

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

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	:	
ROBERT SHAPIRO,	:	Index No.: 653571/2014
	:	
Plaintiff,	:	
	:	
- v -	:	
	:	VERIFIED ANSWER,
GABRIEL ETTENSON and DAVID NEWMAN,	:	AFFIRMATIVE DEFENSES,
	:	AND COUNTERCLAIMS
	:	
Defendants.	:	
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Defendants Gabriel Ettenson (“Ettenson”) and David Newman (“Newman”) (together, “Defendants”), by and through their undersigned attorneys, hereby respond to the Verified Complaint (the “Complaint”) of Robert Shapiro (“Plaintiff” or “Shapiro”), dated November 17, 2014, upon knowledge with respect to their own acts and upon information and belief as to all other matters, as follows:

ANSWER

FIRST CAUSE OF ACTION

1. Defendants admit that Shapiro is an individual, but lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in 1 of the Complaint.
2. Admitted.
3. Admitted.
4. Defendants admit that ENS Health, LLC (“ENS or the “Company”) was formed at the direction of Shapiro, Ettenson, and Newman in January 2012, and that ENS was organized pursuant to the New York Limited Liability Company Law, N.Y. Limit. Liab. Co. § 101, et. seq.

(the “LLC Law”). Defendants further admit that Shapiro, Ettenson, and Newman are each currently one-third owners of ENS and have continuously been one-third owners of ENS since the formation of the Company. Except as stated, Defendants deny the remaining allegations set forth in paragraph 4 of the Complaint.

5. Defendants admit that Shapiro, Ettenson, and Newman are each currently one-third owners of ENS and have continuously been one-third owners of ENS since the formation of the Company. Defendants further admit that the Company’s original Articles of Organization were filed with the New York Department of State on January 11, 2012, and that the Company was initially a member-managed limited liability company by virtue of the fact that the Company’s original Articles of Organization did not specifically provide for management of the Company by a manager or managers or a class or classes of managers. Defendants refer the Court to the LLC Law and the Company’s original Articles of Organization for their actual language and complete provisions and terms. Except stated, the remaining allegations set forth in paragraph 5 of the Complaint are denied.

6. Denied.

7. Defendants admit that, from its formation, the Company has been governed by and operated in accordance with has the LLC Law. Except as stated, the remaining allegations set forth in paragraph 7 of the Complaint are denied.

8. Defendants admit that on December 13, 2013, they approved and adopted an operating agreement for the Company (the “Operating Agreement”) in accordance with the LLC Law. Defendants further admit that Shapiro did not sign the Operating Agreement and that Defendants were authorized under the LLC Law to execute the Operating Agreement for the

Company. Except as stated, the remaining allegations set forth in paragraph 8 of the Complaint are denied.

9. Defendants admit that ENS is a limited liability company formed and existing under the LLC Law. Except as stated, the allegations of paragraph 9 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 9 of the Complaint.

10. Defendants admit that ENS is a limited liability company formed and existing under the LLC Law. Section § 417(c) of the LLC Law speaks for itself, and Defendants refer the Court to § 417(c) of the LLC Law for its complete and actual provisions. Except as stated, the remaining allegations of paragraph 10 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants lack information or knowledge sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 10 of the Complaint

11. Defendants admit that no written operating agreement for the Company was entered into by Shapiro, Ettenson, and Newman before, at the time of, or within ninety days after the filing of the Company's original Articles of Organization on January 11, 2012. Except as stated, Defendants deny the remaining allegations set forth in paragraph 11 of the Complaint.

12. The terms of the Operating Agreement speak for themselves, and Defendants respectfully refer the Court to the entire Operating Agreement for its complete and actual terms. Except as stated, Defendants deny the allegations set forth in paragraph 12 of the Complaint.

13. The terms of the Operating Agreement speak for themselves, and Defendants respectfully refer the Court to the entire Operating Agreement for its complete and actual terms. Except as stated, Defendants deny the allegations set forth in paragraph 13 of the Complaint.

