be granted.

POINT IV

THE SE-SECOND COMPLAINT FAILS TO STATE ANY CAUSES OF ACTION

Pursuant to CPLR 3211(a)(7), a complaint may be dismissed where it fails to state a cause of action. Pleadings are liberally construed in favor of the party against whom the motion is made. The complaint states causes of action for breach of fiduciary duty, for an accounting, for a constructive trust, for removal of KFS as the managing partner and for fraud. As noted above, the fraud claim is not viable.

As to the remaining claims, all of these claims are derivative, not individual claims. As such, these claims should be dismissed. The complaint does not state that there was a demand made upon the Company to pursue these claims or that such a demand would have been futile. See Trump v. Chen, 63 A.D.3d 623, 882 N.Y.S. 2d 87 (1st Dept 2009) (dismissing a complaint by a minority limited partner against the majority limited partners for selling the assets of the limited partnership at an unreasonably low price).

In Yudell v. Gilbert, 99 A.D. 3d 108, 949 N.Y.S. 2d 380, 383 (1st Dept 2012), the First Department found that "where shareholders suffer solely through depreciation in the value of their stock, the claim is derivative... (citations omitted) even if the diminution in value derives from a breach of fiduciary duty... Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation"). See also Abrams v. Donati, 66 N.Y. 2d 951 (Ct. of Appeals 1985).

Here as in Yudell and Abrams, any claims by plaintiffs that the Company has suffered losses as a result of KFS' mismanagement amount to derivative, not individual claims. Since

plaintiff herein did not bother to plead derivative claims or make any type of demand upon KFS, the complaint fails to state any causes of action.

In addition, the complaint is barred by the business judgment rule. In Frankel v. Am. Film Tech., 177 Misc.2d 279, 675 N.Y.S.2d 837 (Sup. Ct. Monroe Co. 1998), the Supreme Court dismissed an action by a minority shareholder alleging that the directors of a corporation had managed the company for their own benefit and not for the benefit of the company. The Court found that the business judgment rule barred the action.

In Security Police & Fire Prof. Am Retirement Fund v. Mack, 30 Misc.3d 663, 917 N.Y.S.2d 527 (Sup. Ct. N.Y. Co. 2010), the Supreme Court dismissed claims of unjust enrichment and breach of fiduciary duties by shareholders against the board of directors of Morgan Stanley. The Supreme Court dismissed the complaint finding that the level of compensation determined by the board of directors were discretionary actions within the purvey of the business judgment rule.

Here, as in Security and Frankel, SE Wall and Baruch will be unable, as a matter of law, to prove that any of the defendants acted in violation of their obligations to them and the KFS, Elliott and New Wall were protected by the business judgment rule.

The motion to dismiss should be granted.

POINT V

PAUL ELLIOTT IS NOT A PROPER PARTY HERE

As the Court of Appeal noted in Morris v. New York State Department of Taxation, 82 N.Y.2d 135, 603 N.Y.S.2d 807 (1993), "a corporation exists independently of its owners, as a separate legal entity, that the owners are not normally liable for the debts of the corporation, and

that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." Id., 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 810 (1993).

"An owner and shareholder of a corporation is not individually liable for the torts of that corporation unless it is established that complete domination was exerted by the owner or shareholder to commit a wrong against one seeking to pierce the corporate veil." Brito v. DILP Corp., 282 A.D.2d 320, 321, 723 N.Y.S.2d 459, 460 (1st Dept. 2001).

As noted above, SE Wall and Baruch will be unable to prove fraud by any of the defendants here. Additionally, the SE-Second Complaint does not include any allegations that Elliott in any way abused the corporate form or that he abused the corporate form with intent to deceive the plaintiffs herein. Absent a legal showing that Elliott misused the corporate form, he should be dismissed from this action.

In a case similar to the case at bar, Lichtman v. Estrin, 282 A.D.2d 326, 723 N.Y.S.2d 185 (1st Dept. 2001), the First Department affirmed the dismissal of a complaint against a corporate officer. The First Department held that when the complaint did not include any allegations that the corporate form was abused by the individual defendant or that there was complete domination over the corporation by the individual defendant with intent to commit a wrong against plaintiff, the complaint should be dismissed against the individual defendant.

Similarly, in Buehner v. International Business Machines Corp., 270 A.D.2d 299, 704 N.Y.S.2d 303 (2d Dept. 2000), the Second Department affirmed the dismissal of a complaint against a parent corporation and against accountants. The Second Department found that absent any allegations warranting piercing the corporate veil that the complaint should be dismissed.

POINT VI

ABSENT DISMISSAL, SE-SECOND COMPLAINT SHOULD BE STAYED PENDING OUTCOME OF FIRST ACTION

At this time, the First Action was filed and served prior to the SE-Second Complaint. SE Wall and Baruch made a motion to dismiss the First Action based upon the existence of the SE-Second Complaint, a plenary action.

Should this Court determine that it is not appropriate to dismiss the SE-Second Complaint at this time; the SE-Second Complaint should be stayed pending the decision and order on the motion to dismiss.

Second, should this Court deny the motion to dismiss the First Action, the SE-Second Complaint should be stayed pending the outcome of the appraisal proceeding. In all likelihood, the First Action (appraisal proceeding), will determine all of the rights of the parties thereby eliminating any need to litigate the SE-Second Complaint. See Tong v. SAC Capital Mgt LLC, 16 Misc.3d 401, 835 N.Y.S. 2d 881 (Sup. Ct. N.Y. Co. 2007).

CONCLUSION

For all of the reasons heretofore stated, defendants' motion to dismiss should be granted in its entirety. In the alternative, this action should be stayed pending the outcome of the First Action.

Dated: New York, New York
January 11, 2013

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