

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

JEAN-PASCAL SIMON,

Plaintiff,

v.

FRANCINVEST, S.A. and JJS GROUP, INC.,

Nominal Defendants,

-and-

FRENCH-AMERICAN SURGERY CENTER, INC.,  
FRENCH AMERICAN CLINIC, INC., FIFTH AVENUE  
SURGERY CENTER, LLC, GEORGE KESSLER,  
JEAN-FRANCOIS SIMON, VCC, INC. d/b/a CICERO  
CONSULTING ASSOCIATES, LYNN ROSENBERG,  
and CHARLES RAAB,

Defendants.

Index No. 162867/2014

Scarpulla, J.

**THIRD AMENDED  
VERIFIED COMPLAINT**

Plaintiff Jean-Pascal Simon (“Plaintiff” or “Pascal”), by his undersigned attorneys, as and for his Third Amended Verified Complaint, brings this action to recover monetary and equitable relief: (i) directly against defendants Jean-Francois Simon (“Francois”), George Kessler (“Kessler”), Lynn May Rosenberg (“Rosenberg”), and Charles Raab (“Raab”) (collectively the “Individual Defendants”), and VCC, Inc. d/b/a Cicero Consulting Associates (“CCA” or “Cicero”), French-American Surgery Center, Inc. (“FASC” or “Surgery Center”), French American Clinic, Inc. (“FAC”), and Fifth Avenue Surgery Center, LLC (“FAAA”); (ii) double-derivatively on behalf of and for the benefit of nominal defendant FrancInvest, S.A. (“FrancInvest”) to enforce causes of action on behalf of nominal defendant JJS Group, Inc. (“JJS”), of which FrancInvest is the majority shareholder; and (iii) derivatively on behalf of and for the benefit of FrancInvest.

Plaintiff alleges the following based on personal knowledge as to allegations regarding himself and on information and belief as to all other allegations:

### INTRODUCTION

1. Plaintiff Pascal and his brother, defendant Francois, along with their sister, non-party Anne-Valerie (“Valerie”), are the children of Jean-Jacques Simon (“Jean-Jacques”) and Francine Simon (“Francine”).

2. Jean-Jacques, a renowned obstetrician-gynecologist (“OB-GYN”) and health care entrepreneur in France, came to New York in 1982 with his son, Pascal, to apply a business model that proved successful for Jean-Jacques in France and, together with Pascal, open surgery centers. Because Jean-Jacques would continue to live in France, Pascal planted roots in New York City, spent years training to become a fully licensed and credentialed OB-GYN in New York State, and made a name for himself within the local French-American community. Only then, after Pascal contributed substantial time, money, and effort, could they legally open what would become the French-American Surgery Center. It was always understood, and Jean-Jacques always promised Pascal, that Jean-Jacques was opening the Surgery Center for Pascal and that Pascal would share in the fruits of their endeavors.

3. In 1988, after Pascal completed his residency and became fully licensed to practice medicine in New York State, FASC opened and flourished from the outset. The Surgery Center developed a sterling reputation within the medical and patient communities and enjoyed great financial success.

4. In 1995, Jean-Jacques formed JJS to purchase, for the benefit of his children, the commercial condominium within which the Surgery Center operated: 1049 Fifth Avenue near Central Park. JJS paid \$1.8 million for the property and, today, it is worth over \$50 million.

5. Several years earlier, Jean-Jacques had formed FrancInvest, a Société Anonyme (*i.e.*, closely-held corporation), for the purpose of bestowing, to his children, the wealth originally bestowed to him by his mother as well as his own wealth. The latter eventually included, among other assets, an 80% interest in JJS. Pascal, Francois and Valerie each received approximately one-third share interest in the family holding company from Jean-Jacques. Prior to the misdeeds of certain defendants as alleged herein, Pascal, as the oldest son, was FrancInvest's largest individual shareholder.

6. In 2002, Jean-Jacques passed away and his entire estate passed to Francine by operation of French law. With Jean-Jacques's demise came the golden opportunity that Francois had been longing for. As alleged below, Francois, no longer under his father's supervision, was finally free to do as he pleased. Exerting undue influence over his mother and incapacitated sister, and buying their loyalty with "allowances," Francois, aided and abetted by various cohorts, like defendant Kessler, set in motion a scheme to defraud his family members – chief among them, Pascal – of the family's crown jewels: the Surgery Center and the Premises.

7. For example, Francois secretly caused JJS to refinance the mortgage on the Premises several times and cashed out millions of dollars for himself. These transactions, entered into only to fill Francois's personal coffers, are a product of fraud and deceit, constitute corporate waste, and must be paid back by Francois.

8. Pascal also recently learned that Francois, with the aid of Kessler and his wife, Rosenberg, improperly gained *de facto* control of JJS in furtherance of a fraudulent scheme to effectuate a transfer of the Premises – a Simon family asset worth \$50 million – to himself, Kessler, and Rosenberg. Defendants must be enjoined from consummating their illicit plan.

9. Since Jean-Jacques' death in 2002, Francois, with the aid of Kessler, has been using the Premises as his personal piggy bank by encumbering the premises with \$3,300,000 in mortgages that yielded over \$2,600,000 in tax-free cash-outs, which he used for his own personal enjoyment. As the icing on the cake, he let FrancInvest pay for the debt service on the loans.

10. Because Francois is named after Francine, she has always been his stalwart supporter, believing he can do no wrong. Francois returned the favor by using his undue influence to induce Francine to sign a durable New York power of attorney with no restrictions, thus enabling him to assign rental income of over \$400,000 per year to First Choice Bank of New Jersey, and thus also depriving his own mother of the rental income that might have spared her the sale of the family apartment in January.

11. In addition, Francois, through sleight of hand and surreptitious legerdemain, seized control over Jean-Jacques's interest in FASC that Francine inherited. In violation of New York law, Francois illegally owned, operated, and controlled the Surgery Center built by his brother and father, sold it behind Pascal's back for \$2.3 million in a non-arms-length transaction, and kept the proceeds for himself.

12. Finally, Francois sold FASC – an Article 28 multi-specialty ambulatory surgery center (ASC), licensed by the New York State Department of Health (“DOH”) that provides services to patients including anesthesia, general surgery, and pain management – to defendant FAAA, owned by the Surgery Center's former business manager, non-physician Charles Raab, and a group of podiatrists. This transaction was illegal and is void *ab initio*. In accordance with New York law and public policy, and for the sake of patients, it must be rescinded, and a constructive trust must be imposed to protect Pascal's equitable interest in the Surgery Center.

## THE PARTIES

### Plaintiff

13. Pascal is, and at all times relevant hereto was, a resident of the City and State of New York and a naturalized citizen of the United States. Pascal is also a medical doctor licensed to practice within the City and State of New York. Pascal is an equitable owner of the Premises vis-à-vis his shares in FrancInvest and, by extension, JJS.

### Individual Defendants

14. Francois is an individual residing at 820 NE 25th Avenue, Hallandale, Florida, 33009. He also maintains a residence at 225 East 57th Street in New York City. Francois is the holder of a Green Card. Francois is not, and never was, a medical doctor.

15. Kessler is an attorney licensed to practice in New York. For several years, he represented Pascal as well as FASC, FAC, and JJS, and Jean-Jacques and Francois in their personal capacities. At no time did he disclose to Pascal the ethical improprieties of multiple representations in the presence of adverse interests.

16. Rosenberg is Kessler's wife. She became one of three directors of FrancInvest in December 2002 without Pascal's knowledge or consent. Because her last name is different than her husband's, Pascal was unaware of Kessler's influence over FrancInvest, Francine and Francois, and Rosenberg's involvement, until after this litigation began.

17. Charles Raab is a non-physician managing member and 10% owner of FAAA. At all relevant times, Raab has been an officer of JJS, with unfettered access to JJS's bank accounts. Raab also owns Empire Fiscal Management, Inc. and SEM Services, LLC and is one of three owner/managing members of Madison Associates ASC Management, Inc.

**FASC**

18. FASC was a domestic business corporation authorized to do business in the State of New York at the time this action was commenced. Its current principal executive office is located at 820 NE 25th Avenue, Hallandale, Florida, 33009.

19. On December 31, 2014, immediately after the initial Complaint was filed in this matter, the entity became inactive.

20. Francine was the President. Francois, however, is now listed as the Chief Executive Officer of FASC according to the New York Secretary of State. FASC did business as “Fifth Avenue Surgery Center.”

21. At all times since its incorporated in 1988, Pascal was a Vice President.

**FAC**

22. FAC was a New York corporation formed on December 10, 1982 that was, according to the New York Secretary of State, terminated on or about January 25, 2012. FAC was re-formed as a Florida entity following its termination in New York and has or had a principal executive office at 820 NE 25th Avenue, Hallandale, Florida, 33009. The re-formation of FAC was completed by Francois with the aid of defendant Kessler.

23. The president of FAC as represented on the Florida DOS, at the time of its formation in Florida, was Francine, the Vice President/Treasurer was Francois, and the Secretary was Rosenberg. Pascal at all times believed he was a Vice President of FAC since its incorporation in 1982 and was never apprised differently.

24. FAC was the tenant of the Premises and, in turn, subleased the Premises to FASC. This was true under December 1, 2003 when, as Pascal recently learned, Francois and Kessler had secretly drafted a new lease between JJS and FASC, thus cutting out FAC without the

knowledge or consent of the FrancInvest shareholders. FASC assigned its rights to its putative successor, FAAA, which currently operates a multi-specialty surgery center therein with an operating license issued by the DOH. The rental income is well-below market rates, is corporate waste, and further evidences the non-arm's-length relationship between Francois and Raab.

#### **FAAA**

25. FAAA was first formed as a corporation on March 7, 2007. FAAA was also formed on July 23, 2008 as Fifth Avenue ASC Acquisition, LLC that, according to the New York Secretary of State, changed its name to Fifth Avenue Surgery Center, LLC on December 21, 2010. Its registered agent is Charles Raab. Its address is 1049 Fifth Avenue, New York, New York 10028.

26. FAAA entered into an illegal transaction to purchase FASC on or about November 7, 2007, then assigned its rights in an Assignment and Assumption Agreement on April 8, 2009 and is continuing the business of FASC under the same assumed name, "Fifth Avenue Surgery Center."

#### **Cicero**

27. VCC, Inc. d/b/a Cicero Consulting Associates ("CCA" or "Cicero") is a New York State domestic business corporation. Frank M. Cicero (Cicero Jr.) is the Chief Executive Officer of CCA. CCA's principal executive office is located at 701 Westchester Avenue, Suite 210W, White Plains, New York 10604. The senior partner and founder of the company is Frank T. Cicero, M.D. (Cicero Sr.).

28. For several years, Cicero Sr. served as a trusted consultant to Pascal, Jean-Jacques, and FASC.

## Nominal Defendants

### FrancInvest

29. FrancInvest is a French Société Anonyme (*i.e.*, closely-held corporation) with an address of 60 Boulevard Malesherbes, Paris, 75008, France. At present, the President is Francine, who is an “administrator” along with Francois and Kessler’s wife, Rosenberg.

30. In this case, Pascal seeks to protect his rights as a beneficial owner of the Premises, which are located in New York County, and does not seek to address the “internal affairs” of FrancInvest. There is no action pending in France.

31. To the extent that Pascal alleges wrongdoing concerning the internal affairs of FrancInvest, such allegations are made to demonstrate a pattern and practice of fraud and/or other wrongdoing by the Defendants.

32. FrancInvest owns 80% of, and controls, nominal defendant JJS (below) and FAC.

### JJS

33. Nominal Defendant JJS is a domestic business corporation authorized to do business in the State of New York. Its principal executive office is currently located at 820 NE 25<sup>th</sup> Avenue, Hallandale, Florida, 33009. Francois is listed as the Chief Executive Officer of JJS, according to the New York Secretary of State.

34. JJS was incorporated in New York on May 23, 1995 as a holding company for the purpose of purchasing the commercial condominium unit known as 1049 Fifth Avenue, New York, New York 10028, Professional Unit 3, Block 1497, Lot 1003, where the Surgery Center, FASC, was situated (the “Premises”). FrancInvest owns 80% of, and controls, JJS. The remaining 20% was owned by Jean-Jacques and, upon his death, was transferred to Francine by operation of French law.



35. The Premises consist of a 10,000 square-foot three-level unit of prime commercial space, with 60 feet of windowed road frontage along 86th Street and a private canopied entrance. It is next door to the Neue Galerie on the city's famed "Museum Mile."

36. The most recent FrancInvest annual report lists Francine as the President of JJS and Francois as the Vice President.

37. The Florida Department of State also shows a filing for JJS, initial filing date October 12, 2011, indicated the registered agent and Vice President as Francois at 820 NE 25<sup>th</sup> Avenue, Hallandale, Florida. The President is listed as Francine and the Secretary is Rosenberg. Kessler owned the property at this Hallandale, Florida address at the time of the filing and the last annual report was filed on March 24, 2015. Yet Francois, as an officer of JJS, in his Answer on March 18, 2015 and verified by a court-ordered affidavit on June 15, 2015, admitted Plaintiff's allegation that JJS was a domestic entity.

38. A mortgage agreement on August 3, 2011 between JJS and First Choice Bank of New Jersey contains a notarized Spreader Agreement with JJS Group, LLC signed by Jean-Francois Simon, Vice President.

39. JJS's only asset is the Condominium, which only has one tenant with a triple-net lease. Thus, other than basic accounting services and garden-variety administrative costs, JJS's expenses should be the absolute bare minimum and substantial profits should be distributed upstream. Unfortunately, however, over the course of several years, Francois has been looting JJS and wasted the company's assets to benefit him and others.

#### **JURISDICTION & VENUE**

40. This Court has personal jurisdiction over Defendants because FASC, JJS, FAAA, FAC, and CCA are domestic entities, because FrancInvest is a foreign entity doing business in

New York, and because Francois, Kessler, and Rosenberg are residents of New York and the acts complained of herein took place in New York County. CPLR §§ 301, 302.

