UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EMIL SHASHA, TRUSTEE FOR THE VIOLET SHUKER SHASHA LIVING TRUST; JUDITH JACOBSON; LAURENCE ADLER AND SHIRLEY ADLER, TRUSTEES FOR THE ADLER FAMILY TRUST; EMPIRE STATE LIQUIDITY FUND LLC; HOWARD EDELMAN, TRUSTEE FOR THE EDELMAN FAMILY DECEDENT'S TRUST; MYRNA JOY EDELMAN, TRUSTEE FOR THE 2006 GILBERT M. EDELMAN INTER VIVOS TRUST; ROBERT A. MACHLEDER; MELVYN H. HALPER; PHYLLIS J. HALPER; WENDY S. TAMIS; ALAN D. GORDON; AND MARY JANE FALES,

Plaintiffs,

-against-

PETER L. MALKIN; ANTHONY E. MALKIN; THOMAS N. KELTNER, JR; AND MALKIN HOLDINGS LLC,

Defendants.

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14 Civ. 9989

(Jury Trial Demanded)

AMENDED COMPLAINT

Plaintiffs, Emil Shasha, Trustee for the Violet Shuker Shasha Living Trust, Judith Jacobson, Laurence Adler and Shirley Adler, Trustees for the Adler Family Trust, Empire State Liquidity Fund LLLC, Howard Edelman, Trustee for the Edelman Family Decedent's Trust, Myrna Joy Edelman, Trustee for the 2006 Gilbert M. Edelman Inter Vivos Trust, Robert A. Machleder, Melvyn H. Halper, Phyllis J. Halper, Wendy S. Tamis, Alan D. Gordon, and Mary Jane Fales, by and through their attorneys, Storch Amini & Munves PC and Griggs & Adler, P.C. *(admitted pro hac vice)*, allege, upon knowledge as to themselves, and information and belief as to Defendants, as follows:

1. This is a complaint for damages stemming from the fraudulent conversion of ownership interests (or "units") in the Empire State Building (the "ESB" or the "Building") into a substantively different investment. The conversion was the final phase of a complex scheme designed to usurp power, revenue, and ultimately the Building itself from its owners in violation of the Securities Laws of the United States.

2. Plaintiffs are investors ("Participants") who previously held ownership interests in Empire State Building Associates, LLC ("ESBA"), which owned the ESB. On October 7, 2013, Defendants compelled Plaintiffs to convert their ownership units in the ESB for shares of stock in a real estate investment trust ("REIT"). The stock that Plaintiffs received through the conversion amounted to less than one-third of the ESB's value. Defendants orchestrated and carried out the conversion by issuing a false and misleading proxy statement in January 2013 to gain investors' consents to a consolidation of eighteen real estate properties into a REIT, known as the Empire State Realty Trust, Inc. ("ESRT"). The ESB became the flagship asset of the REIT and its main marketing symbol. Although the ESB owners bore the expense of the transaction, Defendants reaped enormous windfalls, including securities projected to be worth over $730,000,000, plus an increase in their equity holdings of the consolidated properties from 9.8% to 25.8%.

3. The federal securities claims that Plaintiffs assert in this complaint are subject to arbitration. Plaintiffs are currently pursuing these claims against the Defendants in arbitration, which is pending before the American Arbitration Association. The Defendants have filed an answer and counterclaims in the pending arbitration proceeding. The filing of a demand for arbitration, however, does not toll the statute of limitations for federal securities claims, and Defendants have not agreed to toll the statute of limitations. In consequence and out of an

abundance of caution, Plaintiffs file this complaint to toll the statute of limitations as to these claims in the event the arbitrators determine that these claims are not subject to arbitration. Plaintiffs intend to file a motion to stay this action in favor of the already pending arbitration proceedings.

JURISDICTION

4. This Court has jurisdiction over this action under 28 U.S.C. § 1331(2008). The causes of action arise under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C § 78n(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9.