14. Denied.

15. Defendants admit that Shapiro was duly provided, in accordance with the LLC Law, with a Notice of Action Taken at Meeting Held on October 14, 2014 (the “October 2014 Notice of Action”). Defendants further admit that they signed the October 2014 Notice of Action. The October 2014 Notice of Action speaks for itself, and Defendants respectfully refer the Court to the October 2014 Notice of Action for its complete and actual terms. Except as stated, the remaining allegations set forth in paragraph 15 of the Complaint are denied.

16. The October 2014 Notice of Action speaks for itself, and Defendants respectfully refer the Court to the October 2014 Notice of Action for its complete and actual terms. Except as stated, the remaining allegations set forth in paragraph 16 of the Complaint are denied.

17. Defendants admit that Shapiro was duly provided, in accordance with the LLC Law, with a Notice of Call for Additional Capital Contributions from Members (the “Capital Call”) at the same time he was provided with the October 2014 Notice of Action. Defendants further admit that they signed the Capital Call. The Capital Call speaks for itself, and Defendants respectfully refer the Court to the Capital Call for its complete and actual terms. Except as stated, the remaining allegations set forth in paragraph 17 of the Complaint are denied.

18. The Capital Call speaks for itself, and Defendants respectfully refer the Court to the Capital Call for its complete and actual terms. Except as stated, the remaining allegations set forth in paragraph 18 of the Complaint are denied.

19. The Capital Call speaks for itself, and Defendants respectfully refer the Court to the Capital Call for its complete and actual terms. Except as stated, the remaining allegations set forth in paragraph 19 of the Complaint are denied.

20. Denied.

21. The allegations of paragraph 21 set forth legal conclusions to which no response is required. To the extent a response is required, the allegations set forth in paragraph 21 of the Complaint are denied.

22. The allegations of paragraph 22 set forth a prayer for legal relief and/or legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 22 of the Complaint and request a judgment dismissing the Complaint with prejudice.

SECOND CAUSE OF ACTION

23. Defendants incorporate their responses to paragraphs 1 through 22 of the Complaint as though set forth at length herein.

24. Denied.

25. Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 25 of the Complaint.

26. Defendants admit that, at a meeting in September 2013, Shapiro, Ettenson, and Newman agreed that each could receive monthly salaries from time to time on the basis of the following annualized rates: Shapiro, \$50,000, Ettenson, \$100,000, and Newman, \$100,000. Except as stated, Defendants deny the remaining allegations set forth in paragraph 26 of the Complaint.

27. Denied.

28. Denied.

29. Denied.

30. The allegations of paragraph 30 set forth legal conclusions to which no response is required. To the extent a response is required, the allegations set forth in paragraph 30 of the Complaint are denied.

31. The allegations of paragraph 31 set forth a prayer for legal relief and/or legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 31 of the Complaint and request a judgment dismissing the Complaint with prejudice.

THIRD CAUSE OF ACTION

32. Defendants incorporate their responses to paragraphs 1 through 31 of the Complaint as though set forth at length herein.

33. The allegations of paragraph 33 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 33 of the Complaint.

34. Denied.

35. The allegations of paragraph 35 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 35 of the Complaint.

36. The allegations of paragraph 36 set forth a prayer for legal relief and/or legal conclusions to which no response is required. To the extent a response is required, Defendants

deny the allegations set forth in paragraph 36 of the Complaint and request a judgment dismissing the Complaint with prejudice.

FOURTH CAUSE OF ACTION

37. Defendants incorporate their responses to paragraphs 1 through 36 of the Complaint as though set forth at length herein.

38. The allegations of paragraph 38 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 38 of the Complaint.

39. Denied.

40. The allegations of paragraph 40 set forth a prayer for legal relief and/or legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 40 of the Complaint and request a judgment dismissing the Complaint with prejudice.

FIFTH CAUSE OF ACTION

41. Defendants incorporate their responses to paragraphs 1 through 40 of the Complaint as though set forth at length herein.

42. The allegations of paragraph 42 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 42 of the Complaint.

43. Denied.

44. The allegations of paragraph 44 set forth legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 44 of the Complaint.