41. Plaintiff's derivative action is proper in this Court because Bus. Corp. Law § 626(a) expressly authorizes a derivative suit against foreign corporations. Plaintiff does not seek to address internal corporate affairs issues herein and seeks in this action to preserve and enforce his rights as related to the Premises and FASC, located in New York County.

42. Venue is proper in New York County because Plaintiff, Francois and FASC are residents of New York County and the Premises are located in New York County. CPLR § 503.

### **FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS**

#### **I. Background**

##### **A. The Simon Family**

##### **1. Members of the Family**

43. Marguerite Simon ("Marguerite") was the matriarch of the Simon family. She had one son, Jean-Jacques.

44. In 1953, Jean-Jacques married Francine.

45. Jean-Jacques and Francine had three children – plaintiff Pascal (born in 1954), non-party Valerie (born in 1957), and defendant Francois (born in 1962). All three children were born in hospitals owned and operated by Jean-Jacques.

46. Marguerite had considerable means and, upon her death in 1971, Jean-Jacques inherited the family wealth.

##### **2. Jean-Jacques Becomes an Esteemed Doctor and a Surgery Center Entrepreneur**

47. Jean-Jacques studied medicine in France and became a well-known OB-GYN. He was also a successful entrepreneur and pioneer in the in-patient hospital business in France.

48. Jean-Jacques owned, operated, and/or managed the following world-renowned surgery centers: (i) Clinique des Sablons in Neuilly; (ii) Clinique du Parc Montsouris in Paris; (iii) Clinique Francois Mauriceau in Neuilly, which Jean-Jacques acquired with funds provided by Marguerite (“Mauriceau”); and (iv) Clinique Spontini in Paris (established in 1966) (“Spontini”).

49. Spontini, for example, had 50 fulltime employees and granted operating privileges to 100 private attending surgeons using the facility for inpatient and outpatient procedures. Due to its sterling reputation, Spontini was the surgery center of choice for many dignitaries and celebrities. In addition, the liposuction procedure was invented at Spontini and its inventor, Dr. Illouz, tutored plastic surgeons from all over the world at Spontini.

50. In addition to surgery centers, Jean-Jacques also developed real estate, building and renovating apartment houses in Paris and its suburbs.

### 3. Jean-Jacques Creates FrancInvest

51. In 1957, Jean-Jacques and Marguerite formed a holding company, Clinique Francois Mauriceau, S.A., for the specific purpose of bestowing to Jean-Jacques’s children the wealth bestowed to him by Marguerite and, later on, his own fortune.

52. After Jean-Jacques sold Mauriceau to real estate developers in the 1970s, he renamed the family company FrancInvest.

53. FrancInvest had five hundred and thirty (530) authorized shares at the time of its founding and the initial ownership was structured as follows:

<b>NAME</b>	<b>SHARES</b>
Estate of Jean-Jacques (Francine Simon)	51/530
Jean-Pascal Simon (Plaintiff)	163/530
Anne-Valerie (Plaintiff’s sister)	155/530
Francois (Defendant)	159/530
Gaston Cahen (non-party)	1/530

Jean Choukroun 1/530

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**TOTAL 530/530**

54. Pascal was the largest shareholder of FrancInvest at the time of its founding and, but for the misdeeds of Francois and others who, as alleged herein, wrongfully caused Valerie's shares to be transferred to Francois, would still be the largest shareholder.

55. Gaston Cahen was Francine's father (the grandfather of Pascal, Valerie, and Francois). Gaston passed away in the late 1980s and Francine inherited his share of FrancInvest.

56. Jean Choukroun was a physician in Paris and a close friend of Jean-Jacques. He passed away in 2013.

**4. Pascal Follows in Jean-Jacques's Footsteps and Becomes an OB-GYN and a Surgery Center Entrepreneur**

57. In 1971, Pascal graduated from Lycee Janson de Sailly High School and received a "Science Baccalaureat with honors."

a. In 1971, Francois, eight-years Pascal's junior, was nine (9) years old.

b. Because of academic excellence, Pascal's entire education was paid for by the French state.

c. Francois, by contrast, had to attend a private school paid for by his parents because he failed the tests that permitted advancement in publicly funded schools.

d. While in high school, at approximately the age of 17 years old, Francois moved out of the family home and into a rental apartment, paid for by his parents, because he did not get along with Jean-Jacques. He never moved back into the family home.

58. After high school graduation, Pascal attended an accelerated seven-year college/medical school program at the University of Paris V, Rene Descartes Medical School.

59. During medical school, Pascal worked at Spontini and Mauriceau and, under his father's tutelage, learned the business and entrepreneurial aspects of medicine.

60. In 1975, Pascal served as Spontini's Assistant Director, in which he participated in the administration and management of hospital operations. He was also responsible for fiscal operations, personnel, implementation of hospital policies and issuance and interpretation of operational procedures.

61. In 1977, Pascal graduated from medical school and, after successfully ranking in the top 1.5% nationally of a highly competitive residency-matching exam, was appointed to the "Interne des Hopitaux de Paris" (which, after the completion of residency, is referred to as an "Ancien Interne des Hopitaux de Paris"). Pascal also received a Silver Medal for his final thesis, "Conization Procedures for Pre-cancerous Lesions of the Cervix."

a. In 1977, Francois was 15 years old.

62. After graduating from medical school, Pascal pursued his Paris residency training in OB-GYN and general surgery on rotation throughout top Parisian hospitals, beginning with one of his family's surgery centers: Spontini. Even though Spontini was not part of the Paris rotation, Pascal received special permission to train there because he was committed to his family business. Pascal also did his residency at Hotel Dieu, the best hospital in France for gynecological surgery, and Port Royal/Cochin, the best hospital for obstetrics.

63. On December 18, 1981, Jean-Jacques gave to Pascal, *as a gift*, the family country home in Behoust, France that Jean-Jacques had owned since the 1960s.

**B. Jean-Jacques and Pascal Come to New York to Open Surgery Centers**

64. In 1982, Pascal became a Fulbright fellow and came to New York to pursue post-graduate clinical training and research at Columbia/Presbyterian Medical Center (1982-1983).

65. In the fall of 1982, Jean-Jacques saw this an opportunity to take his successful business model to New York City and open surgery centers with Pascal.

66. By this point, Pascal had spent about seven (7) years learning the business from his father.

**1. Jean-Jacques Leases Space at 1049 Fifth Avenue**

67. Jean-Jacques and Pascal found space at 1049 Fifth Avenue (*i.e.*, the Premises) for what would eventually become the home of the French-American Surgery Center (*i.e.*, FASC).

68. On December 10, 1982, Jean-Jacques formed French American Clinic, Inc. (*i.e.*, FAC), which would be the leaseholder. FAC signed a 12-year lease for the space. Pascal was, at all relevant times, a Vice President and Director of FAC. The other directors of FAC were Jean-Jacques and real estate agent Joel Powell.

69. FrancInvest owned 83% of FAC and Jean-Jacques owned the other 17%.

**2. Jean-Jacques and Pascal Spend the Next Six Years Working to Fulfill New York State's Requirements to Obtain a Surgery Center License**

70. Before Jean-Jacques and Pascal could open and operate FASC, Pascal, who was supposed to be a shareholder of FASC, had to become fully licensed and credentialed in New York State to comply with New York State law, as described below.

**a. Relevant New York State Law**

**i. Article 28 of the New York Public Health Law**

71. Article 28 of the New York Public Health Law ("Article 28") is a New York State statute that creates authority for and regulates the investment in, purchase of, establishment and safe management of public health care facilities such as hospitals and free-standing ambulatory surgery centers, among others ("Article 28 Facility") to ensure patient health and welfare.

**ii. Certificate of Need**

72. In order to purchase, invest in, or establish an Article 28 Facility, an applicant must submit a Certificate of Need (“CON”) application to the New York State Public Health Council. CON applications are reviewed for, among other things:

- a. **Public Need:** Whether there is a public need for the project.
- b. **Financial Feasibility:** The financial capability and feasibility of the project based on the applicant’s ability to fund the project, the reasonableness of the budget, current financial status and capacity to retire debt.
- c. **Character and Competence:** The character and competence of the proposed operators, which is based primarily on relevant experience and past performance in operating a health care facility, including records of violations, if any, and whether a substantially consistent high level of care was maintained. Applicants without experience in providing health care are evaluated based on, among other things, compliance with laws and regulations pertinent to their business or profession and the status of any professional licenses.
- d. **Legal Issues:** Legal issues related to the organizational structure of the proposed operators and/or contractual arrangements.

**iii. New York State’s Strict Prohibition of the Corporate Practice of Medicine**

73. New York State strictly prohibits the corporate practice of medicine.
74. The Corporate Practice of Medicine doctrine (“CPOM”) prohibits unlicensed individuals and non-physician owned and controlled entities from employing licensed physicians to provide professional medical services. A product of the 19th century, the CPOM emerged to combat two forms of corporate involvement in medicine: (1) “contract practice,” where corporations employed physicians to provide medical services to their employees; and (2)

“corporate practice,” where physicians’ services were marketed to the public by corporations which either employed physicians or contracted separately for their services.

75. Created by the American Medical Association, the CPOM is premised upon the principle that physicians should act autonomously. It sought to ensure that only licensed professionals deliver medical care and that lay persons and entities, and external factors such as business and financial interests, not influence treatment decisions, and also strove to protect patients from potential abuses because commercialized medicine would ultimately divide a physician’s loyalty between profits and the delivery of quality patient care. In furtherance of these goals, the CPOM prohibits the division or splitting of professional fees between physicians and lay persons/entities and/or the payment for referrals.

76. New York Education Law § 6521 defines the practice of medicine as “diagnosing, treating, operating, or prescribing for any human disease, pain, injury, deformity or physical condition.”<sup>1</sup> New York prohibits the corporate practice of medicine by allowing only New York State-licensed doctors to practice medicine.<sup>2</sup>

77. The unauthorized practice of medicine is a felony in New York State,<sup>3</sup> and the Attorney General has the power to prosecute the unauthorized practice if an investigation “substantiates that violations exist....”<sup>4</sup>

78. New York State permits doctors to form professional corporations as long as the corporations are *owned, operated and controlled by licensed doctors*.<sup>5</sup>

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<sup>1</sup> NY EDUC. LAW § 6521.

<sup>2</sup> See N.Y. Bus. Corp. Law § 1501, *et seq.*; N.Y. Educ. Law § 6602.

<sup>3</sup> NY EDUC. LAW § 6512(1) (“Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, or who practices any profession as an exempt person during the time when his professional license is suspended, revoked or annulled, or who aids or abets an unlicensed person to practice a profession, or who fraudulently sells, files, furnishes, obtains, or who attempts fraudulently to sell, file, furnish or obtain any diploma, license, record or permit purporting to authorize the practice of a profession, shall be guilty of a class E felony.”).

<sup>4</sup> NY EDUC. LAW § 6514(1).



79. For example, New York Business Corporation Law (“BCL”) § 1507 provides that a physician shareholder of a medical professional corporation must be actively engaged in the practice of medicine through the professional corporation for it to be lawfully licensed. BCL § 1507 provides as follows:

**Issuance of Shares**

A professional service corporation may issue shares only to individuals who are authorized by law to practice in this state a profession which such corporation is authorized to practice and who are or have been engaged in the practice of such profession in such corporation ... or who will engage in the practice of such profession in such corporation within thirty days of the date such shares are issued ... *All shares issued, agreements made, or proxies granted in violation of this section shall be void.* [Emphasis added].

80. The legislative history of BCL § 1507 is instructive. In 1971, the State Education Department, commenting on the proposed amendment to BCL § 1507, stated: “This bill amends the Business Corporation Law in relation to the operation of professional service corporations. While this bill allows more flexibility in the ownership and transfer of professional service corporation stock, *it maintains the basic concept of restricting ownership to professionals working within the corporation.*” [Emphasis added].

81. As a corollary, in accordance with New York’s prohibition against lay ownership of shares in medical corporations (and the accompanying potential for fraud), a corporation cannot practice medicine by hiring doctors to act for it. Likewise, it is the established public policy of New York State that medical providers may not engage in voluntary prospective fee-splitting arrangements. Under Section 6509-a of the New York Education Law, a doctor may be guilty of professional misconduct if the doctor:

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<sup>5</sup> See N.Y. LLC Law §§ 1203, 1207; N.Y. Bus. Corp. Law §§ 1501, 1503(a), 1507, 1508.

has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of professional care, or service . . . .<sup>6</sup>

82. This precept has been codified as a rule of the Board of Regents applicable to all licensed professions since 1977. New York State Education Department regulations, which define “unprofessional conduct” in the practice of any licensed profession, forbid, *inter alia*:

(4) permitting any person to share in the fees of professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice in the same profession, or a legally authorized trainee participating under the supervision of a licensed practitioner. This prohibition *shall include* any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a professional licensee constitutes a percentage of, or is otherwise dependent upon, the income of receipts of the licensee from such practice . . . .<sup>7</sup>

83. Accordingly, firmly established New York law prohibits the sharing of professional fees with anyone other than a partner or associate in the same profession, and business corporations and LLC’s commit unlicensed practice by employing doctors or sharing their fees. This prohibition includes, as New York courts have held, corporations entering into contracts with medical professionals to provide accounting, billing, personnel, and other management services in exchange for fees. As a result, the use of a nominal or sham owner equates to a fraudulently licensed medical corporation and constitutes behavior tantamount to fraud.

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<sup>6</sup> NY EDUC. LAW § 6509-a.

<sup>7</sup> NY EDUC. LAW § 6530(19).

84. Because fee sharing with an unlicensed individual is professional misconduct, an agreement to share fees between a doctor and a non-doctor is void and unenforceable.

**b. Pascal Works to Become Fully Licensed to Practice Medicine In New York State So He Can Lawfully Be a Shareholder of, and Help Build, the Surgery Center**

85. As explained above, in order to (i) obtain an Article 28 license and Certificate of Need from the New York State DOH, and (ii) not violate New York State's strict prohibition of the corporate practice of medicine, Pascal had to obtain a full, unrestricted New York State license to practice medicine.