VENUE

5. Venue in this district is proper under 28 U.S.C. § 1391(b) (2008) because the defendants reside or work in this district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

PARTIES

6. Plaintiff Emil Shasha, One Deer Run, Chappaqua, New York 10414, is Trustee of The Violet Shuker Shasha Living Trust, a trust created under the laws of the State of Florida. The Trust held two participation units in ESBA.

7. Plaintiff Judith Jacobson, is an individual residing at 51 Rolling Ridge Road, Fairfield, Connecticut 06824. She held one-quarter (0.25) of a participation unit in ESBA.

8. Plaintiffs Laurence Adler and Shirley Adler, 26416 South Ribbonwood Drive, Sun Lakes, AZ 85248, are the Trustees of The Adler Family Trust, a trust created under the laws of the State of Arizona. The Trust held one participation unit in ESBA.

9. Plaintiff Empire State Liquidity Fund LLC is a limited liability company organized under the laws of the State of Delaware. Its managing agent is Andrew Penson, 51 Fifth Avenue, Suite 1416, New York, NY 10176. It held nine and one-tenth (9.1) participation units of ESBA.

10. Plaintiff Howard Edelman, 12534 Avenida Tineo, San Diego, CA 92128, is the trustee of The Edelman Family Decedent's Trust, a trust created under the laws of the State of California. The Trust held five participation units in ESBA.

11. Plaintiff Myrna Joy Edelman, 6250 11th Avenue South, St. Petersburg, FL 33707, is Trustee of The 2006 Gilbert M. Edelman Inter Vivos Trust, a trust created under the laws of the State of California. The Trust held five participation units in ESBA.

12. Plaintiff Robert A. Machleder is an individual residing at 69-37 Fleet Street, Forest Hills, NY 11375. He held approximately one and one-tenth (1.08) participation units in ESBA, as well as interests in other consolidated properties.

13. Plaintiff Melvyn H. Halper is an individual residing at 9 Latonia Road, Rye Brook, New York 10573. He held one-quarter (0.25) of a participation unit in ESBA, as well as interests in other consolidated properties.

14. Plaintiff Phyllis J. Halper is an individual residing at 9 Latonia Road, Rye Brook, New York 10573. She held approximately one and one-half (1.5625) participation units in ESBA.

15. Plaintiff Wendy S. Tamis is an individual residing at10 Trotter Lane, North Salem, New York 10560. She held one-half (0.50) of a participation unit in ESBA.

16. Plaintiff Alan D. Gordon is an individual residing at 420 West End Avenue, Apt. 9B, New York, NY 10024. He held one-quarter (0.25) of a participation unit in ESBA, as well as interests in another consolidated property.

17. Plaintiff Mary Jane Fales is an individual residing at 57 Fifth Avenue, Nyack, New York 10960. She held seven participation units in ESBA.

18. Defendant Peter L. Malkin is a principal of Malkin Holdings LLC, a member of ESBA, an agent of the Participants under the Participation Agreement, and owed fiduciary duties to Plaintiffs. His address is c/o Empire State Realty Trust, One Grand Central Place, 60 East 42nd Street, New York, NY 10165.

19. Defendant Anthony E. Malkin is a principal of Malkin Holdings LLC, a member of ESBA, an agent of the Participants under the Participation Agreement by assignment, and owed fiduciary duties to Plaintiffs. His address is c/o Empire State Realty Trust, One Grand Central Place, 60 East 42nd Street, New York, NY 10165.

20. Defendant Thomas N. Keltner, Jr., is a principal of Malkin Holdings LLC, a member of ESBA, an agent of the Participants under the Participation Agreement by assignment, and owed fiduciary duties to Plaintiffs. His address is c/o Empire State Realty Trust, One Grand Central Place, 60 East 42nd Street, New York, NY 10165.

21. Defendant Malkin Holdings LLC is a limited liability company organized under the laws of the State of New York, acted as the supervisor for ESBA, performed various asset management and routine administrative services for ESBA, and owed fiduciary duties to Plaintiffs.