45. The allegations of paragraph 45 set forth a prayer for legal relief and/or legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations set forth in paragraph 45 of the Complaint and request a judgment dismissing the Complaint with prejudice..

AFFIRMATIVE AND OTHER DEFENSES

Defendants hereby assert the following affirmative and other defenses without assuming the burden of proof as to any such defense that would otherwise rest with Plaintiff:

1. The Complaint fails, in whole or in part, to state a cause of action against Defendants.
2. The allegations of the Complaint are barred, in whole or in part, by the documentary evidence.
3. The allegations of the Complaint are barred, in whole or in part, by the LLC Law and other controlling law.
4. The allegations of the Complaint are barred, in whole or in part, by the doctrines of laches, estoppel, acquiescence, waiver, ratification, and unclean hands.
5. The allegations of the Complaint are barred, in whole or in part, by the business judgment rule.
6. Defendants neither owed nor breached any fiduciary duty to Plaintiff.
7. Plaintiff has suffered no cognizable loss or damages.
8. Plaintiff has failed to mitigate his damages, if any.

9. Plaintiff's damages, if any, are speculative and not recoverable.
10. Plaintiff's damages, if any, were not actually or proximately caused by Defendants.
11. Plaintiff's damages, if any, are due in whole or in part to the acts of Plaintiff.
12. The supposed contracts and agreements upon which Plaintiff's claims are based, if any such contracts and agreements even exist, are invalid, void, and unenforceable.
13. The allegations of the Complaint are barred, in whole or in part, by Plaintiff's own breaches of his fiduciary and/or other duties.
14. The allegations of the Complaint are barred, in whole or in part, by the doctrine of accord and satisfaction.
15. The allegations of the Complaint are barred, in whole or in part, by Plaintiff's admissions.
16. Plaintiff's claims against Defendants are barred, in whole or in part, because of the contributory or comparative fault of Plaintiff or others.
17. The allegations of the Complaint are barred, in whole or in part, by the terms of the applicable agreements between and among the parties.
18. The allegations of the Complaint are barred, in whole or in part, due to Plaintiff's material breaches of the express and implied terms of the applicable agreements between and among the parties.
19. To the extent that Plaintiff seeks damages for any alleged injury that occurred prior to the applicable limitations period, the Complaint is barred, in whole or in part, by the applicable statutes of limitations and/or repose.

20. Defendants reserve the right to assert and/or to amend this answer to assert additional affirmative and other defenses as may be appropriate.

COUNTERCLAIMS

Ettenson and Newman (hereinafter, “Counterclaimants”), by and through their undersigned attorneys, hereby assert the following Counterclaims against Shapiro, based upon knowledge with respect to their own acts and upon information and belief as to all other matters:

1. The Company is a limited liability company organized and existing pursuant to the LLC Law.

2. The Company engages in the marketing, sale, and distribution of the HyperVibe Performance Whole Body Vibration Machine pursuant to an exclusive distributorship agreement with HyperVibe Pty. Ltd.

3. The Company’s original Articles of Organization were signed by Shapiro and filed with the New York Secretary of State on January 11, 2012.

4. As a limited liability company organized and existing pursuant to the LLC Law, the Company has at all times since formation been governed by the LLC Law.

5. The Company was initially established as a member-managed limited liability company by virtue of the fact that the Company’s original Articles of Organization did not specifically provide for management of the Company by a manager or managers or a class or classes of managers.

6. At all times since formation, the only members of the Company have been Shapiro, Ettenson, and Newman.

7. At all times since formation, Shapiro, Ettenson, and Newman have each been entitled to a one-third share of the current profits of the Company.

8. At all times since formation of the Company, Shapiro, Ettenson, and Newman each have had one-third management rights.

9. At all times since formation, any two members of the Company, including Ettenson and Newman, together comprise a “majority in interest of the members” of the Company, as that term is defined in §102(o) of the LLC Law.

10. The Company did not have at formation, and has never had at any time since formation, any “operating agreement,” as that term is defined in §102(u) of the LLC Law, requiring the Company to be member-managed, requiring all material decisions to be made by unanimous vote of the members, or providing that in the event of a capital call, the inability or decision of a member not to make any payment on account of a capital call would not result in any diminution of that member’s membership interest.