86. To do so, he had to repeat three more years of residency, which he began at St. Luke's-Roosevelt Hospital Center (his PGY 2 residency). Pascal continued his residency (his PGY 3-4 residency) at Boston Medical Center, which he completed in 1988.

**c. In the Interim, FAC Leased the Premises to Physicians and Managed the Premises**

87. Knowing that it would take several years for Pascal to meet New York State's requirements for obtaining a license to operate a surgery center, Jean-Jacques and Pascal, by and through FAC, subleased the Premises to physicians and their practices.

88. From 1986–1988, while completing his residency at Boston Medical Center, Pascal traveled back to New York City on weekends to manage FAC.

89. Because Pascal was spending weekdays in Boston and Jean-Jacques was living in France, in 1986, Jean-Jacques sent Francois, who was unemployed at the time, to New York to serve as another set of “eyes and ears” onsite, perform basic back office and administrative functions, and send Jean-Jacques regular reports by phone and fax.

90. In 1986, Francois was 24 years old. He had no formal training in any particular profession and had no full-time job or career to speak of. He also applied for his green card and was denied.

**C. Jean-Jacques and Pascal Open the French-American Surgery Center**

91. In 1988, Pascal, after completing his residency, became: (i) fully licensed to practice medicine in New York State; and (ii) a board-eligible OB-GYN.

92. To form the Surgery Center, Jean-Jacques hired and paid substantial fees to two trusted professionals: (i) defendant Kessler, the attorney, who prepared all of the corporate formation documents, including all documents concerning the shareholders and their respective percentage interests in FASC; and (ii) defendant CCA and its CEO, Frank T. Cicero M.D., a consultant who specializes in representing clients, like FASC, in preparing, coordinating, and submitting Article 28 and CON applications to the New York State DOH, monitoring such applications through the governmental review process, and responding to inquiries by the DOH on behalf of clients.

93. As trusted professionals and fiduciaries representing clients in the health care industry and undertaking the responsibilities alleged herein, Kessler and CCA knew, or should have known, New York State's requirements to own, operate, and control a surgery center, including, *inter alia*, that it is illegal in New York State for corporations and non-physicians to own, operate, control, and sell medical practices and surgery centers.

94. On May 31, 1988, FASC received consent from New York State to incorporate and issue 200 shares of common stock.

95. Consistent with New York State's strict prohibition of the corporate practice of medicine, such consent was granted upon several conditions, including that:

a. no person shall own ten percent (10%) or more of the stock of FASC unless he has been approved for such ownership by the Public Health Council;

b. any transfer, assignment or other disposition of 10% or more of the stock of FASC or of 10% of the voting rights thereunder or the transfer, assignment or other disposition of the stock or voting rights of FASC which results in the ownership or control of more than 10% of the stock or voting rights thereunder of FASC by any person shall be subject to the approval by the Public Health Council; and

c. no stock in FASC or any voting rights thereunder may be owned or controlled by another corporation.

96. FASC was incorporated on or about June 6, 1988.

97. FASC obtained an Article 28 surgery center license and a CON from the DOH.

98. Business took off right away and Jean-Jacques hired Howard Weinberg as FASC's Executive Administrative Director to oversee all of the Surgery Center's operations and staff. In that role, Weinberg had the following responsibilities, among others: compliance, human resource management and supervision, payroll, coordinating Department of Health inspections with government agencies and the center's Head Nurse and Medical Director, property and facility management, accounting and bookkeeping. Weinberg essentially handled all of the non-medical operations of the business.

99. From 1988 to 1994, while serving as FASC's Medical Director, Pascal also made a name for himself as a highly respected OB-GYN. His hospital affiliations with attending privileges included: Beth Israel South Medical Center; Doctor's Hospital/Beth Israel North; Mount Sinai Hospital; New York Presbyterian Hospital; and, FASC. This was good for the Surgery Center's reputation and helped grow the Surgery Center's business.

100. On the business side, Pascal, among other things, expanded his network within the New York City medical community and marketed the center to physicians to perform cases at the center (whose patients paid facility fees to do so), advertised the center by, among other things, conducting a public information campaign in the French-speaking community, ensured compliance with government licensing and reporting requirements (including the DOH), and formulated long-range goals and objectives for the business. Pascal also had the foresight to recognize the importance of the nascent managed care industry and made sure that FASC had contracts with all the Health Maintenance Organizations (HMO's) and managed-care plans, to enable managed-care patients to utilize FASC's facilities.

101. From 1988 to 1994, Francois worked for FAC and FASC and performed back office functions.

**D. Pascal's Financial Contributions to FASC and FAC**

102. Pascal assumed, and always reasonably believed, that as a director and officer of FASC, he was also a shareholder of FASC because Jean-Jacques always made it clear to Pascal that he was opening the Surgery Center for him. Pascal also assumed, and always reasonably believed, that he was a shareholder of FASC because *he had to be*, in order to open and operate the Surgery Center, because Jean-Jacques was never licensed to practice medicine in New York, and because he had invested years of time and money training to do so.

103. For these reasons, Pascal made substantial financial contributions to FASC and FAC, both on his own and at Jean-Jacques's request.

104. In addition to the professional and entrepreneurial contributions that Pascal made to FASC and FAC as described above, at numerous times, Pascal loaned to or otherwise invested

substantial capital in FASC and FAC. In total, Pascal invested at least **\$1,239,000.00** into the Surgery Center.

105. On numerous occasions, Jean-Jacques and Francine both promised Pascal that he would be paid back for his investments in FASC.

106. In addition, since Jean-Jacques passed away, Francine promised Pascal, on numerous occasions, that if the Surgery Center was ever sold, that he would be paid back for his investments.

**1. Pascal Waived His Annual Salary as FASC's Medical Director**

107. From day one, Pascal served as FASC's Medical Director, which entitled him to a salary of \$75,000.00 per year, as set forth on FASC's CON application.

108. Instead of drawing this salary, Pascal left the money in the business and treated the \$75,000.00 per year as an investment in the business.

**2. Pascal Made Substantial Loans to FASC and FAC**

109. Commencing in or about 1991, Pascal loaned FASC and FAC at least one hundred and sixty-nine thousand dollars (\$169,000.00) for FASC's and FAC's benefit ("Loan").

110. The Loan is evidenced by, among other things, several checks (totaling \$79,000.00) made payable to FASC and FAC and endorsed for deposit by Francois. The Loan is also evidenced by a check for \$90,000.00 that had been made payable to Pascal by his medical practice and that Pascal endorsed and gave to Jean-Jacques (written on August 10, 1992, deposited on August 26, 1992) to be used for the Surgery Center.

111. FASC and FAC promised to repay the Loan to Pascal on several occasions.

112. From time to time, Pascal received reimbursements for the Loan, including by check signed by Francois.

113. Pascal made several demands for repayment of the Loan. As alleged below, however, after Francois surreptitiously usurped control over FASC and FAC, Francois took affirmative steps to avoid paying back the Loan.

### **3. Pascal Paid Equipment Leases on Behalf of FASC**

114. In 1991, Pascal, “doing business as” Fifth Avenue Surgery Center, entered into the first contract with Copelco Leasing Corporation, a division of CitiBank (“Copelco”), to lease medical equipment on behalf of the Surgery Center in the amount of \$151,029.60 (60 payments of \$2,517.16). The lease was personally guaranteed and paid for by Pascal on behalf of the Surgery Center over a five-year period.

115. In 1993, Pascal, “doing business as” Fifth Avenue Surgery Center, entered into a second contract with “Copelco” to lease medical equipment on behalf of the Surgery Center in the amount of \$69,781.18 (60 payments of \$1,163.03). The lease was guaranteed and paid for by Pascal on behalf of the Surgery Center over a five-year period.

### **4. Pascal Allows Jean-Jacques to Sell the Family’s Country Home – Which Jean-Jacques Had Gifted to Pascal – to Buyout a Minority Owner of FASC**

116. On or about December 18, 1981, Jean-Jacques gave to Pascal, **as a gift**, title to the family’s country home in Behoust, France, which Jean-Jacques had owned since the 1960s. This gift was in lieu of an inheritance of equivalent value he was bestowing upon his other children, Valerie and Francois.

117. In 1989, Jean-Jacques asked Pascal for permission to sell the home and use the proceeds to acquire a minority interest in FASC held by Dr. Albert Waitman. Pascal happily obliged because (i) his father asked him to, and (ii) increasing the family’s equity in the Surgery Center was good for the family. Pascal did not ask Jean-Jacques for anything in return.



118. The house sold for 2,100,000 French francs (about \$400,000.00) and Jean-Jacques used the proceeds to buyout Dr. Waitman as an investment in FASC on Pascal's behalf.

119. Because Francois was cognizant of the loans and investments Pascal had made into FASC, and in some cases signed acknowledgements, Francois and Kessler went to great lengths to conceal the sale of FASC to FAAA, thus paving the way for Francois to keep tax-free loan repayments for his own benefit. Pascal entrusted Kessler, who had prepared the document, with enforcing the provisions of his living will, yet Kessler failed to warn Pascal about the sale and that Kessler's own duty of loyalty to his client had been breached.

**E. Jean-Jacques Forms JJS to Purchase the Premises**

120. In 1995, JJS was formed to purchase and hold title to the Premises, a commercial condominium. The purchase price was \$1.8 million and the transaction was financed by a \$1.3 million mortgage from CitiBank, the same bank to which Pascal had personally guaranteed and was still promptly paying the \$220,000.00 (*see supra*) surgical equipment leases. This purchase money mortgage was dated July 28, 1995.

a. Defendant Kessler represented JJS in the transaction.

121. The ownership of JJS was as follows: 80% FrancInvest; 20% Jean-Jacques.

122. Pascal is a shareholder in FrancInvest, which, in turn, has a majority ownership interest in JJS (and therefore the Premises) and a majority ownership interest in FAC.

123. JJS, as owner, leased the Premises to FAC until December 2003, and the sole purpose of FAC was to serve as the tenant of the Premises.

124. FAC, in turn, subleased the Premises to FASC.

**F. The Death of Jean-Jacques Simon in 2002**

125. Jean-Jacques passed away on August 2, 2002.

**1. Jean-Jacques's Ownership Interest in the Surgery Center Passed to Francine By Operation of French Law**

126. Following Jean-Jacques's death, Pascal learned from Kessler that Jean-Jacques did not leave a will, so he sought letters of administration on Jean-Jacques's estate from the New York County Surrogate's Court.

127. In response to Pascal's petition, Francine presented a document known as a "Communaute Universelle" (*i.e.*, a universal marriage contract), pursuant to which, under French law, all of Jean-Jacques's property passed to Francine. On December 23, 2002, Pascal's petition was denied without prejudice as the court determined that Jean-Jacques's estate was subject to French law.

128. Therefore, upon the death of Jean-Jacques, Francine became the sole shareholder and President of FAC, which, as explained above, is unlawful in New York State.

**2. Francine's Ownership, and Subsequent Disposition, of the Surgery Center Was Unlawful Under New York Law**

129. As set forth above, it was unlawful for Jean-Jacques, who was never licensed to practice medicine in New York State, to have an ownership interest in the Surgery Center. But thanks to defendants Kessler and CCA, and because *Jean-Jacques* and *Jean-Pascal* had the same name ("Jean") and because Pascal's New York medical license is in the name "Jean Simon," he did nevertheless give the appearance of ownership and, when he died, his interest passed to Francine. Pascal, ever the dutiful son, did not want to disrespect his mother.

130. It was also unlawful for Francine and Francois, who are not doctors, to own, operate, and/or control the Surgery Center. Once again, defendants Kessler and CCA facilitated Francine's and Francois's illegal ownership, operation, and/or control – and, later on, with the help of Raab, the sale – of the Surgery Center.

a. **Francine's Limited Rights and Obligations Under the New York Business Corporation Law**

131. Francine's rights upon Jean-Jacques's death vis-à-vis her shares in the Surgery Center were substantially limited. New York Business Corporation Law ("BCL") § 1510 (entitled "Death or Disqualification of Shareholders") states, in pertinent part:

*A professional service corporation shall purchase or redeem the shares of a shareholder in case of his death ... within six months after the appointment of the executor or administrator or other legal representative of the estate of such deceased shareholder ... at the book value of such shares as of the end of the month immediately preceding the death or disqualification of the shareholder as determined from the books and records of the corporation in accordance with its regular method of accounting. The certificate of incorporation, the by-laws of the corporation or an agreement among the corporation and all shareholders may modify this section by providing for a shorter period of purchase or redemption, or an alternate method of determining the price to be paid for the shares, or both. If the corporation shall fail to purchase or redeem such shares within the required period, a successful plaintiff in an action to recover the purchase price of such shares shall also be awarded reasonable attorneys' fees and costs.*

*Id.* (emphasis added).

132. In addition, BCL § 1511 (entitled "Transfer of Shares") states, in pertinent part:

No shareholder of a professional service corporation may sell or transfer his shares in such corporation except to another individual who is eligible to have shares issued to him by such corporation or except in trust to another individual who would be eligible to receive shares if he were employed by the corporation. Nothing herein contained shall be construed to prohibit the transfer of shares by operation of law or by court decree. ***No transferee of shares by operation of law or court decree may vote the shares for any purpose whatsoever except with respect to corporate action under [Business Corporation Law § 909] and [Business Corporation Law § 1001]*** ... Any sale or transfer, except by operation of law or court decree or except for a corporation having only one shareholder, may be made only after the same shall have been approved by the board of directors, or at a shareholders' meeting specially called for such purpose by such proportion, not less than a majority, of the outstanding shares as may be provided in the certificate of incorporation or in the by-laws of such professional service corporation. At such shareholders' meeting the shares held by the shareholder proposing to sell or transfer his shares may not be voted or counted for any purpose, unless all shareholders consent that such shares be voted or counted.

*Id.* (emphasis added).