STATEMENT OF FACTS

A. Background

22. On July 11, 1961, Lawrence Wien, Henry Klein, and Peter Malkin formed ESBA as a general partnership for the purpose of acquiring the ESB. To obtain capital required for the acquisition, which included purchasing and obtaining a net lease of the property, the three partners raised money from ordinary investors in $10,000 units pursuant to an offering prospectus for the sale of $39 million of participation units in ESBA, dated October 31, 1961, and filed with the SEC. The partnership was organized into three "agency groups" with each group responsible for one-third of the participation units that were sold. Messrs. Wien, Klein, and Malkin each served as agent for one such group. The three agents themselves held relatively few of the original investment units.

23. The relationships of Wien, Klein, and Malkin with their respective groups of investors are set forth in the Participation Agreements. Wien, Klein, and Malkin each assumed contractual and fiduciary duties to the Participants in their capacities as agent and partner. Each of the Plaintiffs in this case owned a unit or units, or a fraction of a unit, in ESBA under one of the three Participation Agreements, or is a successor in interest to such an owner.

24. Each of the original agents in the Participation Agreements was a partner in the law firm of Wien, Lane & Klein, which the 1961 Partnership Agreement designates as supervisor of ESBA and as general counsel. Accordingly, through the three agents, the law firm of Wien, Lane & Klein also assumed fiduciary duties to the Participants.

25. Over the years, members of the Wien, Lane & Klein firm changed, as did the name of the law firm. In or about September, 2009, the law firm was dissolved, and Peter Malkin and Anthony Malkin, a non-lawyer, formed Malkin Holdings LLC, a real estate

development firm. Malkin Holdings declared itself successor to the law firm as supervisor of the property, notwithstanding Malkin Holdings' incapacity to engage in the practice of law or to serve in the supervisor's role as general counsel. Peter Malkin, Anthony Malkin, and Thomas Keltner (a former partner in the dissolved law firm) assumed the functions of agents.

26. Each Participation Agreement contains identical provisions that significantly limited the agents' ability to act without the Participants' unanimous consent. Paragraph 4 of the Participation Agreements provides that:

> The Agent shall not agree to sell, mortgage or transfer The Property or the Master Lease, nor to renew or modify the Master Lease, nor to make or modify any mortgage thereon, nor to make or modify any sublease affecting the premises, nor to convert the partnership to a real estate investment trust, a corporation or any other form of ownership, nor to dispose of any partnership asset in any manner, without the consent of all of the Participants.

27. The Participation Agreements also contain a forced buy-out provision, pursuant to which the agents, upon obtaining "the consents of Participants owning at least eighty percent (80%) of The Property" with respect to a proposed course of action requiring the consent of all Participants, could purchase the interests of any dissenting Participant for not less than $100, if such Participant did not grant consent within ten days of receiving written notice that the prescribed super-majority had been obtained. The agents thus could obtain the consent of all of the Participants upon reaching a threshold of 80% by forcing any remaining non-consenting Participants to change their votes or suffer forfeiture of their units. Defendants exploited this provision to compel Participants into approving the proposed consolidation or changing their votes and consenting to a proposed transaction that was clearly adverse to their interests.

28. In order to comply with the applicable tax and other laws that existed in 1961, the three partners entered into a series of transactions that split ownership and management of the ESB. First, Wien, Klein, and Malkin raised capital for the purchase of the Building from its

previous owner, Henry Crown, and then sold the Building to Prudential Insurance Company ("Prudential"), which already owned the land beneath the Building. Second, Prudential entered into a master lease agreement ("Master Lease") with ESBA for the entire premises, with renewal options which could extend the Master Lease for more than 100 years. Third, Lawrence Wien, along with real estate developer Harry Helmsley, formed an entity called Empire State Building Company ("ESBC") to manage the Building. The transaction was designed, in essence, to be a syndication creating thousands of partners, with all benefiting from higher and more reliable yields than could be obtained from ordinary stocks.