FIRST COUNTERCLAIM
(Declaratory Relief – Operating Agreement)

11. Counterclaimants repeat and reallege all of the foregoing allegations of the Counterclaims as though fully set forth herein.

12. Prior to December 13, 2013, the Company did not have any “operating agreement,” as that term is defined in §102(u) of the LLC Law.

13. On December 13, 2013, Counterclaimants acted pursuant to the LLC Law to approve and adopt the Operating Agreement for the Company, and in connection therewith to authorize Ettenson and Newman to execute and deliver the Operating Agreement on behalf of the Company.

14. Ettenson and Newman executed and delivered the Operating Agreement on behalf of the Company, and all requisite notices and consents relating to Counterclaimants’ actions pursuant to the LLC Law to approve, adopt, execute, and deliver the Operating Agreement for

the Company were promptly delivered to Shapiro (among others) in accordance with the LLC Law via certified mail, return receipt requested.

15. At the time Ettenson and Newman acted pursuant to the LLC Law to approve, adopt, execute, and deliver the Operating Agreement for the Company, Ettenson and Newman together comprised a “majority in interest of the members” of the Company, as that term is defined in §102(o) of the LLC Law.

16. Shapiro objected to the Operating Agreement through counsel by letter dated December 24, 2013, claiming it to be “of no legal force and effect” and requesting that Ettenson and Newman “immediately rescind the actions taken and withdraw the ... Operating Agreement.”

17. Counterclaimants, through counsel, responded to Shapiro’s objections by letter dated January 2, 2014, declining to rescind the Operating Agreement because it “is valid, binding, and consistent with the [LLC] Law in all respects.”

18. Shapiro did not respond to Counterclaimants’ letter dated January 2, 2014, or take any further action to challenge the Operating Agreement until he commenced the above-entitled action. Moreover, following Counterclaimants’ letter dated January 2, 2014, but before he commenced the above-entitled action, Shapiro participated in meetings of the Company’s members held pursuant to § 6.09 of the Operating Agreement.

19. Shapiro has again challenged the validity of the Operating Agreement, contending that it is invalid and of no legal force or effect.

20. Counterclaimants continue to maintain that the Operating Agreement and each of its provisions are valid and binding on the Company and each of its members, including Shapiro.

21. There exists a genuine dispute and justiciable controversy among the parties concerning the validity of the Operating Agreement and its binding effect on the Company and each of its members, including Shapiro.

22. Counterclaimants therefore seek a declaratory judgment pursuant to CPLR 3001 regarding the validity of the Operating Agreement and each of its provisions, and its binding effect on the Company and each of its members, including Shapiro.

**SECOND COUNTERCLAIM
(Declaratory Relief – Amendment to Articles of Organization)**

23. Counterclaimants repeat and reallege all of the foregoing allegations of the Counterclaims as though fully set forth herein.

24. On December 13, 2013, in connection with the adoption of the Operating Agreement, Counterclaimants also acted pursuant to the LLC Law to authorize an amendment to the Company's original Articles of Organization in order to provide for the management of the Company by one or more managers and to authorize each of Ettenson and Newman to execute and file a Certificate of Amendment with the New York Department of State to effect such an amendment to the Company's original Articles of Organization.

25. All requisite notices and consents relating to Counterclaimants' actions pursuant to the LLC Law to authorize the forgoing amendment to the Company's original Articles of Organization, including with respect to its execution and filing, were promptly delivered to Shapiro (among others) in accordance with the LLC Law via certified mail, return receipt requested.

26. At the time Counterclaimants acted pursuant to the LLC Law to authorize the forgoing amendment to the Company's original Articles of Organization, including with respect

to its execution and filing, Ettenson and Newman together comprised a “majority in interest of the members” of the Company, as that term is defined in §102(o) of the LLC Law.