133. Further, BCL § 909(a) addresses the “sale, lease, exchange or other disposition of all or substantially all the assets of a corporation” and BCL § 1001 concerns the voluntary dissolution of a corporation by a vote of two-thirds of the outstanding shares. In that regard, under New York law, selling the Surgery Center itself and obtaining value for its goodwill to which the decedent contributed – as opposed to merely liquidating its assets – *is prohibited*.

134. Accordingly, Francine, as a non-professional transferee of Jean-Jacques’s shares by operation of law, had two sets of limited rights vis-à-vis the Surgery Center: (i) the right to have FASC purchase her shares pursuant to BCL § 1510 (assuming, of course, that FASC would continue to be owned, operated, and controlled by New York State licensed physicians); and (ii) the right to vote as a shareholder, but *only* for the limited purpose of liquidating all or substantially all of the assets of FASC pursuant to BCL §§ 909 and 1001.

135. To facilitate his plan to secretly sell FASC, Francois signed an Asset Purchase Agreement with FAAA on November 7, 2007. The purchase price was \$2,300,000.00, and a down payment of \$200,000.00 was placed in escrow pursuant to an escrow agreement with Francois’s friend, podiatrist Pamela Karman, as Escrow Agent. CCA represented the parties in their application to the Public Health Commission, which approved the transfer (subject to contingencies) as memorialized in its Executive Summary of June 30, 2009. The final sale was consummated in July 2011 with Francois, using the Power of Attorney that Francine had signed only days earlier, acting as Francine’s agent.

136. Francine later told Pascal that she never owned 90% of anything. She also told Pascal that she never received any of the proceeds from the sale and indicated that she was unaware that the Power of Attorney was used to sell FASC. In any event, because Francine and

Francois did not have the right or the power to sell the Surgery Center, the transaction was unlawful and is *void ab initio*.

137. Kessler received a certified check for \$246,849.55, drawn on a dormant FASC account at Signature Bank, signed by Raab and dated February 15, 2011. The legend on the check's debit slip stated "official check payable to Kessler as Escrow Agent for French-American Surgery Center, Inc."

**b. Notice of Change of Ownership Was Required Under Article 28**

138. As defendants Kessler and CCA knew full well, under Article 28, New York State needs to be notified of any change of ownership in an Article 28 Facility within 60 days.

139. Upon Jean-Jacques's death and, in turn, the passing of Jean-Jacques's shares in FASC to Francine, no such notice was ever provided to New York State.

140. Thus, between 2002 and 2007 – when, as alleged below, the Surgery Center was surreptitiously sold without Pascal's knowledge – **the DOH never knew that the Surgery Center had been operating under the ownership and control of Francine, a non-physician living in France, and Francois, her non-physician son.**

**G. In 2014, Pascal Was First Put on Notice of Both Defendants' Scheme to Defraud Him of His Ownership Interest in the Simon Family Business and the Unlawful Sale of the Surgery Center**

141. As alleged above, Pascal, an FASC director and officer, assumed and reasonably believed that he was a shareholder of FASC because his father always made it clear to Pascal that he was opening the Surgery Center for him. Pascal also believed that he was a shareholder because, under New York law, FASC could not operate without him, which is why he and Jean-Jacques waited six years for Pascal to complete his residency and receive a full New York license to practice medicine before opening the Surgery Center. If Pascal was not going to be a

shareholder – and, the face of the Surgery Center – then there would have been no reason for Jean-Jacques to wait six years to open the Surgery Center.

142. It was not until 2014, after conversations with Francine and David Gronsbell, CPA, the New York accountant for JJS, FASC, and FAC (“Gronsbell”), that Pascal first learned about the defendants’ illicit scheme and course of conduct and their conspiracy to defraud him of his ownership interests in the family businesses that he helped to build over the course of several years.

143. In early September of 2014, Pascal spoke to his mother concerning, among other things, the business of FrancInvest and its related entities. Francine offered concerning information, including that Francois represented that the family entities were “broke” and not generating sufficient revenue, as justification for selling the apartment that Francine resides in located in Paris. At no point during this conversation did Francine state or otherwise represent that a change in the ownership or management of FASC or FAC had occurred. When Pascal suggested that Francine sell the Surgery Center or the Premises, rather than the family home for over 50 years (as explained below), she said Francois would not want to.

144. On or after September 18, 2014, Pascal spoke with Gronsbell, concerning: (i) Pascal’s preparation of an application for reappointment to New York Hospital under the Stark law, which requires certain financial disclosures; and (ii) information pursuant to the preparation of Pascal’s personal tax returns. Mr. Gronsbell did not appear to be aware of the issues between Pascal and Defendants as complained of herein.

145. During that telephone conversation, Mr. Gronsbell informed Pascal that he had recently met with defendant Kessler regarding an anticipated merger of FAC and FASC.

146. Mr. Gronsbell further informed Pascal that Kessler informed him that JJS was to be the eventual sole surviving entity. These transactions are indicia of the fact that JJS, as controlled by FrancInvest (which is, in turn, controlled by Francois), is contemplating a sale of the Premises – the Simon family’s most valuable asset.

147. These conversations raised red flags that caused Pascal to conduct an investigation into his family businesses. As alleged below, Pascal discovered, via FOIL requests and other efforts, the defendants’ unlawful scheme to defraud him of his ownership interest in the Simon family businesses and their unlawful sale of the Surgery Center.

148. Pascal also recently learned for the first time that he was not named as a shareholder when FASC was formed, that, upon Jean-Jacques’s death, Francine owned 90% of the Surgery Center, and that, somehow, Francois became a 5% shareholder.

## **II. Defendants’ Scheme and Fraudulent Course of Conduct**

149. As explained above, Jean-Jacques passed away in 2002. Because Jean-Jacques had a universal contract of marriage under French law, Francine immediately gained control of his assets.

150. Following Jean-Jacques’s death, Valerie became solely dependent upon her mother and Francois for financial support. Divorced and unemployed, she was extremely vulnerable both emotionally and financially.

151. At the time of Jean-Jacques’ death, Francois was working for FASC in a non-medical capacity and, to buy their loyalty, which he would need to execute his scheme to defraud, made allowance payments to Francine and Valerie from FAC and FASC.

**A. Francois Executes a Plan to Seize Control of the Surgery Center and the Premises and Engages in a Series of Unlawful Transactions for Personal Financial Gain**

**1. Francois Acquires His Sister Valerie's Shares in FrancInvest for Minimal Consideration and Illicitly Seizes Control Over FrancInvest**

152. In October 2002, not long after Jean-Jacques's death, Francois facilitated a transfer of Valerie's shares in FrancInvest to himself for minimal consideration – once again, without Pascal's knowledge or consent. To do so, Francois misrepresented the financial status and other relevant information concerning FrancInvest and its related entities to both Francine and Valerie in furtherance of his own selfish motives.

153. At the time of the transfer of Valerie's shares to Francois, JJS was worth in excess of \$20 million. Thus, Valerie's share (one-third of 80%) was worth over \$5 million dollars. Francois, however, only paid Valerie the equivalent of approximately 50,000 euros for these shares and never declared the "gift" on his tax return.

154. Recent documents promulgated by FrancInvest incorrectly indicate that Pascal owns one hundred and fifty-nine (159) shares as opposed to one hundred and sixty-three. (163). Not only did Francois wrongfully usurp Valerie's 157 shares, he proclaimed himself owner of four additional shares belonging to Pascal. Francois also wrongfully gave away four (4) shares of Francinvest, not to Francine's trusted French friends, but, without Pascal's knowledge, to: defendant Kessler, Kessler's wife, Rosenberg, Kessler's brother, Stuart Kessler ("Stuart") and Francois's friend, Pamela Karman, who also served as Escrow Agent in the sale of FASC to FAAA. Documents also show that Francois owns three hundred and fourteen (318) shares, and Francine owns fifty-one (51) shares. Based on the initial allocation of shares (*see supra*), this is clearly not what Jean-Jacques intended.



155. According to the Francinvest “Order of Mouvement” share registry, Lynn Rosenberg’s share of Francinvest was worth \$35,000 on the date of transfer, December 26, 2002. Its present value is greater than \$97,483.00. Kessler’s share of Francinvest was given to him on September 27, 2012. Its present value is greater than \$97,483.00. Stuart Kessler’s share was given to him on March 13, 2013. Its present value is greater than \$97,483.00. Thus, the Kessler family stands to profit handsomely (almost \$300,000.00) from these gifts.

156. Francois knew that Valerie had mental health issues and was an easy target. This was especially so in the weeks following Jean-Jacques’ death, when she was vulnerable emotionally and financially. In the fall of 2012, Valerie was placed under a “curatelle” or guardianship under the jurisdiction of the French courts.

157. The French Court of Appeals held a hearing concerning Valerie’s appeal of guardianship on January 27, 2015 and affirmed the “curatelle” on February 24, 2015. The French court favorably noted the litigation pending in this New York Court (*i.e.*, the case at bar) and stressed the importance of having a guardian from outside the Simon family assist in assessing Valerie’s legal remedies for recovering her assets, including her shares in FrancInvest and, by extension, the Premises.

158. In addition, the French “Pole Financier” (*i.e.*, government prosecutors) is addressing issues of misconduct concerning the transfer of Valerie’s FrancInvest shares as well. In 2010, when Francine turned 80, FrancInvest did not have three valid administrators as required by French law and, thus, the financial actions undertaken by FrancInvest in 2011, including Francine’s power of attorney given to Francois (with Kessler’s assistance) enabling JJS to mortgage the Premises for \$3.3 million, were illegal, thus rendering its actions void or

voidable. Kessler's wife, Lynn Rosenberg, was named an officer and director of FrancInvest in December 2002, but she does not read or speak French or attend meetings.

159. As noted above, in this case, Pascal seeks to protect his rights as a beneficial owner of the Premises and his equitable interest in the Surgery Center. He does not seek to address the "internal affairs" of FrancInvest and, instead, will defer to the French independent prosecutor on those issues. The foregoing is alleged because it is probative of Francois's fraudulent conduct.

## **2. Francois Fires the Family's Longtime Tax and Accounting Advisors**

160. Since the 1960s, Jean-Jacques had engaged the prominent firms of Francis Lefebvre and Robert Habanski of Fiduciare Sarette to serve as the family's tax and accounting advisors. Jean-Jacques enjoyed a trusted relationship with these firms and the individual professionals who handled the family's accounts. French commercial law requires two accountants for oversight purposes.

161. Shortly after Jean-Jacques died, without consulting with Pascal, Francois fired the firms and hired Andre Azouley of Eurodec and Tita Zeitoun of Boiserie Expertise Audit ("BEA"). Although Habanski of Fiduciare Sarette told Pascal that he had given the files to Francine, Zeitoun of BEA wrote to Pascal in November 2002 stating that she had no files and was trying to research the company on a commercial registry. Recently, Pascal learned that Global Audit, another accounting firm owned by Andre Azouley of Eurodec, had replaced Mme. Zeitoun and BEA since 2011, thus violating French commercial law requiring two accountants for oversight purposes. Laurent Abehsera of LACEF performed additional accounting work for FrancInvest – his partner is Elie Azoulay.

**3. In 2002, Francois Replaces FASC's Longtime Executive Director, Howard Weinberg, With Charles Raab**

162. In 2002, Francois replaced FASC's longtime Executive Director, Howard Weinberg, who had been hired by Jean-Jacques, and replaced him with Charles Raab, a non-physician, who was named CEO/CFO of the Surgery Center.

163. As set forth below, Raab "left" FASC in 2007 to form FAAA and, with a group of podiatrists, acquired the Surgery Center in an inside transaction.

164. Because the sale of FAAA was an inside transaction, the purchase price of \$2,300,000.00, as reflected in the Public Health Council Executive Summary, is far below the fair market value (FMV) such a transaction would have commanded if it were arm's-length.

165. Pascal located a "LinkedIn" profile for Larry Jacobs, CPA, the Gronsbell firm's accountant responsible for the JJS, FAC and FASC account. His profile indicated that he handled a sale in 2011 of an Ambulatory Surgery Center in Manhattan for \$12 million.

166. On June 10, 2015, Pascal received a copy of the Asset Purchase Agreement between FASC and FAAA and other CON documents produced by DOH pursuant a FOIL request. The documents included the 2009 balance sheet and Profit & Loss statement ("P&L") for FASC showing \$10,000,000.00 in gross revenue for 2009.

167. As part of the transaction, and in addition to its goodwill, FASC transferred to FAAA its Medicare and Medicaid contracts.

168. The DOH Public Health Commission, in its Executive Summary, noted that it was an "inside transaction" because the discount was so outrageous.

**4. Charles Raab's Role in the Fraudulent Scheme**

169. Charles Raab, who had previously been involved in a litigation and acquisition of another family-owned Ambulatory Surgery Center dispute, "Empire Fiscal Management v.

Nassau Center for Ambulatory Surgery” which resulted in the acquisition of that facility by Insight Amsurg Center, Inc. and himself, saw an opportunity to acquire a new project. On March 7, 2007, he formed FAAA, Inc. for the purpose of acquiring FASC. The Asset Purchase Agreement for the sale of FASC was entered into on November 7, 2007.

170. Section 1203(a) of New York State’s Limited Liability Company Law states: “With respect to a professional service limited liability company formed to provide medical services as such services are defined in article 131 of the education law, **each member** of such limited liability company must be licensed pursuant to article 131 of the education law to practice medicine in this state.” *Id.* (emphasis added).

171. Because Raab was not a licensed physician, he was not permitted to be a member of FAAA or the owner of a medical practice and surgery center.

172. Under “The Amended and Restated Limited Liability Company Operating Agreement of Fifth Avenue Surgery Center, LLC,” Raab was a “founding member” and an “Initial Member.” Raab was also “Secretary” and “Treasurer” (§ 6.1) and a member of the “Management Board” (§ 5.2). The Operating Agreement also provides that “[t]he Management Board shall have the ultimate power to appoint, reappoint, suspend, and revoke *any physician’s Medical Staff privileges*” (emphasis added).