29. ESBA entered into an operating sublease ("Sublease") with ESBC, pursuant to which ESBC subleased the Building and was responsible for its operations. The Sublease could be renewed for four successive 21-year renewals co-extensive with the Master Lease. Section 2.05 of the Sublease stated that it did not create a joint venture or partnership between ESBA and ESBC, a provision which Defendants subsequently either ignored or unilaterally modified in violation of paragraph 4 of the Participation Agreements.

30. In 1991 and 2001, Defendants solicited consents from the Participants to allow ESBA to purchase the fee title to the Building, financed by a mortgage paid for by the Participants. Defendants promoted the acquisition of the fee, combined with the ownership of the Master Lease, as a major increase in value for ESBA. The Participants approved the fee acquisition on each occasion, with ESBA ultimately acquiring fee title in 2002 for $57.5 million. ESBC declined to participate with ESBA in the purchase of the fee, which resulted in the enhancement of ESBA's interest relative to that of ESBC.

31. Defendants also solicited consents of the Participants for gratuitous payments to themselves of 10% of the proceeds from any future "sale or financing" of the ESB,

or other similar event, and included these requests in the solicitations of approval for the fee acquisition. These payments were referred to as "voluntary overrides." The voluntary overrides had no connection to the fee acquisition. The language of the 1991 and 2001 override solicitations obscured the scope and voluntary nature of the consents. Defendants further misled the Participants by changing the wording and format of the override consent forms in successive solicitations. The solicitations were misleading. Defendants were persistent in soliciting consents at the expense of the Participants, despite at least one Plaintiff's lack of capacity to comprehend what Defendants were seeking.

32. In September 2001, citing concerns arising from the events of September 11, 2001, Defendants converted ESBA into a New York State limited liability company ("LLC"). Defendants failed to seek the Participants' consent, thereby violating paragraph 4 of the Participation Agreements requiring "the consent of all of the Participants" "to convert the partnership to a real estate investment trust, a corporation or any other form of ownership." The conversion of ESBA into an LLC substantially altered the nature of the Participants' partnership rights and decision-making authority, despite Defendants' written representations to the Participants that the nature of the asset and the rights and obligations of the parties set forth in the Participation Agreements remained unchanged by the LLC conversion. Defendants had no authority for undertaking this conversion, nor for enlarging the power of the agents at the expense of the Participants.

33. Until the late 1990's, although Defendants were designated supervisor of both ESBA and ESBC, they lacked management control over ESBC, the entity that operated the Building. Defendants held 23.75% of the voting rights of ESBC, but retained equity ownership of

less than 10%. Instead, Helmsley Spear LLC, controlled ESBC, and thereby controlled operation and management of the ESB.

34. After Harry Helmsley's death, control of Helmsley Spear LLC passed into other hands. In 1997, Wien & Malkin LLP sued to oust Helmsley Spear as managing and leasing agent of the ESB and certain other properties. The litigation lasted until 2006 and concluded with a settlement agreement negotiated with Leona Helmsley, who inherited Harry Helmsley's interests in ESBC and other properties that were later included in the REIT roll-up. After a decade of litigation and dispute and the death of Leona Helmsley in 2007, the removal of Helmsley Spear as managing and leasing agent of the ESB and the other properties occurred. Thereafter, Malkin Holdings established a working relationship with the Helmsley Estate regarding their respective interests in ESBC and the other properties.

B. <u>The Proposed Real Estate Investment Trust</u>

35. Pursuant to Leona Helmsley's will, the Helmsley Estate was required to liquidate its real estate holdings, which included its 63.75% ownership interest in ESBC, as well as interests in other leases and buildings. The liquidation of the Helmsley interests made the Defendants vulnerable to losing their influence in the affairs of ESBC, especially if the Helmsley Estate sold its interest in ESBC to an independent third-party. A third-party investor would be in a position to control ESBC, and deprive Defendants of the generous revenues and broad authority which they had enjoyed.

