

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

-----X  
ROBERT SHAPIRO,

Plaintiff,  
-against-

Index No.:

**SUMMONS**

GABRIEL ETTENSON and DAVID NEWMAN,

Defendants.  
-----X

To the above named defendants:

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

Plaintiff designates New York as the place of trial. The basis for venue is the residence of one defendant .

Dated: New York, New York  
November 17, 2014

Yours, etc.

**KILHENNY & FELIX**

By:   
James M. Felix, Esq.  
Attorneys for Plaintiff  
350 Seventh Avenue, Suite 1800  
New York, NY 10001  
(212) 419-1492

Defendants' Addresses:

Gabriel Ettenson  
4087 Nevis Street,  
Boulder, CO 80301

David Newman  
192 East 75<sup>th</sup> Street, Apt. 7A  
New York, NY 10021

Plaintiff's Address:

11538 Briarwood Circle  
Boynton Beach, FL 33437

Summons filed on November 17, 2014

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

-----X  
ROBERT SHAPIRO,

Index No.:

Plaintiff,

**VERIFIED COMPLAINT**

-against-

GABRIEL ETTENSON and DAVID NEWMAN,

Defendants.  
-----X

Plaintiff Robert Shapiro, by and through his counsel, Kilhenny & Felix, as and for his Verified Complaint against defendants Gabriel Ettenson and David Newman, alleges, upon information and belief, as follows:

**FIRST CAUSE OF ACTION**

1. Plaintiff Robert Shapiro ("plaintiff" or "Shapiro") is an individual and resident of the State of Florida.
2. Defendant Gabriel Ettenson ("Ettenson") is an individual and a resident of the State of Colorado.
3. Defendant David Newman ("Newman") is an individual and a resident of the County, City and State of New York.
4. In January 2012, plaintiff Shapiro, defendant Ettenson and defendant Newman formed ENS Health, LLC ("ENS") a limited liability company under the laws of the State of New York, with each owning an equal 33.33% membership interest in ENS.
5. The Article of Organization of ENS were filed with the New York Department of State on January 11, 2012 establishing ENS as a member managed limited liability company, and ENS had and for all times since the formation to present, been managed by the same three members, Ettenson, Newman and Shapiro, each having consistently held and continuing to hold an equal 33.33% membership interest in

ENS. Hereinafter Ettenson, Newman and Shapiro are collectively referred to as the “3 ENS Members”.

6. In connection with the formation of ENS, Ettenson, Newman and Shapiro, expressly agreed that ENS would be member managed, that all material decisions would be by unanimous vote of all the members and that in the event of a capital call, that no members inability or decision not to make any payment on account of a capital call, would result in any diminution of that member's membership interest.

7. From its formation, ENS has been operated by the three members, plaintiff Shapiro and defendants Ettenson and Newman (hereinafter collectively referred to as the “3 ENS Members”).

8. In December of 2013, over eleven (11) months after ENS was formed, defendants Ettenson and Newman, without obtaining consent or signature of plaintiff Shapiro, promulgated and signed an “operating agreement” for ENS. Hereinafter, said purported operating agreement is referred to as the “Purported ENS Operating Agreement”.

9. As a New York Limited Liability Company, ENS is governed by the New York State Limited Liability Law, as well as New York common law.

10. Pursuant to § 417 (c) of the New York Limited Liability Law, an operating agreement may be entered into by all of the members of the limited liability company before, at the time of or within ninety days after the filing of the articles of organization.

11. No operating agreement was entered into by all the members of ENS, either before, at the time of or within the ninety day period after the filing of the articles of organization, or at any time thereafter. Therefore, the Purported Operating Agreement is a nullity and of no legal force and effect

12. The Purported Operating Agreement provided that a majority of the members purportedly could take certain actions on behalf of ENS, including but not limited to determining the number of Managers, the appointment of Managers, the removal of Managers (with or without cause) and the making of capital calls. These provisions, among others, are of no legal force and effect.

13. The Purported Operating Agreement further provided that the business is to be managed by managers, not members and that a majority of the managers can basically operate the business on behalf of ENS and make the majority of major decisions. These provisions, among others, are of no legal force and effect.

14. From December 2013 until October, 2014, ENS was being operated by plaintiff Shapiro, defendant Ettenson and defendant Newman, with all of the 3 ENS Members participating in the operations of the business of ENS and neither defendant Ettenson or defendant Newman overtly took any significant action in the operations of the business that was based upon any claim under the Purported Operating Agreement to the exclusion of or at the express objection of Shapiro.