27. Newman signed on behalf of the Company a Certificate of Amendment of the Company’s Articles of Organization (the “Amendment”) on December 20, 2013. The Amendment added a new Article FOURTH, providing that the Company “shall be managed by one or more managers.” The Amendment was filed with the New York Secretary of State on December 23, 2013, and provided to Shapiro (through his attorney) under cover letter dated January 2, 2014.

28. Pursuant to § 6.01 of the Operating Agreement, Shapiro, Ettenson, and Newman were designated as the managers of the Company and, except as otherwise provided in the Operating Agreement or as required by the LLC Law, any action requiring the approval of the managers could be approved by a majority of the managers.

29. Shapiro has challenged Counterclaimants’ authority to amend the Company’s original Articles of Organization and the validity of the Amendment. Shapiro contends that the Amendment is invalid and of no legal force or effect.

30. Counterclaimants maintain that they were authorized to amend the Company’s original Articles of Organization and that the Amendment is valid and binding on the Company and each of its members, including Shapiro.

31. There exists a genuine dispute and justiciable controversy among the parties concerning the validity of the Amendment, and Counterclaimants therefore seek a declaratory judgment pursuant to CPLR 3001 regarding the validity of the Amendment and its binding effect on the Company and each of its members, including Shapiro.

THIRD COUNTERCLAIM
(Declaratory Relief – Applicability of LLC Law)

32. Counterclaimants repeat and reallege all of the foregoing allegations of the Counterclaims as though fully set forth herein.

33. As a limited liability company organized and existing pursuant to the LLC Law, the Company has at all times since formation been governed by the LLC Law.

34. Prior to December 13, 2013, the Company did not have any “operating agreement,” as that term is defined in §102(u) of the LLC Law.

35. Prior to December 13, 2013, in the absence of any “operating agreement,” as that term is defined in §102(u) of the LLC Law, management of the Company was vested equally in Ettenson, Newman, and Shapiro, who were required to operate the Company in accordance with the LLC Law. In the absence of any “operating agreement,” as that term is defined in §102(u) of the LLC Law, the default provisions of the LLC Law were the governing terms, conditions, and requirements for the conduct of the members of the Company for the operation of the Company.

36. Following the adoption of the Operating Agreement on December 13, 2013, the terms, conditions, and requirements of the Operating Agreement governed the conduct of the members and managers of the Company for the operation of the Company, except with respect to matters not specifically addressed in the Operating Agreement. With respect to any matters not specifically addressed in the Operating Agreement, the default provisions of the LLC Law governed the operation of the Company.

37. Pursuant to the § 6.03 of the Operating Agreement, except as otherwise provided in the Operating Agreement or as required by the LLC Law, any action to be taken by the members of the Company could be approved by a majority of the members.

38. Although Counterclaimants contend in the first instance that the Operating Agreement is valid and binding on the Company and each of its members, including Shapiro, if it is determined that the Operating Agreement is not valid and binding on the Company and each of its members, including Shapiro, then the Company has no “operating agreement,” as that term is defined in §102(u) of the LLC Law, and the default provisions of the LLC Law are the governing terms, conditions, and requirements for the conduct of the members of the Company for the operation of the Company.

39. Moreover, to the extent that the Operating Agreement is valid and binding on the Company and each of its members but does not address certain topics, the default requirements and provisions set forth in the LLC Law govern with respect to those topics.

40. Shapiro has challenged the applicability of the default provisions of the LLC Law in the absence of an “operating agreement,” or a controlling provision in an “operating agreement,” as that term is defined in §102(u) of the LLC Law. Shapiro contends that there exist certain oral agreements among the members of the Company which trump the default provisions of the LLC Law. Specifically, Shapiro contends that the members of the Company orally agreed that the Company must be member-managed, that all material decisions must be made by unanimous vote of all the members, and that in the event of a capital call, that the inability or decision of a member not to make any payment on account of a capital call may not result in any diminution of that member’s membership interest.

41. Counterclaimants dispute that any such agreement exists or that any such oral agreement would be binding on the Company or its members. Counterclaimants maintain that, in the absence of any “operating agreement,” or a controlling provision in an “operating agreement,” as that term is defined in §102(u) of the LLC Law, the default provisions of the LLC

Law are the governing terms, conditions, and requirements for the conduct of the members of the Company for the operation of the Company.