36. The liquidation of the Helmsley Estate also presented an opportunity for the Participants to substantially increase their income from the ESB by purchasing the Helmsley Estate's majority interest in ESBC. Defendants, as agents for the Participants, owed a duty of honesty, fair dealing, good faith, and loyalty, as well as an obligation to avoid conflicts of interest.

Accordingly, Defendants were obligated to disclose the nature of the opportunity presented by the Helmsley Estate divestment, allow the Participants to pursue the opportunity, and negotiate a transaction most favorable to the Participants, rather than intentionally obstruct the Participants' opportunity in order to seize the opportunity for themselves. Faced with this conflict, however, Defendants chose to pursue a course of action for their own personal benefit and to the detriment of the Participants.

37. In 2008, Defendants began instituting several prerequisites necessary to implement the consolidation that they were planning. These preliminary actions included a massive capital improvement program to modernize the ESB, an extension of the soon-to-expire Sublease, an increase in the management fees charged to ESBA by Malkin Holdings LLC, and the adoption of measures to prevent direct third-party proxy solicitations of Participants' interests.

38. On June 9, 2008, Defendants sought consents from the Participants for a multi-year capital improvement program for the ESB costing a total of $625 million to be financed by a new mortgage on the property. The purpose of the program, as described in the solicitation of consents filed with the SEC, was to modernize the ESB in order to achieve "higher occupancy with better credit tenants at increased rents." At the same time, Defendants made another request for consents to their voluntary overrides, which again were unrelated to the request to upgrade the ESB. Defendants projected that the multi-year capital improvement program would be substantially completed by 2016, largely paid for by ESBA by means of a reduction of revenue and distributions to the Participants. The Defendants failed to disclose to the Participants that they planned to divest the Participants of their ownership interests in the ESB prior to 2016, and thus deprive them of the increased income from the capital improvement program.

39. For Defendants, a primary advantage of the consolidation of various properties into a REIT which eroded the ESB, was the opportunity to cash out their investments in underperforming suburban properties, and procure reimbursement for their tax liability through the tax protection provisions built into the REIT transaction. The capital improvement program facilitated this opportunity in two important ways. First, Defendants used the ESB's diminished annual revenues during the capital improvement program to suppress the ESB's relative appraisal value in the run-up to and promotion of the REIT. Then, they relied on soaring future revenues projected from the refurbished ESB to offset the diminishing or stagnant returns projected from the consolidated suburban properties. The strategy was to shift the risk from undesirable investments to the ESB, acquire control of ESB, and secure for Defendants $97.7 million in potential tax relief.

40. In 2010, Defendants undertook to shift a substantial proportion of the ESB's value from ESBA to ESBC by adding 63 years to the term of the Sublease, which constituted most, if not all, of the value of ESBC, instead of pursuing a transaction more favorable to the Participants. The Master Lease and Sublease both contained four 21-year renewal options, but the renewals could be exercised only at times specified in the respective leases. Renewal and modification of the Master Lease, as well as modification of the Sublease, required approval of the Participants. Defendants exercised the first renewal option in 1989 to extend the leases through January 1, 2013.

41. In January and February, 2010, Defendants exercised the second renewal option to extend the leases through 2034, and at the same time purported to exercise prematurely the third and fourth renewal options to extend the terms of the leases to 2076. The intended effect was to increase the value of ESBC, while simultaneously shifting value away from ESBA.

Defendants breached the Participation Agreements by unilaterally modifying the respective leases without the consent of the Participants.