173. This is one of the many reasons why New York State prohibits the corporate practice of medicine: because a non-physician with no ethical obligations or professional training, such as Raab, should never be permitted to exercise control over patient care.

174. At the same time, Raab was also an officer (*to wit*, the Treasurer) of JJS.

175. Raab is listed on the bank records of a JJS account that was opened in 2005 at Signature Bank. Raab was listed as the “primary contact person” for JJS, where he had

unfettered access to JJS's checking and money market accounts. These facts were never disclosed in FrancInvest Annual Reports or otherwise.

176. Raab also owned Empire Fiscal Management, Inc. ("Empire"), a billing company that was dissolved by proclamation and had its authority to do business annulled on June 23, 1993. Despite being deemed inactive by New York State, Empire received over \$1.5 million in "billing" fees from FASC as follows: \$306,073 in 2005; \$397,275 in 2006; \$436,533 in 2007; \$348,215 in 2008; and \$75,000 in 2010.

177. During that same timeframe, FASC paid Raab over \$1,800,000.00 in "salary" as follows: \$269,401 in 2005; \$158,208 in 2006; \$281,274 in 2007; \$311,539 in 2008; \$405,770 in 2009; and \$395,193 in 2010.

178. Francois also caused FASC to pay himself a "salary" on top of the no-show "salaries" Francois received from Madison Associates ASC Management, Inc. and his "officers/directors fees" from JJS. According to FASC federal tax filings, Francois received: \$179,373 in 2005; \$109,884 in 2006; \$190,022 in 2007; \$194,746 in 2008; \$402,970 in 2009; and \$238,188 in 2010.

179. On April 15, 2010, Raab created another billing company, SEM Services, LLC, in order to bill the Surgery Center's facility fee to Medicare, Medicaid, or the patient's insurer. Raab's company was to receive \$535,000.00 per year from FAAA, regardless of the number of patients or bills submitted.

180. DOH reported 3600 cases performed at FASC in 2009. This means that Raab is earning \$138.00 per case just to file the claim for the facility fee with the patient's insurance.

181. In 2013, DOH reported 1665 cases performed at the Surgery Center.

182. In 2014, DOH showed 1544 cases performed at the Surgery Center. Thus, the number of cases is falling, but with Raab's billing contract at \$535,000.00 per year, he is earning \$324.00 per case just for billing. Raab also failed to disclose his partners in this lucrative billing company.

**5. Charles Raab Forms Madison Associates ASC Management, Inc. to Further Enrich Himself and Francois**

183. On March 7, 2007, Raab, along with Gregg Rock, DPM and Igor Amigud, M.D., anesthesiologist, the Managing Board of FAAA, formed a second company, Madison Associates ASC Management, Inc. ("MAD"). Its purpose was to contract with FAAA for \$180,000.00 per year as "management consultant" after the sale of FASC was consummated.

184. MAD received substantial monies from FASC for "billing" and "management" before and after the fraudulent sale of the Surgery Center was consummated.

185. Starting in 2008, MAD received \$216,520 for "billing services" and \$180,000 for "management fees." In 2009, MAD received \$535,000 for "billing fees" and \$180,000 for "management fees. In 2010, MAD received \$172,500 in management fees and \$513,187 in billing fees.

186. In other words, Raab received billing *and* management fees every year from 2005 to 2010, and triple-dipped by receiving billing fees through MAD entered into a Consulting and Administrative Services Management contract with FASC and, later, FAAA. Empire and MAD in 2008 and 2010.

187. According to the First Amendment to Administrative Services Agreement, signed April 8, 2009, MAD paid Francois a no-show salary of \$227,471.00, which was a "raise" over his previous "salary" of \$191,071.92. Francois was also made a party to the contract.

188. According to the Assignment, Assumption and Amendment signed the same day, April 8, 2009, MAD paid “legal costs and expenses of the Landlord and Seller incurred in connection with the preparation and negotiation of this Agreement” to Kessler of \$7,500 and \$10,000.

189. Francois, Kessler, and CCA were also aware of these contractual relationships.

190. As part of the transaction with FAAA, Francois allowed JJS to enter a “sweetheart” (*i.e.*, substantially below market value) lease agreement directly with FAAA. The present rental income on the triple net lease is \$394,000.00, whereas the fair market value of this 10,000 square-foot space is \$1,500,000.00. This transaction, without question, constitutes corporate waste and is a product of gross mismanagement or fraud. At the time, Raab was an officer of both JJS and FAAA.

191. Kessler also prepared the Assignment, Assumption and Amendment Agreement, signed April 8, 2009, which permitted FAAA, Inc. to transfer its rights to acquire FASC to FAAA, LLC and also the amend the JJS lease to the Premises so that FAAA, LLC would be in privity with JJS.

**5a. Further Evidence of the Impropriety of the Sale of the Surgery Center From FASC to FAAA**

192. Kessler received well over \$800,000.00 in “legal fees” from the defendant companies during a time when, by his own admission, he was “in the throes of retirement.”

193. Further, the law firm of McDermott, Will & Emery (“MWE”) represented FAAA in connection with its acquisition of the FASC license.

194. FASC paid for FAAA’s legal fees to MWE, which represented FAAA as “buyer.” This is further evidence of the fact that the transaction between buyer FAAA and seller FASC

was not arms-length and that the parties were inseparable and united in their efforts to defraud Plaintiff.

195. In 2009, FASC paid \$254,448.17 to MWE, and in 2010, FASC paid an additional \$179,635.83 to MWE.

196. CCA was aware that MWE was representing Raab and FAAA, as evidenced by a December 29, 2009 letter from CCA to the DOH, in which MWE and Raab were copied.

197. In addition, in 2008, FASC also paid FAAA \$114,147.51 for “legal transactions.”

198. These sums are in addition to the fees paid to the law firm of Nixon Peabody LLP (“Nixon Peabody”), which, according to the November 5, 2007 Asset Purchase Agreement, was representing FASC. FASC paid Nixon Peabody the following: in 2004, \$23,158; in 2005, \$44,538.14; in 2006, \$48,532.06; in 2007, \$42,016.85; in 2008, \$16,222.27; in 2009, \$21,365.32; and in 2010, the year the transfer closed, \$1,853.52. But FASC had also paid MWE \$68,500 on December 16, 2010, which was noted on the ledger as “closing costs.”

199. But that is not all. JJS, the landlord, also paid substantial fees to Nixon Peabody: in 2005, \$23,687.33; in 2006, \$26,598; in 2007, \$3,921; in 2008, \$20,019; in 2009, \$12,739.80; and in 2010, \$8,579.99 (booked as “Entertainment” on the general ledger).

200. Even FAC, the inactive subsidiary, paid Nixon Peabody, which further illustrates the fact that Francois disregarded the corporate formalities in furtherance of his fraudulent scheme. In 2005, FAC paid Nixon Peabody \$2,054.46, and in 2006, \$5,623.58.

201. In other words, over \$847,282 was spent in legal fees to effectuate this fraudulent and unlawful “sale” that allegedly yielded \$1,800,000. When Kessler’s fees of \$803,000, the additional “legal transaction” paid to FAAA of \$114,147.51, and CCA’s fees of \$ 74,000 are added to this amount, legal fees total over \$1,825,000 for a deal that yielded \$1,800,000.



202. CCA was aware that FASC, as seller, was paying for buyer FAAA's expenses because CCA, which was representing FAAA and submitted its CON application to the DOH, was also being paid by FASC. In 2009, FASC paid CCA \$58,448.95 in eight separate payments from June 1, 2009 through December 31, 2009. In 2010, FASC paid CCA \$16,370.39. In other words, CCA received \$74,819.34 from "seller" FASC while representing "buyer" FAAA.

203. CCA was also aware that Raab was not a physician and therefore not qualified, as a matter of law, to have any ownership interest in FAAA.

204. Nevertheless, CCA stated, in its June 26, 2009 letter accompanying FAAA's CON application, that "*all members* of the proposed applicant (Fifth Avenue) already practice at the existing Center (French-American) and will continue to practice in the same fashion upon approval of this project" (emphasis added).

**6. On December 31, 2002, Francois Refinances the Mortgage on the Premises and Keeps the Proceeds for Himself**

205. One week after the Surrogate's Court proceeding was terminated (on December 23, 2002), when it was confirmed that Jean-Jacques's entire estate passed to Francine, Francois wasted no time and, on December 31, 2002, without Pascal's knowledge or consent, caused JJS to refinance the mortgage on the Premises with HSBC Bank in the amount of \$123,330.14. Francois also received a \$300,000 line of credit, which was repaid from the cash-out proceeds from the Park Avenue loan.

206. Francois kept all of this money for himself.

**7. Francois Gives Shares in FrancInvest to Defendant Kessler, Kessler's Wife and Brother, and Francois's Friend Pamela Karman**

207. Francois also improperly arranged for the transfer of FrancInvest shares to defendant Kessler, Kessler's wife (Rosenberg) and Kessler's brother (Stuart) and named

Rosenberg an officer/director of FrancInvest, effective December 26, 2002 – literally right after the termination of the Surrogate’s Court proceeding.

208. These “transactions” were made without Pascal’s knowledge or consent. It was also never disclosed that “Rosenberg” was married to Kessler. And as she does not speak French, she is unable to read the annual reports and other documents and does not attend meetings.

209. Notably, defendant Kessler represented Jean-Jacques (and Pascal) for seventeen (17) years, yet it was not until after Jean-Jacques’s death and Francois seized control over FrancInvest that defendant Kessler and his family members became shareholders of the Simon family’s holding company.

210. In 2005, Francois made his friend, podiatrist Pamela Karman, a shareholder in FrancInvest, again, without Pascal’s knowledge or consent.

211. Francois also caused himself, Francine and Rosenberg to be installed as the three administrators of FrancInvest without authorization.

#### **8. Francois Causes JJS to Assign Its Rental Income to HSBC**

212. Almost immediately upon Jean-Jacques’s death, Francois caused JJS to assign its rental income to HSBC Bank even though he had no authority to do so.

213. Neither JJS nor FrancInvest benefited from this transaction in any way whatsoever.

214. The rental income of \$394,000 is still assigned, to the present mortgagor, Berkshire Bank, f/k/a First Choice Bank.

**9. Francois Causes FrancInvest to Forgive a \$300,000 Loan to FAC**

215. According to a 2012 FrancInvest audit report, a \$300,000 loan to FAC had been forgiven by FrancInvest on November 29, 2002, yet there was no notice of or approval by the FrancInvest shareholders.

216. That audit report also indicates that FrancInvest acquired an interest in another family-owned holding company for 445,000 euros, yet there was no notice of or approval by any of the FrancInvest shareholders, as is required.

**10. On February 25, 2005, Francois Refinances the Mortgage on the Premises a Second Time and Keeps the Proceeds for Himself**

217. On February 25, 2005, without notice to Pascal and without Pascal's knowledge or consent, Francois caused JJS to refinance the mortgage on the Premises with The Park Avenue Bank for \$2,400,000.00, with a cash-out in the amount of \$1,556,745.32.

218. Francois kept the money for himself.

**11. Francois Coerces Francine Into Executing a Durable New York Power of Attorney and Enters Into Unauthorized Personal Transactions**

219. On June 23, 2011, Francine executed a durable power of attorney in favor of Francois. This power of attorney, written in English but signed by Francine, gave Francois, as Francine's agent, unrestricted power of attorney over all of Francine's assets, with no limitations.

220. It is unclear as to whether Francine still owns her 20% share of JJS.

221. Defendant Kessler prepared the power of attorney that Francine signed for Francois.

222. The power of attorney was immediately used to alienate or encumber corporate property to Pascal's (and Francine's) detriment. The escrow account, currently maintained by

Berkshire Bank f/k/a First Choice Bank, shows Francois as Francine's "attorney-in-fact" on the signature card, with no signature on file for Francine in her personal capacity.

223. The Power of Attorney was also used to finalize and complete the fraudulent transfer of FASC to FAAA in July 2011. Although the Asset Purchase Agreement of November 7, 2007 required a resolution by the FASC board of directors, there was no resolution because Pascal, as Vice President and Director, was not invited to attend such a meeting.

**12. On August 3, 2011, Francois Refinances the Mortgage on the Premises for the Third Time and Keeps the Proceeds for Himself**

224. On August 3, 2011, without prior notice to Pascal and without Pascal's knowledge or consent, Francois caused JJS to refinance the mortgage on the Premises with First Choice Bank of New Jersey for \$3,300,000.00, with a cash-out in the amount of \$1,141,729.93. There was no corporate resolution undertaken regarding this mortgage, nor was it reported in the FrancInvest financial statements. In fact, up to and including 2014, the FrancInvest financial report stated that HSBC was still the mortgagor and holder of the JJS note.

225. As consideration for the transaction, Francois caused rent from FASC and any other tenants to be assigned to First Choice, which has deprived, and will continue to deprive, JJS and its equitable owners, including Pascal, of over \$394,000.00 of annual income for the duration of the loan. Since that time, approximately \$1,825,000.00 of rental income has been assigned to First Choice.

226. JJS has been paying the debt service on the loan, which has further deprived shareholders Francine and FrancInvest and its shareholders, including Pascal, of income, while Francois continues to enrich himself at their expense.

227. Francois kept the \$1,141,729.93 for himself.

228. Immediately thereafter, on August 24, 2011, Francois used the proceeds to pay off the mortgage on his co-op apartment located at 225 East 57th Street in Manhattan.

229. Francois's spending spree did not stop there. Three (3) months later, on November 29, 2011, Francois purchased a condominium located at 820 NE 25th Avenue, Unit 67, Hallandale, Florida, for \$328,000.00. The seller was defendant Kessler.

a. Notably, the address on the power of attorney executed by Francine in favor of Francois (*see supra*) is this very same address despite the fact that the power of attorney execution date was *five months before* Francois actually acquired Kessler's Florida condominium.