42. There exists a genuine dispute and justiciable controversy among the parties concerning the applicability of the default provisions of the LLC Law. Counterclaimants therefore seek a declaratory judgment pursuant to CPLR 3001 regarding the applicability of the default provisions of the LLC Law in the absence of any “operating agreement,” or a controlling provision in an “operating agreement,” as that term is defined in §102(u) of the LLC Law.

**FOURTH COUNTERCLAIM
(Declaratory Relief – Capital Call)**

43. Counterclaimants repeat and reallege all of the foregoing allegations of the Counterclaims as though fully set forth herein.

44. Section 7.01 of the Operating Agreement authorizes “a Majority of the Members” of the Company to “determine if additional Capital Contributions are necessary to conduct the Company’s business activity.” If such a determination is made, notice must be given to all members of the Company, “specifying the due date, which shall not be less than thirty (30) days from the date of the notice, of any additional Capital Contributions which may be required.” Pursuant to § 7.01, the members of the Company are not required to make the additional Capital Contribution, but if they do not do so their interests in the Company may be adjusted if Capital Contributions are made by other members.

45. Prior to a members’ meeting scheduled for October 14, 2014, Newman circulated an e-mail to all members of the Company detailing the Company’s financial status and indicating that the Company had a shortfall of approximately \$31,000. Ettenson and Newman then voted at that meeting, at which Shapiro attended, to request of each of the members an additional capital contribution of ten thousand dollars (\$10,000).

46. On October 15, 2014, Ettenson and Newman, on behalf of the Company, caused the Capital Call to be issued to all members. The Capital Call requested from each of the members of the Company an additional capital contribution of ten thousand dollars (\$10,000) by no later than November 21, 2014.

47. The Capital Call further provided that (a) if any member of the Company shall fail to make such additional capital contribution then the other members may contribute all or a part of the deficiency created by such failure, and (b) upon the failure of any member to provide all or part of his proportionate share of such additional capital contribution and the provision of additional capital contributions by other members, including any additional capital contributions made by the other members to cover all or part of the deficiency created by such failure, the interests of the members would be adjusted proportionally.

48. Shapiro has challenged the validity of the Capital Call, while Counterclaimants maintain that it is valid and binding on all members in all respects.

49. There exists a genuine dispute and justiciable controversy among the parties concerning the validity of the Capital Call, and Counterclaimants therefore seek a declaratory judgment pursuant to CPLR 3001 regarding the validity of the Capital Call.

**FIFTH COUNTERCLAIM
(Declaratory Relief – Salary)**

50. Counterclaimants repeat and reallege all of the foregoing allegations of the Counterclaims as though fully set forth herein.

51. At a meeting among the members of the Company held in September 2013 (the “September 2013 Meeting”), Shapiro, Ettenson, and Newman agreed that each could receive monthly salaries from time to time on the basis of the following annualized rates: Shapiro, \$50,000, Ettenson, \$100,000, and Newman, \$100,000.

52. At the time these salaries were approved at the September 2013 Meeting, the Company had no “operating agreement,” as that term is defined in §102(u) of the LLC Law.

53. At the time these salaries were approved at the September 2013 Meeting, the Company was member-managed.

54. Following the September 2013 Meeting, the Company’s attorney circulated by e-mail dated November 12, 2013, a proposed Unanimous Written Consent of the Members of the Company (the “Proposed Consent”). The Proposed Consent, which was dated as of October 1, 2013, proposed that the members’ salaries “shall be reviewed by the Members of the Company at the end of the ninety (90) day period commencing as of the date of this Unanimous Written Consent and may be extended or modified at such time by the unanimous consent of the Members.”

55. The Proposed Consent was not signed by Ettenson or Newman.

56. There is no provision in the Operating Agreement or the Company’s Articles of Organization concerning the payment of salaries to Shapiro, Ettenson, and Newman.