42. In a letter, dated January 1, 2010, the Malkins, on behalf of ESBA, purported to exercise the third and fourth options to renew the Master Lease for two 21-year terms, "notwithstanding any provision . . . requiring the [ESBA] to exercise such renewal options, respectively, between January 5, 2013 and January 5, 2031, and between January 5, 2034 and January 5, 2052." In the letter, the Malkins, on behalf of lessee, also requested that the Malkins, on behalf of the lessor, "consent to the early exercise of these renewal options, thereby waiving such requirement." Contemporaneously with their execution of the letter, the Malkins, on behalf of the lessor, executed a consent to the early exercise of the Master Lease renewal options. Such consent, however, could not be granted without first obtaining the requisite consents from the Participants, which Defendants never attempted to obtain.

43. In a further letter, dated February 11, 2010, and addressed to ESBA, Peter Malkin, on behalf of ESBC, notified the Malkins, on behalf of ESBA, that ESBC was exercising the remaining two options to renew the term of the Sublease for two 21-year terms, commencing January 4, 2034, "notwithstanding any provision . . . of the [Sublease] requiring [ESBC] to exercise such renewal options, respectively, between January 4, 2013 and July 4, 2031 and between January 4, 2034 and July 4, 2052." Peter Malkin, on behalf of ESBC, further requested that the Malkins, on behalf of ESBA, "consent to the early exercise of these renewal options, thereby waiving such requirement." Contemporaneously with his execution of this letter, the Malkins, on behalf of ESBA, executed a consent to the early exercise of the Sublease renewal options. In essence, the Malkins, representing both sides of the transaction, consented to their own modification of the

Sublease, again without Participant approval. In so doing, Defendants increased the value of ESBC relative to that of ESBA.

44. Also in 2010, Defendants unilaterally increased the supervisory fee charged to ESBA by Malkin Holdings. Without approval of the Participants, the fees were increased from $100,000 per year to $725,000, with additional adjustments for inflation in subsequent years. Simultaneously, payment of the supervisory fees was converted into a priority obligation which took precedence over distributions to the Participants, as well as eliminated any requirement for Defendants to render services in exchange for collection of the fee. This sevenfold increase in the supervisory fee, along with increases in fees charged by other Malkin-owned entities, was later used in the REIT consolidation to justify payment to Defendants of $16.3 million to cover "equitized" future value for services that Defendants never performed.

45. On November 30, 2011, Peter Malkin, Anthony Malkin, and Thomas Keltner, acting in their capacity as the members of ESBA LLC, without informing the Participants and without obtaining Participant consent, unilaterally executed Amendment Number One to the ESBA LLC Agreement ("the Poison Pill Amendment"), which purported to vest in Defendants unfettered authority to approve all actions that previously required the Participants' consent. This Amendment also purported to impose certain limitations on the transfer of ownership interests, thus restricting the Participants' ability to sell their units. The Poison Pill Amendment provided that any individual or entity, other than Defendants, acquiring an interest in ESBA greater than 6% would lose the rights both to vote and to receive distributions. The intended effect was to deter direct proxy solicitations to the Participants, and thus leave Defendants with sole discretion to evaluate and disregard all offers for the ESB or ESBA submitted for their approval. The Amendment was never communicated directly to the Participants, submitted for Participant

approval, or adequately or meaningfully disclosed in the S-4. Defendants breached the Participation Agreements, failed to disclose material information, consolidated Defendants' power at the Participants' expense, and usurped the Participants' opportunities to receive and evaluate other solicitations for their units.

46. By late 2011, having taken the necessary preparatory steps, Defendants were ready to launch their roll-up scheme by means of a REIT and take it public. Defendants outlined the proposed consolidation in Form 8-K report filed with the SEC in November, 2011, and on February 12, 2012, Defendants filed their Form S-4 Registration Statement. Spanning more than 1,200 pages, the initial iteration of Form S-4 was amended and resubmitted five separate times before final approval by the Securities and Exchange Commission on December 21, 2012, after which it was mailed to the Participants. Embedded in the S-4 were Defendants' disclosures and concessions that they were engaging in self-dealing, that they had numerous conflicts of interest, that the Participants and other individual investors were not independently represented, that such lack of representation resulted in potential detriment to the investors, and that Defendants would receive over seven hundred million dollars from the transaction. Defendants failed to disclose that the proposed transaction was fundamentally and incurably unfair to the Participants, that Defendants were usurping an opportunity belonging to the Participants, that the transaction had been structured to provide maximum value to Defendants without regard for the interests of Plaintiffs, other ESBA Participants and investors, and that Defendants were acting in bad faith in pursuing the consolidation.