**13. Francois Sells the Family Apartment in Paris and Other Evidence of Francois's Fraud and Misappropriation of JJS's Assets**

230. In the early fall of 2014, Pascal spoke with Francine, who informed him that the Paris apartment in which she (and the family) had been living for over 50 years – which is owned by FrancInvest – was being sold because she needed the money.

231. During that conversation, Francine also indicated that she believed that she still owned the Surgery Center – thus, Francois never told her about the sale of the Surgery Center.

232. The anticipated sale of the family apartment and the impact it might have on Valerie's well-being prompted Pascal to conduct a further investigation of the management of the Simon family's assets.

233. FrancInvest held an "emergency" meeting in Paris on December 29, 2014 to authorize the sale of the apartment. Pascal received notice of the meeting on December 24, 2014, which is insufficient under the FrancInvest bylaws and precluded Pascal from participating.

234. FrancInvest, in Pascal's absence, approved the sale of the apartment and it was sold on February 2, 2015. FrancInvest's share of the proceeds was \$1,666,846.00.

235. On February 9, 2015, the proceeds from the sale were deposited into a FrancInvest account with HSBC.

236. Less than 24 hours later, the proceeds were wire-transferred out of France and into a personal account controlled by Francois.

237. Francois did not tell Francine what he was doing with the money. In fact, during a telephone conversation, Francine told Pascal that she believed that all of the proceeds from the sale of the Paris apartment remained in the FrancInvest bank account.

238. On February 20, 2015, an additional \$1,800,000 was transferred from FrancInvest's HSBC account in France to JJS's Citibank account in Hallandale, Florida.

239. On April 2015, Francois caused \$2,500,000 to be transferred from JJS's account at First Choice Bank in New Jersey to FrancInvest's HSBC account in France.

240. On February 28, 2017, Francois caused FrancInvest to wire \$500,000 from its HSBC account in France to a JJS account at Citibank in Hallandale, Florida.

241. On January 24, 2012, JJS "borrowed" \$700,000 from FrancInvest's HSBC account in France and immediately loaned the same amount to FAC – an entity that has no legitimate purpose.

242. On March 15, 2005, April 4, 2005, and May 5, 2005, a total of \$160,713 was wired from landlord JJS to tenant FASC.

#### **14. Francois Causes JJS to Pay Him a Salary of \$100,000 Per Year**

243. As Pascal first learned in 2015, since 2003, Francois caused JJS to pay him a salary of \$100,000.00 per year.

244. Francois did not obtain consent from FrancInvest's shareholders to pay himself this salary, which is exorbitant, unnecessary, and corporate waste. Rosenberg, as a director, knew or should have known about this salary.

245. Rosenberg, Kessler's common law wife, also received a "no-show" salary. She received \$75,636.00 in officer's fees for 2015 and 1016 and \$60,000 in Director's fees from 2005 to 2012 for doing absolutely nothing.

246. Kessler received a total of \$500,490.00 in so-called "legal fees" from JJS despite the fact that, at all relevant times, he was, by his own admission, "in the throes of retirement."

247. Kessler also received \$246,830.00 from FASC as "Escrow Agent" even though the Asset Purchase Agreement indicated that Pamela Karman served as escrow agent for the transaction.

248. Francois also received \$2,043,518 in combined salary from JJS and FASC, in addition to the no-show "salary" he received from Raab's MAD.

249. According to the books and records of JJS, Francois charged \$102,704.00 in so-called "travel expenses" to the company – charges which, for a real estate holding company, especially under these circumstances in which Francois is not the sole owner, are improper.

250. According to the books and records of JJS, in 2011 alone, Francois used \$493,905.50 of JJS's money for his own personal use, including travel and entertainment.

251. The 2015 JJS general ledger shows transfers of \$770,000.00 and 1,800,000.00 to "French Invest" on April 7 and 26, and to "Francinves TSA" on February 26, 2015 of \$1,800,000.00. An April 7, 2015 entry under French Invest (#6225) indicates a loan of \$1,800,000.00. However, there is no such loan on the FrancInvest Annual Report nor would

FrancInvest have such funds on hand. Also, “French Invest” is not FrancInvest. It is a French S.A.S. that was formed in 2015.

252. Further, according to the 2015 JJS general ledger, Francois also has a Charles Schwab 401K account, which he has caused JJS to pay on his behalf.

253. The 2015 JJS general ledger also indicates an officer’s salary of \$260,000.

254. Further, over the last several years, contractor Jon Bremen of Bremen Restoration was paid \$671,329.00 by JJS and FASC combined, which were classified in the General Ledgers as follows: (1) \$124,200.00 for “Outside Services,” mostly paid over two years by JJS; (2) \$530,226.00 for Leasehold Improvements; and (3) \$16,863.00 for “Storage.”

255. Pursuant to Section 2.02 of the Lease, these “services” should have been paid for by FASC, as tenant, not by JJS.

256. In sum, according to the books and records of JJS, during the period of April 30, 2005 through April 30, 2016, JJS’s rental income totaled approximately \$4,275,000, while the cash expenditures totaled approximately \$4,385,000.

**B. Francois, With the Help of Others, Unlawfully Sells the Surgery Center in a Series of Illegal Transactions**

257. On November 7, 2007, FASC (d/b/a “Fifth Avenue Surgery Center”) agreed to sell the Surgery Center to Fifth Avenue ASC, Inc. (which, upon DOH approval of the sale, would be changed to Fifth Avenue Surgery Center, LLC (*i.e.*, defendant FAAA)) for \$2,300,000.00 pursuant to an “Asset Purchase Agreement.”

a. In 2007, Francois’s friend, Pamela Karman, a podiatrist, was given the \$200,000.00 down payment to hold as “escrow agent” when the Surgery Center was sold.

258. Under the contract, the additional \$2.1 million was to be paid in July 2011 when the transaction closed.



259. Under the agreement, the assets being sold and purchased by defendant FAAA included, among others, “goodwill” and “the name ‘Fifth Avenue Surgery Center.’” As set forth above, this is prohibited under New York law.

260. According to DOH records, on November 7, 2007, FASC’s ownership structure was as follows: Francine Simon (90%); “Jean Francois” (5%); and “Stanley Schoenbach, MD” (5%). On November 7, 2007, Francine and Francois were not licensed medical professionals, nor was Stanley Schoenbach, as he lost his license to practice medicine in 2000 and, since then, had no affiliation with FASC whatsoever.

261. Francois, with power of attorney over all of Francine’s assets, signed the Asset Purchase Agreement on behalf of FASC as “Vice President.” This was illegal.

a. As alleged above, based on a conversation Pascal had with Francine in the fall of 2014, at that time, she still believed that she owned the Surgery Center.

262. Charles Raab signed the Asset Purchase Agreement on behalf of “Fifth Avenue ASC, Corp.” as “Secretary.” Like Francois, Raab is not a licensed physician. He is also, as set forth above, a former Administrative Manager of FASC and a personal friend of Francois.

263. As set forth above, it is unlawful for corporations and non-professionals to own, operate and control medical practices and surgery centers. It is also unlawful for corporations and non-professionals to sell medical practices and surgery centers.

264. Therefore, the Asset Purchase Agreement – and, in turn, the sale of the Surgery Center to FAAA – was illegal and is *void ab initio*.

265. As a matter of law, an agreement that is void at its inception does not become valid with the passage of time.

266. Moreover, that DOH records indicated, in 2007, that Francine was a 90% owner of FASC, compels only one conclusion: that Francois, with the help of defendants Kessler and CCA made material misrepresentations and omissions to DOH concerning Francine's (and his) ownership in FASC in order to "get the deal done."

267. DOH required that notice of change of ownership, from Jean-Jacques to Francine, be provided within 60 days, yet this was not done, even though defendants Kessler and Cicero knew of this requirement as FASC's attorney and consultant.

268. In addition, at the time of Jean-Jacques's death, Francois had no ownership interest in FASC, nor could he, as he is not a licensed physician; however, according to DOH records, "Jean Francois" held a 5% interest in FASC. Ultimately, *how* Francois became an "owner" of FASC is of secondary importance – one way or another, his ownership was illegal and made possible with the assistance of defendants Kessler and CCA.

269. DOH also requires that documents concerning changes in ownership of under ten percent (10%) be filed 90 days prior to such change. No documentation concerning the aforementioned transfer to Francois was ever filed.

270. Francois's 5% ownership interest in FASC was provided without Pascal's knowledge or consent, and Pascal was never informed of this prior to receiving the DOH records via a FOIL request.

271. FASC was sold a fraction of FASC's then actual market value and without notice to or consent from Pascal who, at all relevant times, was a director and officer of FASC.

272. On or about December 21, 2010, FAAA changed its name to Fifth Avenue Surgery Center, LLC and is continuing the same business as FASC, which remains a viable entity. In fact, FAAA's website claims the Fifth Avenue Surgery Center "has been in operation

since 1990.” Therefore, not only does FAAA continue to exploit FASC’s (*i.e.*, the Surgery Center’s) goodwill and reputation – built, in substantial part, by Pascal’s contributions of his time, money, effort, and reputation – it is possible that FAAA is continuing to operate under licenses or other authorities initially obtained by, or with the assistance of, Pascal in his authority as a medical doctor, Medical Director, investor, and director and officer of FASC.

273. Many people in the medical community continue to believe that Pascal and his family remain involved in the Surgery Center’s management and operations. It is embarrassing to Pascal and his reputation, as a Fulbright fellow and board-certified OB/GYN with attending privileges at New York Presbyterian Hospital, to now be associated with a podiatry facility.

274. FAAA did not pay Pascal for his goodwill as part of its purchase of FASC, yet it continues to exploit it without his permission.

275. Even though the Copelco loans (see above) were fully paid and satisfied, Pascal suffers ongoing harm because, on the Internet, every credit agency continues to see UCC filings from 1991 and 1993 emblazoned with the legend “Jean P. Simon d/b/a Fifth Avenue Surgery Center.” Once they see this, they review the multitude of current outstanding liens filed against the current users of the fictitious name “Fifth Avenue Surgery Center,” which is FAAA. Since the credit agency and bank due diligence departments do not know that Pascal has no association with Fifth Avenue Surgery Center, his loan applications get rejected because it appears to them that Jean P. Simon, alter ego Fifth Avenue Surgery Center, has too many outstanding liens. Making matters worse, Pascal is further harmed because credit agencies wrongfully believe that he has failed to disclose pertinent facts on applications – *to wit*, a fictitious name.

276. Raab, FAAA's registered agent, was previously the Administrative Manager of FASC, is the owner of another entity that performed billing services for FASC, and is a business and/or personal acquaintance of Francois.

277. Moreover, on or about August 31, 2011, a UCC-1 financing statement was filed with the New York City Department of Finance indicating that JJS, as secured party, had obtained a security interest as against FAAA as the debtor concerning equipment, furnishings and other items located in the Premises.

278. Accordingly, the sale of FASC to FAAA appears to be an improper insider, non-arm's length transaction.

279. Notably, Pascal met with Francine and Francois on or about October 18, 2012 in order to discuss, among other things, the management and operation of FrancInvest and the related entities. At no point during the conversation did Francois admit, state or otherwise reveal that a change in the ownership or management of the Surgery Center – that Pascal created and helped to build – had occurred.

280. On or about October 29, 2014, DOH provided Pascal with a Public Health Council Executive Summary from June 9, 2009. This was the first time that Pascal learned about FASC's sale. More records were produced on June 10, 2015 by the DOH pursuant to a FOIL request. Pascal was never informed of this prior to receiving the DOH records. According to the New York Secretary of State, FAAA changed its name to Fifth Avenue Surgery Center, LLC on December 21, 2010.

**C. CCA and Raab Made Numerous Misrepresentations to DOH in Connection With the Sale of the Surgery Center**

281. As a consulting firm specializing in the preparation of applications required for the formation and sale of Article 28 facilities in New York, CCA knew that Jacques was never an

owner of FASC because he could not have been under New York law. Jacques was never a licensed physician anywhere in the United States. In addition, Jacques maintained his primary residence in Paris, and when he was in New York, he was only here as a tourist. He did not have a green card, work visa, or social security number, nor filed tax returns in the United States.

282. CCA also knew that Jacques was not an owner of FASC because *Plaintiff* – who CCA was representing – was, and had to be, the owner of FASC. As an expert in the field, CCA knew that in order for FASC to obtain an Article 28 license and CON and not violate New York State’s strict prohibition of the corporate practice of medicine, Plaintiff had to first obtain a full, unrestricted New York State license to practice medicine by repeating his residency, which he began at St. Luke’s-Roosevelt Hospital Center, continued at Boston Medical Center, and completed in 1988. Once Plaintiff’s qualifications were approved, FASC’s application could be approved.

283. Accordingly, on April 5, 1988, because Plaintiff’s license to practice medicine in New York was approved, FASC’s application was approved and in May 1988, FASC’s incorporation was approved. Thus, CCA’s representation to the DOH that Jacques had 90% (or any) ownership in FASC was false.

284. Further, CCA represented to the DOH that, when Jacques died in 2002, he left his estate to Francine and, because the French courts, which CCA claimed had jurisdiction over the estate, took substantial time to review and approve the estate transfer, it took several years for his “ownership” in FASC to transfer to Francine. This statement was also false. As reflected in a Decision and Order of the New York Surrogate’s Court, Jacques’s estate was *never* subject to probate in France. Rather, all of his property, which the Order noted consisted of “shares of stock

in two closely held New York corporations” (i.e., JJS and FAC), automatically passed to Francine by operation of French law.

285. In that regard, the Surrogate’s Court took judicial notice of a French “Universal Contract of Marriage” between Jacques and Francine which, when it became effective in 1994, preempted the terms of their original 1953 marital contract and eliminated the need for probate or any other judicial intervention. And there was no will or testamentary instrument governing Jacques’s assets in the U.S. prior to 1994 because *there were no assets*. Defendant Kessler confirmed this fact to Pascal in 2002. And, pursuant to Title 10, NYCRR § 600.10 (“Agents, nominees and fiduciaries”): “Agents, nominees and fiduciaries, whether testamentary or inter vivos shall not be considered proper applicants for establishment, transfer of interest or transfer of stock of a facility ...” Thus, it was legally impossible for Francine to retain an ownership interest for *seven years*.