15. However, on or about October 21, 2014, Ettenson and Newman caused to be sent to plaintiff Shapiro, a purported Notice of Action Taken at Meeting Held on October 14, 2014 relating to ENS (the "Purported Oct. 2014 Notice of Action Taken") signed by defendants Ettenson and Newman.

16. The Purported Oct. 2014 Notice of Action Taken provided that, defendants Ettenson and Newman, as members and purported managers of ENS, voted to (a) request of each of the Members an additional Capital Contribution of ten thousand dollars (\$10,000.00) each; and (b) reduce the salary of plaintiff Robert Shapiro to zero dollars (\$0).

17. Accompanying the Purported Oct. 2014 Notice of Action Taken sent to plaintiff Shapiro was a purported Notice of Call for Additional Capital Contribution for Members dated October 15, 2014 (the "Purported Oct. 2014 Capital Call") which were signed only by defendants Ettenson and Newman.

18. The Purported Oct. 2014 Capital Call provided that an additional Capital Contribution of ten thousand dollars (\$10,000.00) was requested from each of the three Members of ENS, which amount was to be deposited into ENS's business account at Chase Bank no later than Friday, November 21, 2014.

19. The Purported Oct. 2014 Capital Call went on to provide that any Member who failed to make the \$10,000 additional Capital Call would be diluted of that Member's interest to the extent that other Members covered all or part of the amount called for in the Capital Call.

20. The Purported Oct. 2014 Capital Call was issued contrary to the operable law and in violation of the express agreement by the parties and of the fiduciary duties owed by defendants to plaintiff and is an ultra vires act and null and void.

21. Whether an operating agreement can be promulgated by less than all the members beyond the 90 day statutory period that adversely impacts the financial status of the non-consenting member is an issue of first impression and creates a justiciable controversy.

22. By reason of the foregoing, Plaintiff seeks a judgment declaring that the Purported Operating Agreement and Purported Oct. 2014 Capital Call are null and void ab initio, and of no legal force and effect.

## **SECOND CAUSE OF ACTION**

23. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "22" of this complaint as if set forth at length herein.

24. The purported act of defendants Ettenson and Newman to reduce the salary of plaintiff Robert Shapiro to zero dollars (\$0), to the extent either Ettenson or Newman earn any salary, is without basis in law and is a breach of the agreement between the 3 ENS Members regarding salaries.

25. Initially at the time of the formation of ENS, the 3 ENS Members agreed that no salaries would be taken by any of the members. Thereafter, the 3 ENS Members discussed and then unanimously agreed that salaries would be paid to the 3 ENS Members and that each member would receive the same salary.

26. On September 19, 2013, the 3 ENS Members held a meeting of all of the members of ENS and unanimous agreed that for the period of the next 90 days, October 1, 2013 to December 31, 2013, that defendant Ettenson and defendant Newman would receive a salary at the annualized rate of \$100,000/year and plaintiff Shapiro would receive a salary at the annualized rate of \$50,000/year.

27. The 3 ENS Members also agreed at the meeting of September 19, 2013 that at the end of said ninety day period, that being December 31, 2013, the agreement as to salaries could be extended or modified by unanimous consent of the 3 ENS Members.

28. After January 1, 2014, there has been no modification or extension of the unanimous agreement as to salary and thus no member is entitled to any salary absent further consent of all the members.

29. The purported action taken regarding the October 14, 2014 “vote” of defendants Ettenson and Newman to reduce the salary of plaintiff Robert Shapiro to zero dollars (\$0), to the extent that either defendant receives any salary is contrary to operable law and in violation of the fiduciary duties owed by defendants to plaintiff, in breach of the agreement between the 3 ENS Members relating to salary and is an ultra vires act and null and void.

30. Whether a majority of the members can vote to take salary and proved none to the non-consenting member in the absence of an operating agreement is an issue of first impression and creates a justiciable controversy.

31. By reason of the foregoing, Plaintiff seeks a judgment declaring the no member of ENS may receive any salary that is not consented to by all the members of ENS and damages in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013, plus interest.

### **THIRD CAUSE OF ACTION**

32. Plaintiff repeats and realleges each and every allegation contained in paragraphs “1” through “31” of this complaint as if set forth at length herein.