57. Salaries were paid by the Company from time to time to Shapiro, Ettenson, and Newman without objection between September 2013 and October 2014, until a members’ meeting that took place on October 14, 2014, when Ettenson and Newman voted, in Shapiro’s presence, to reduce Shapiro’s salary to zero dollars (\$0) due to Shapiro’s continual and ongoing dereliction of his duties to the Company.

58. Shapiro has challenged the Company’s ability to pay salaries to the members of the Company beyond December 2013, and Counterclaimants’ authority to reduce his salary by majority vote. Counterclaimants maintain that the Company was authorized to pay salaries to

the members of the Company beyond December 2013, and that they were authorized to reduce Shapiro's salary by majority vote.

59. There exists a genuine dispute and justiciable controversy among the parties, and Counterclaimants therefore seek a declaratory judgment pursuant to CPLR 3001 concerning the Company's ability to pay salaries to the members of the Company beyond December 2013, and Counterclaimants' authority to reduce Shapiro's salary by majority vote.

DEMAND FOR RELIEF

WHEREFORE, Ettenson and Newman respectfully demand the entry of judgment in their favor and against Shapiro as follows:

- A. Dismissing the Complaint in its entirety, with prejudice;
- B. Declaring that Ettenson and Newman were authorized to adopt the Operating Agreement for the Company, that the Operating Agreement was duly and properly adopted in accordance with the LLC Law, and that the Operating Agreement and each of its provisions are valid and binding on the Company and all of its members, including Shapiro;
- C. Declaring that Ettenson and Newman were authorized to amend the Company's original Articles of Organization, that the Amendment was duly and properly authorized in accordance with the LLC Law, and that the Amendment is valid and binding on the Company and each of its members, including Shapiro;
- D. Declaring that the default provisions of the LLC Law are the governing terms, conditions, and requirements for the conduct of the members of the Company for the operation of the Company in the absence of any controlling provision of the Operating Agreement or valid and binding written operating agreement for the Company;

E. Declaring that Ettenson and Newman were authorized to issue the Capital Call and that the Capital Call is valid and binding on all members in all respects;

F. Declaring that the payment of salaries to the members of the Company beyond December 2013 is authorized, that Ettenson and Newman were authorized to reduce Shapiro's salary to zero dollars (\$0) by majority vote, and that the reduction of Shapiro's salary to zero dollars (\$0) is valid and binding; and

G. Awarding Ettenson and Newman such other and further relief as the Court may deem just and proper.

Dated: January 23, 2015

CARTER LEDYARD & MILBURN LLP

By: 

Stephen M. Plotnick

Alexander G. Malyshev

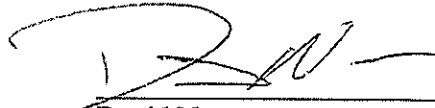
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New York, New York 10005-2072
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*Attorneys for Defendants-Counterclaim
Plaintiffs Gabriel Ettenson and David
Newman*

VERIFICATION

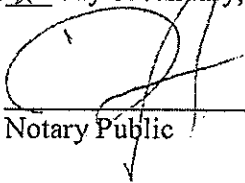
STATE OF FLORIDA)
)
COUNTY OF ORANGE) SS.:

David Newman, being duly sworn, states that he is one of the defendants and counterclaimants in this action; that he and co-defendant/counterclaimant Gabriel Ettenson are united in interest pursuant to CPLR 3020(d); that he has read the foregoing Verified Answer, Affirmative Defenses, and Counterclaims and knows the contents thereof; that the same is true to his own knowledge, except as to those matters founded upon information and belief; and as to those matters founded upon information and belief he believes them to be true.




David Newman

Sworn to before me on this
22nd day of January, 2015



Notary Public

 DHARMEGH B. AMIN
NOTARY PUBLIC
STATE OF FLORIDA
Comm# EE132417
Expires 10/8/2015

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

ROBERT SHAPIRO,

Plaintiff,

- v -

GABRIEL ETTENSON and DAVID NEWMAN,

Defendants.

Index No.: 653571/2014

**VERIFIED ANSWER,
AFFIRMATIVE DEFENSES,
AND COUNTERCLAIMS**

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