286. CCA’s representation to the DOH that “Stanley Schoenbach, M.D.” was part of FASC’s “Current Ownership” in 2009 was also false. Schoenbach’s license to practice medicine was revoked on January 3, 2000. Thus, as of that date, Schoenbach – whose checkered history and myriad transgressions were hardly a secret – could no longer be a member or shareholder of a medical professional corporation since he was legally disqualified from providing medical services. *See* BCL § 1504(a) (“[n]o professional service corporation ... may render professional services except through individuals authorized by law to render such professional services as individuals”).

287. As an expert in this field, CCA should have known that under BCL § 1509, once “Dr. Schoenbach” became “*legally disqualified* to practice his profession within the state,” he was required to sever all of his financial interests in FASC forthwith or as otherwise provided in

[BCL §] 1510 BCL § 1509. Therefore, CCA's representation to the DOH regarding the 5% interest owned by Stanley Schoenbach was also false and misleading.

288. Further, Raab, who is not a physician, could not be a member or investor in FASC, yet he was held out as one in numerous instances. For example, CCA's opening letter to the DOH states: "In addition, all members of the proposed applicant (Fifth Avenue) already practice at the existing Center (French-American) and will continue to practice in the same fashion upon approval of this project" (emphasis added).

289. And on Schedule 2A ("Applicant's Offices/Ownership Interests") to the CON Application, CCA and Raab represented to the DOH that Raab was the "Treasurer (Voting)" of FASC since 1995, but under New York law, he could not be. *See* BCL §§ 1507, 1509, 1510. Raab also stated, on his "employment history for past 10 years," that he was President of Empire Fiscal Management since August 1985, even though it did not exist until 1986.

290. Further, in connection with the CON Application, CCA also failed to disclose material facts on Raab's Schedule 2A "Record of Legal Actions" in four different line items. For example, CCA and Raab failed to disclose an investigation by the New York State Office of State Comptroller Division of State Government Accountability ("OSC"), Report 2008-S-34, regarding fraud in the Empire Plan and \$178,633.00 in overpayments. The report noted that: "the New York State Insurance Department concluded that it may be a violation of the State Insurance Law, and a fraudulent billing practice, when a provider routinely waives out-of-pocket costs and accepts the amount the insurer reimburses as payment in full." Notably, in its "Audit Findings and Recommendations," the OSC found "that Fifth Avenue is routinely waiving Empire Plan members' out-of-pocket obligations" and that "[t]his negates the intended

disincentive from using the more costly non-participating providers *and thus drives up the cost of the Empire Plan to taxpayers.*”

291. As an expert specializing in CON Applications, these facts were easily accessible to CCA, which had a duty to make these disclosures and ensure that the CON Application was complete, truthful and accurate. Likewise, these facts were also easily accessible to Raab, who had the same duties.

292. Moreover, the Schedule 2A included a check-the-box section, where Raab failed to check “Yes” to item “C. Enforcement Actions,” which asked: “During the period of your (or your relative’s) affiliation, were any of the facilities subject to an enforcement or administrative action taken by the State regulatory agency due to the facility’s violation of applicable laws and regulations?” Raab checked “No” where he should have checked “Yes.” He also failed to explain the violation in the space provided on the form. CCA facilitated this material misrepresentation and omission.

293. Similarly, where asked if there had been or were any civil or administrative actions against him or any professional/business entity, Raab checked “No” where he should have checked “Yes.” Where the form requests details, the handwritten response was “N/A” (i.e., not applicable), which was also a misstatement. Raab failed to disclose: (i) that his billing corporation, Empire, was dissolved by proclamation upon annulment of authority in 1993; and (ii) the order to disgorge the \$178,633.00 in overpayments. CCA facilitated these material misrepresentations and omissions as well.

294. Also, notwithstanding the fact that one of Raab’s companies, Empire Fiscal Management, had been dissolved by proclamation upon annulment of authority in 1993, in 2009,



CCA represented to the DOH in support of Raab's character and competence that Raab was currently serving as EFM's President.

**D. Defendants' Misdeeds Vis-à-Vis FASC and FAC**

295. On October 10, 2011, following the sale of the Surgery Center, Francois, without notice to Pascal, re-formed FAC in the State of Florida. He terminated FAC as a New York corporation in January of 2012.

296. Although Pascal believed that FAC was acting as a pass-through to JJS, he learned, from the FOIL documents produced to DOH as part of the CON application, that JJS actually had privity with FASC since December 2003, and FAAA had been in privity since 2007.

297. The Florida FAC entity was terminated on or about June 5, 2013.

298. FAC was re-formed in New York sometime on or after January 1, 2015 according to the New York Secretary of State.

299. FAC was operating for a period of time in which it was neither registered to do business in New York or Florida.

300. Francois orchestrated the transfers and re-formations of FASC and FAC, with the aid of defendant Kessler, to ultimately consolidate the right of the Premises in JJS and authorize the transfer of the Premises owned by JJS for his personal gain and to the detriment of Pascal as well as his mother, Francine, his incapacitated sister, Valerie, and FrancInvest.

301. Not only was FASC rendered inactive and "merged out" on December 31, 2014, but the necessary steps were taken *immediately after* the filing of the initial Complaint in this case, inferably because Francois and/or Kessler was attempting to avoid the litigation he anticipated concerning the loan which Francois, acting on behalf of FASC, refused to pay by email dated December 5, 2014. By deactivating FASC immediately upon the filing of the

Complaint, Francois and/or Kessler revealed that they are actively monitoring the docket and are taking affirmative steps to render themselves judgment-proof, thus providing the Court further insight into the immediate risks of alienation of the Premises in the present proceedings.

302. Francois also caused JJS to incorporate in the State of Florida on October 10, 2011. The Florida Department of State records indicate that the President is Francine, the Vice President/Treasurer is Francois, and the Secretary is Lynn Rosenberg (Kessler's wife). The address is also the location of Kessler's condominium before Francois purchased it.

303. Francois also caused the formation of JJS Group LLC, which appears in a spreader agreement in the 2011 mortgage from First Choice Bank of New Jersey.

### **III. Defendants' Failure to Produce Books and Records**

304. Pascal has not been provided with accurate corporate documents he is legally entitled to receive under the BCL concerning FAC, FASC and JJS.

305. Francois has similarly refused to entertain requests for information concerning the relevant entities and was not forthright, as he is required to be as a fiduciary of Pascal, during prior conversations including those set forth in 2012 and 2014 or in response to Pascal's written submissions to the French courts.

306. By letter dated November 12, 2014, Pascal, through counsel, made a written demand for re-payment of the loan to FASC within thirty (30) days.

307. By email dated November 20, 2014, FASC, by Francois, requested that Pascal submit proof concerning the loan.

308. By letter dated November 24, 2014, Pascal, through counsel, provided FASC with proof of the loan – cancelled checks totaling seventy-nine thousand dollars (\$79,000.00).

309. By email dated December 5, 2014, FASC, by Francois, stated that it would not repay the loan. The corporate books and records of FASC and FAS indicate that the loan remains an outstanding liability to Pascal.

#### **IV. Demand Futility**

310. Plaintiff repeats and realleges each of the allegations set forth above as if fully set forth herein.

311. Plaintiff brings certain causes of action herein “double derivatively” on behalf of and for the benefit of FrancInvest to enforce causes of action on behalf of JJS of which FrancInvest is the supermajority and controlling shareholder and “derivatively” on behalf of FrancInvest in connection with Francois’s and Kessler’s past and ongoing wrongful conduct in connection with the Premises.

312. Plaintiff will fairly and adequately represent the interests of FrancInvest and JJS and their investors in enforcing and prosecuting the rights of FrancInvest and JJS.

313. Plaintiff has not made demand upon FrancInvest, through its majority and controlling shareholder, Francois, to cause FrancInvest to cause JJS to pursue, institute, or prosecute this or any similar action on any of the causes of action set forth herein, or to cause FrancInvest to pursue, initiate, or prosecute this or any similar action on any of the causes of action set forth herein, because such a demand would be futile as Francois is in no position to cause those entities to prosecute causes of action against him.

314. As alleged above, Francois has engaged in malfeasance by, *inter alia*, facilitating the unauthorized and illegal sale of the Surgery Center (for a price far below market value) and making false and misleading statements to DOH (most likely, via mail and/or wire) to do so, the unauthorized change in the corporate forms of FAC, JJS and FASC, the entry into unauthorized

encumbrances concerning the Premises (*e.g.*, assignments of rents), entering into transactions such as multiple refinances of the Premises and looting the proceeds for personal gain, which amount to corporate waste, the issuance of materially false annual statements and other documents by the aforementioned entities, and the causing of the domestic entities, FAC, JJS and FASC, to be terminated and reinstated in Florida and New York without authorization.

315. Francois has, with the assistance of Kessler and his wife, Rosenberg, for the reasons set forth above, gained control of FrancInvest by subterfuge including by, among other things: installing Rosenberg as a director without Pascal's knowledge or consent and concealing her true identity, as Kessler's wife; making misrepresentations to his mother, Francine, and his sister, Valerie; causing false documents to be promulgated; and causing unauthorized resolutions and transactions to be entered into along with other misdeeds.

316. Francois made misstatements and omissions of material fact to Pascal during his prior conversations regarding the entities at issue and has ignored requests to produce accurate corporate documents. Francois has engaged in actual fraud by causing JJS to enter into several transactions concerning the Premises and retaining the proceeds for his personal use.

317. JJS, by and through Francois, entered into several unauthorized agreements, specifically mortgages, as well as assignments of leases and rents which benefited Francois personally because he received in excess of three million dollars secured by the Premises, shortly after Jean-Jacques' death. These assignments and other unauthorized transactions are a matter of public record, having been officially filed in New York County.

318. Francois used the proceeds of the loans, which were secured by the assignments for his personal benefit, including for paying off mortgages on properties he personally owns or owned, including his co-op apartment located at 225 East 57th Street in Manhattan. The property

in Hallandale Beach, Florida, which is the registered address for JJS, FAC and FASC, was purchased by Francois from defendant Kessler on November 29, 2011, according to public records maintained in the State of Florida.

319. Francois, as aided by Kessler and Rosenberg, has engaged in the conduct set forth above towards consolidating all interests in the Premises in JJS for the purposes of selling or otherwise disposing of or entering into additional encumbrances concerning the Premises without notice to or consent from Pascal.

320. Francois has engaged in the conduct described herein with actual knowledge concerning the unlawfulness of his conduct and with the goal of benefitting himself and other defendants to the detriment of Pascal, among others.

321. Francois is aware of all of the material facts pertaining to this action and as such is incapable of making an independent or disinterested decision. Therefore, demand on Francois would have been futile.

322. As indicated above, in this case, Pascal seeks to protect his rights as a beneficial owner of the Premises, which are located in New York County, and does not seek to address the internal affairs of FrancInvest.

323. Therefore, any additional demand upon FrancInvest would be futile and Pascal's claims are ripe for disposition by the Court.

**CAUSES OF ACTION**

**FIRST CAUSE OF ACTION**

**(Against FAC and FASC)**

**(Direct Claim for Breach of Contract – Failure to Repay Loan)**

***(Dismissed Pursuant to Decision and Order Dated September 4, 2018)***

324. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

325. Plaintiff made the Loan to FASC with the expectation that it would be re-paid.

326. Plaintiff also made the Loan to FAC with the expectation that it would be re-paid.

327. The existence of the Loans is or should be reflected on the corporate books and records of FASC and FAC.

328. Plaintiff has previously demanded re-payment of the Loan.

329. FASC and FAC have failed to re-pay the Loan and have refused to do so in writing.

330. Accordingly, FASC and FAC are liable to Plaintiff for the Loan in an amount to be determined at trial but in no event less than \$389,000.00 plus interest.

**SECOND CAUSE OF ACTION**

**(Against FAC and FASC)**

**(Direct Claim for Unjust Enrichment/Quantum Meruit – Failure to Repay Loan)**

***(Dismissed Pursuant to Decision and Order Dated September 4, 2018)***

331. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

332. In the alternative, FASC and FAC were enriched by and through the Loan at the expense of Plaintiff and it would be against the principles of equity and good conscience to permit FASC and FAC to retain the proceeds of the Loan.

333. FASC and FAC have retained the proceeds of the Loan.

334. Accordingly, FAC and FASC have been unjustly enriched in an amount to be determined at trial but in no event less than \$389,000.00 plus interest.

**THIRD CAUSE OF ACTION**  
**(Against Francois, FASC, FAC, and FAAA)**  
**(Direct Claim for Rescission – Sale of FASC)**  
*(Dismissed Pursuant to Decision and Order Dated September 4, 2018)*

335. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

336. As alleged herein, Plaintiff has an equitable interest in FASC (i.e., the Surgery Center).

337. The sale of FASC to FAAA was illegal and is void ab initio.

338. The sale of FASC to FAAA was consummated to Plaintiff's detriment.

339. The sale was consummated as part of a conspiracy to commit fraud.

340. Plaintiff has suffered and will continue to suffer financial and other damages on sale because, among other things, JJS is the owner of the premises and entitled to account of the rent payments. Moreover, JJS has been caused to become a creditor to FAAA without Plaintiff's knowledge or consent and may suffer further damages, including financial, reputational and other damages if the sale is not rescinded.

341. There is no adequate remedy at law where, as here, a fraudulent transaction involving a valuable corporate asset and a regulated health care facility has been consummated and the Court should intervene under its equitable authority to rescind the sale of FASC to FAAA and return the parties to the status quo for further proceedings concerning the disposition of FASC and its assets.

342. Plaintiff requests that the Court issue an order rescinding the sale of FASC to FAAA and that Francois, FASC, FAC, and FAAA be required to pay any costs, fees and penalties associated with such rescission.