33. Defendants, as members of ENS, have fiduciary duties to Plaintiff and owe to Plaintiff a duty of loyalty and good faith.

34. By the aforesaid acts of defendants, including any acts based upon any provisions of the Purported Operating Agreement that adversely affect plaintiff, or move forward with Purported Oct. 2014 Capital Call are in breach of the fiduciary obligations owed by fellow members of ENS.



35. To the extent that defendants have damaged the value of Plaintiff's interest in ENS by virtue of their breaches of fiduciary duty, they are jointly and severally liable to Plaintiff for all such damages.

36. Plaintiff seeks a judgment declaring the no member of ENS may receive any salary that is not consented to by all the members of ENS and damages in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013, plus interest and such other damages, if any in an amount to be proven at trial.

#### **FOURTH CAUSE OF ACTION**

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "36" of this complaint as if set forth at length herein.

38. As members of ENS, defendants are bound by the terms of the agreements between the members, including the agreements regarding unanimous rule, capital calls and salary.

39. As detailed above, defendants have breached or have threatened to breach the agreements between the members of ENS.

40. Plaintiff seeks a judgment declaring the no member of ENS may receive any salary that is not consented to by all the members of ENS and damages in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013, plus interest and such other damages, if any in an amount to be proven at trial.

## **FIFTH CAUSE OF ACTION**

41. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "40" of this complaint as if set forth at length herein.

42. As members of ENS, defendants are bound by the terms of the agreements between the members, including the agreements regarding unanimous rule, capital calls and salary.

43. As detailed above, defendants have breached or have threatened to breach the agreements between the members of ENS.

44. Such actions are a breach by defendants of the implied covenant of good faith and fair dealing that exists in every contract.

45. Plaintiff seeks a judgment declaring the no member of ENS may receive any salary that is not consented to by all the members of ENS and damages in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013, plus interest and such other damages, if any in an amount to be proven at trial.

WHEREFORE, plaintiff Robert Shapiro respectfully demands that judgment be entered declaring (i) the Purported ENS Operating Agreement to be invalid; (ii) the Purported Oct. 2014 Capital Calls to be invalid; (iii) that no capital call can be made unless all the terms thereof are agreed to by all the members of ENS; (iv) that no member of ENS may receive any salary that is not consented to by all the members of ENS; (v) that no actions for or on behalf of ENS Health, LLC be taken absent the unanimous consent of the members; and further ordering a judgment (vi) in the amounts, if any, of any salary paid to defendants Ettenson and Newman which was

in excess of any salary paid to plaintiff Shapiro other than what was agreed to for the period October 1, 2013 through December 31, 2013, plus interest and such other damages, if any in an amount to be proven at trial; and (vii) granting such other and further relief as this Court may deem proper.

Dated: New York, New York  
November 17, 2014

Yours, etc.

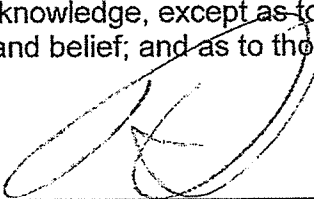
**KILHENNY & FELIX**

By:   
James M. Felix, Esq.  
Attorneys for Plaintiff  
350 Seventh Avenue, Suite 1800  
New York, NY 10001  
(212) 419-1492

VERIFICATION

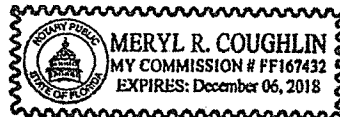
STATE OF FLORIDA           )  
  ) ss.:  
COUNTY OF PALM BEACH )

Robert Shapiro, being duly sworn, deposes and says: I am the plaintiff in the within action; I have read the foregoing Verified Complaint and know the contents thereof; the same is true to my own knowledge, except as to the matters herein stated to be alleged on information and belief; and as to those matters I believe them to be true.

  
\_\_\_\_\_  
Robert Shapiro

Sworn to before me this 17<sup>th</sup> day  
of November, 2014

  
\_\_\_\_\_  
Notary Public



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

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ROBERT SHAPIRO,

Plaintiff,

-against-

GABRIEL ETTENSON and DAVID NEWMAN,

Defendants.  
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Index No.:

**SUMMONS AND VERIFIED COMPLAINT**

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and reasonable inquiry, the contentions contained in the annexed document(s) are not frivolous.

 11/17/14  
James M. Felix, Esq.      date  
Kilhenny & Felix

**KILHENNY & FELIX**  
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