**FOURTH CAUSE OF ACTION**  
**(Against Francois, FASC, and FAC)**  
**(Direct Claim for Unjust Enrichment/Quantum Meruit – Sale of FASC)**  
***(Dismissed Against Francois Pursuant to Decision and Order Dated September 4, 2018)***

343. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

344. Francois, FASC, and FAC were enriched by and through the unlawful sale of FASC at the expense of Plaintiff and it would be against the principles of equity and good conscience to permit Francois, FASC, and FAC to retain the proceeds of the sale of FASC.

345. Francois, FASC and FAC have retained the proceeds of the sale of FASC.

346. Accordingly, Francois, FASC, and FAC have been unjustly enriched in an amount to be determined at trial but in no event less than \$2,300,000.00 plus interest.

**FIFTH CAUSE OF ACTION**  
**(Against Francois, FASC, FAC, and FAAA)**  
**(Constructive Trust – Sale of FASC)**  
***(Dismissed Against Francois and FAAA Pursuant to***  
***Decision and Order Dated September 4, 2018)***

347. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

348. A confidential or fiduciary relationship existed among Pascal, Jean-Jacques, Francine, and Francois.

349. Express or implied promises were made to Pascal that he would be a shareholder of FASC, that he would be paid back for all of his investments in the Surgery Center and FAC, and that he would share in the profits of the Surgery Center and FAC.



350. Pascal developed an equitable interest in FASC (i.e., the Surgery Center) and FAC through the expenditure and contribution of substantial monies, time, labor, and effort in reliance upon the express and/or implied promises made to him.

351. FASC, FAC, FAAA, and Francois were unjustly enriched as a result.

352. The imposition of a constructive trust is necessary to satisfy the demands of justice.

**SIXTH CAUSE OF ACTION**  
**(Against Francois)**  
**(Direct Claim for Fraud – Sale of FASC)**  
***(Dismissed Pursuant to Decision and Order Dated September 4, 2018)***

353. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

354. In connection with the sale of FASC to FAAA, Francois made omissions of material fact, which he had superior knowledge of and that were not available to Pascal, which Francois actively concealed from Pascal.

355. Francois made those material omissions with scienter.

356. Plaintiff reasonably relied upon Francois's material omissions in failing to take action to block the illegal sale of the Surgery Center to FAAA and protect his equitable interest in the Surgery Center.

357. As a result, Plaintiff has been damaged in an amount to be determined at trial, but no less than \$2,300,000.00.

**SEVENTH CAUSE OF ACTION**  
**(Against CCA, FAAA and Raab)**  
**(Direct Claim for Aiding and Abetting Fraud – Sale of FASC)**  
***(Dismissed Against CCA and FAAA and Leave to Amend With Respect to Raab Denied Pursuant to Decision and Order Dated September 4, 2018)***

358. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

359. Francois committed fraud in connection with the sale of FASC.

360. CCA and Raab had knowledge of the fraud committed by Francois in connection with the sale of FASC.

361. CCA and Raab provided substantial assistance, by affirmative acts and concealment, to advance the fraud's commission and enable it to proceed.

362. CCA's and Raab's misconduct proximately caused the harm suffered by Pascal on which Francois's primary liability is predicated.

363. As a result, Pascal has been damaged in an amount to be determined at trial, but no less than \$2,300,000.00.

**EIGHTH CAUSE OF ACTION**  
**(Against Francois, Rosenberg and Raab)**  
**(Double Derivative Claim for Corporate Waste – The Premises)**

364. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

365. As alleged herein, Francois has caused JJS, a subsidiary of FrancInvest, to give to himself, to transfer to others, to lose and/or waste JJS's corporate assets, by neglect of, failure to perform, or other violation of his duties.

366. Rosenberg and Raab, as officers of JJS, also violated their duties in connection with the foregoing transactions.

367. As a result of the foregoing, JJS has been and will continue to be damaged.

368. Plaintiff has no adequate remedy at law.

**NINTH CAUSE OF ACTION**  
**(Against Francois)**  
**(Double Derivative Claim for Fraud – The Premises)**  
***(Dismissed Pursuant to Decision and Order Dated September 4, 2018)***

369. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

370. In connection with the Premises, Francois made misstatements and omissions of material fact, which he had superior knowledge of and that were not available to JJS shareholders, which Francois actively concealed from JJS shareholders.

371. Francois made those material misstatements and omissions with scienter.

372. Francois made material omissions with the intent of inducing forbearance from further inquiry by JJS shareholders.

373. As a result, JJS has been damaged in an amount to be determined at trial, but no less than \$7,000,000.00.

**TENTH CAUSE OF ACTION**  
**(Against Francois, Rosenberg and Raab)**  
**(Double Derivative Claim for Breach of Fiduciary Duty – The Premises)**

374. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

375. Francois owed, and owes, JJS a fiduciary duty, based on the fact that Francois is identified as the Chief Executive Officer of JJS, to act and perform the services he is required to perform in that capacity in a careful and prudent manner.

376. As set forth above, Francois breached his fiduciary duties to JJS by his improper acts alleged herein concerning the Premises.

377. Rosenberg and Raab, as officers of JJS, also owed and owe JJS a fiduciary duty to perform the services they are required to perform in that capacity in a careful and prudent manner.

378. As set forth above, Rosenberg and Raab breached their fiduciary duties to JJS by their improper acts alleged herein concerning the Premises.

379. The misconduct set forth above has caused financial and other damage to JJS in an amount to be determined at trial, but no less than \$7,000,000.00.

**ELEVENTH CAUSE OF ACTION  
(Against Kessler)  
(Double Derivative Claim for Aiding and Abetting Fraud – The Premises)**

380. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

381. Francois committed fraud in connection with the Premises.

382. Kessler had knowledge of the fraud committed by Francois in connection with the Premises.

383. Kessler has intimate knowledge of the workings of the corporate defendants and nominal defendants on account of his representation of the parties.

384. Kessler and his family members received shares in FrancInvest, which is the supermajority owner of JJS, without notice to or consent from Pascal.

385. Kessler provided substantial assistance, by affirmative acts and concealment, to advance the fraud's commission and enable it to proceed including, inter alia, terminating FAC as a New York entity and merging FASC, FAC and JJS into a single entity.

386. Kessler is motivated to engage in the wrongful conduct alleged herein because he and his family members stand to gain substantial monies if and when the Premises are sold or by virtue of his ownership interest in FrancInvest, which is the supermajority owner of JJS.

387. Kessler's misconduct proximately caused the harm suffered by JJS on which Francois's primary liability is predicated.

388. As a result, JJS has been damaged in an amount to be determined at trial, but no less than \$7,000,000.00.

**TWELFTH CAUSE OF ACTION  
(Against Francois and Rosenberg)  
(Derivative Claim for Corporate Waste – The Premises)**

389. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

390. As alleged herein, Francois has given to himself, transferred to others, lost and/or wasted FrancInvest's corporate assets, by neglect of, failure to perform, or other violation of his duties.

391. Rosenberg, as director of FrancInvest, failed to apprise the shareholders, the President, and other directors, of the foregoing transactions.

392. As a result of the foregoing, FrancInvest has been and will continue to be damaged.

393. Plaintiff has no adequate remedy at law.

**THIRTEENTH CAUSE OF ACTION**  
**(Against Francois)**  
**(Derivative Claim for Fraud – The Premises)**  
***(Dismissed Pursuant to Decision and Order Dated September 4, 2018)***

394. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

395. In connection with the Premises, Francois made misstatements and omissions of material fact, which he had superior knowledge of and that were not available to FrancInvest shareholders, which Francois actively concealed from FrancInvest shareholders concerning JJS.

396. Francois made those material misstatements and omissions with scienter.

397. Francois made material omissions with the intent of inducing forbearance from further inquiry by FrancInvest shareholders.

398. As a result, FrancInvest has been damaged in an amount to be determined at trial, but no less than \$7,000,000.00.

**FOURTEENTH CAUSE OF ACTION**  
**(Against Kessler)**  
**(Derivative Claim for Aiding and Abetting Fraud – The Premises)**

399. Plaintiff repeats and realleges each and every allegation set forth above as if fully set forth herein.

400. Francois committed fraud in connection with the Premises.

401. Kessler had knowledge of the fraud committed by Francois in connection with the Premises.

402. Kessler has intimate knowledge of the workings of the corporate defendants and nominal defendants on account of his prior representation of the parties.

403. Kessler and his family members received shares in FrancInvest without notice to or consent from Pascal, then the largest individual shareholder.

404. Kessler provided substantial assistance, by affirmative acts and concealment, to advance the fraud's commission and enable it to proceed including, inter alia, terminating FAC as a New York entity and merging FASC, FAC and JJS into a single entity.

405. Kessler is motivated to engage in the wrongful conduct alleged herein because he and his family members stand to gain substantial monies if and when the Premises are sold or by virtue of his ownership interest in FrancInvest.

406. Kessler's misconduct proximately caused the harm suffered by FrancInvest on which Francois's primary liability is predicated.

407. As a result, FrancInvest has been damaged in an amount to be determined at trial, but no less than \$7,000,000.00.

**FIFTEENTH CAUSE OF ACTION  
(Against Francois and Rosenberg)  
(Derivative Claim for Breach of Fiduciary Duty – The Premises)**

408. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

409. Francois and Rosenberg, as directors, owed, and owe, FrancInvest a fiduciary duty as Administrators (i.e., directors) to act and perform the services they are required to perform in that capacity in a careful and prudent manner.

410. As set forth above, Francois and Rosenberg, as directors, breached their fiduciary duties to FrancInvest by their improper acts alleged herein concerning the Premises.

411. The misconduct set forth above has benefitted Francois and Rosenberg and caused financial and other damage to FrancInvest in an amount to be determined at trial, but no less than \$7,000,000.00.

**SIXTEENTH CAUSE OF ACTION  
(Against FAC, FASC, JJS, and Francois)  
(Accounting)**

*(Dismissed Pursuant to Decision and Order Dated September 4, 2018)*

412. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

413. A confidential or fiduciary relationship exists between Plaintiff and FAC, FASC, JJS, and/or Francois.

414. FAC, FASC, JJS, and/or Francois breached a duty imposed by the confidential or fiduciary relationship with respect to the Premises and FASC, in which Plaintiff has an interest.

415. Therefore, the Court may order that FAC, FASC and JJS (as controlled by FrancInvest, as controlled by Francois) permit Plaintiff to access and copy all existing books and records maintained by each corporation.

416. Accordingly, Plaintiff requests an Order that he be permitted access to the records of FAC, FASC and JJS.

**SEVENTEENTH CAUSE OF ACTION  
(Against All Defendants)  
(Injunction)**

*(Dismissed Pursuant to Decision and Order Dated September 4, 2018)*

417. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

418. As set forth above, Francois, Kessler, and Rosenberg have engaged in misconduct affecting FrancInvest, JJS, FASC and FAC.



419. Accordingly, Pascal requests an injunction precluding the sale, transfer, distribution, mortgage, trade, pledge or any other alienation of the Premises pending this action as authorized by Article 63 of the CPLR and BCL § 720.

420. Plaintiff also requests that the Court enjoin Defendants from utilizing any rental payments relating to the Premises as a security for any debt or for being pledged for any other purpose without the approval of the Court while this action is pending and to compel the rental payments to be placed in a trust under the Court's supervision pending the disposition of this matter.

421. Plaintiff requests that the Court issue a permanent injunction requiring that FAC/FASC be restored to their status as active New York corporations based in New York and that Defendants be required to pay any costs, fees and penalties associated therewith.

422. Plaintiff requests that the Court issue a permanent injunction requiring that any assignment, transfer, or other action substituting FAAA as tenant, sub-tenant or otherwise permitting it to exist or occupy the Premises be annulled and that FASC be restored to its tenancy.

423. Plaintiff requests any additional injunctive relief that Court believes is just and proper including but not limited to the appointment of a receiver under Article 12 of the BCL.

**EIGHTEENTH CAUSE OF ACTION  
(Against Francois, Kessler, and Rosenberg)  
(Double Derivative Claim for Unjust Enrichment – The Premises)**

424. Plaintiff repeats and realleges each and every allegation contained in the preceding paragraphs as if set forth fully herein.

425. As alleged herein, Francois, Kessler, and Rosenberg were unjustly enriched at the expense of JJS and it would be against the principles of equity and good conscience to permit Francois, Kessler, and Rosenberg to retain JJS's monies.

426. Accordingly, Francois, Kessler, and Rosenberg have been unjustly enriched in an amount to be determined at trial.

**WHEREFORE**, Plaintiff demands judgment against Defendants as follows:

- i. Awarding damages in an amount to be determined at trial, but no less than \$10,000,000.00;
- ii. Awarding punitive damages;
- iii. Awarding prejudgment interest at the statutory rate of 9%;
- iv. Awarding costs, expenses, disbursements and fees incurred by Plaintiff in connection herewith;
- v. Rescinding the sale of FASC to FAAA;
- vi. Ordering Defendants to permit Plaintiff to access, inspect and copy all existing business records as prayed for herein;
- vii. Granting a permanent injunction as prayed for herein; and
- viii. Granting such other and further relief as the Court deems just and proper.

Dated: September 24, 2018

**LACHTMAN COHEN P.C.**


/s/ *Brian S. Cohen*  
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**Attorneys for Plaintiff**

VERIFICATION

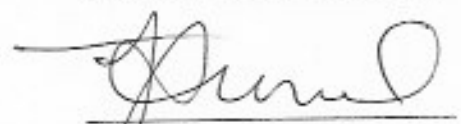
STATE OF NEW YORK )  
 )  
COUNTY OF NEW YORK )

Jean-Pascal Simon, being duly sworn, deposes and says:

I am the plaintiff in this action. I have read the annexed *Third Amended Verified Complaint* and know the contents thereof. As to the *Third Amended Verified Complaint*, each of the allegations contained in the separately numbered paragraphs therein are true based on my own personal knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe them to be true.

  
\_\_\_\_\_  
JEAN-PASCAL SIMON

Sworn to before me this  
24th day of September 2018

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