47. The REIT was structured to usurp the opportunity arising from the Helmsley Estate's divestment, and designed specifically for Defendants' benefit. In a letter to Participants, dated May 31, 2012, Defendants claimed that the REIT consolidation was necessary

to prevent control of ESBC from falling into the hands of an unknown third party. Nevertheless, Defendants actively opposed proposals by Participants that ESBA acquire the Helmsley Estate's interest in order to protect ESBA from such risks. In letters dated September 17 and October 17, 2012, Defendants stated that they would "retain a blocking vote of ESBC" if any group of ESBA investors sought to purchase the Helmsley Estate's interest because they were "committed to another course of action." As agents for the Participants, Defendants had a duty to avoid such conflicts of interest, and to act in the best interests of their principals.

48. At the core of the REIT transaction is an appraisal of the various real estate properties and other business entities consolidated into the REIT. Defendants retained Duff & Phelps to perform the appraisal. Duff & Phelps derived an exchange value for each property based primarily on a discounted cash flow analysis. The appraiser added up the total value of all properties and assigned to each an allocation percentage based on its percentage of total value. The exchange value was then used as the basis to allocate securities issued by the new entity, ESRT, for the properties that were consolidated into the REIT. The appraiser allocated 56% of the total value of the REIT as the exchange value for the ESB. The actual value of the securities was set on October 1, 2013, by an initial public stock offering ("IPO").

49. Defendants instructed Duff & Phelps to split the value of the ESB on a 50/50 basis between ESBA, the fee and Master Lease owner, and ESBC, the sublessee, even though the appraiser had recommended that ESBA should be allocated a higher percentage. As the fee owner with perpetual life and a valuable reversionary interest upon expiration of the Sublease, ESBA had greater recognized value than ESBC, which was a limited-life entity that had been improperly extended pursuant to the Sublease modifications. The Form S-4 states that "[t]he independent valuer relied on information the supervisor provided…. The supervisor has a conflict of interest

in connection with the information it provided because it affects the number of shares of common stock and operating partnership units issued to it and the Malkin Holdings group."

50. The impact of Defendants' interference with the valuation process was grossly self-serving. Upon implementation of the transaction, ESBA received securities worth $816,471,453, the equivalent of only 28% of the securities issued in the IPO. When added to the amount allocated to ESBC, the value of the ESB recognized by the transaction was $1.618 billion, far less than its acknowledged value of at least $2.6 billion. At the same time, while the Participants lost as much as two-thirds of the value of the Building, Defendants derived enormous personal benefit. Prior to the consolidation of all the various properties into the REIT, Defendants owned 9.8% of the total equity of all the various real estate ventures. After consolidation into the REIT, Defendants owned 25.8% of the stock in ESRT. Anthony Malkin was made Chairman, CEO, and President, and Peter Malkin Chairman Emeritus of ESRT, and the stock that they and their family members acquired carries 30.4% of the voting rights, a controlling interest that insures their retention of control and continued corporate benefits.

51. Even though they were transferring the ESB to an entity that they created and controlled, Defendants characterized the REIT as a transaction subject to the voluntary overrides. At various times, Defendants had sought consent to the overrides not only from the ESBA Participants, but also from owners of interests in a number of other properties in the consolidation. Defendants chose to define the language of the override solicitations in the most expansive possible terms to encompass the REIT transaction, and thus authorize them to collect the override payments. In fact the override solicitation language justified a narrower, more limited, interpretation that would have excluded the REIT transaction. The overrides alone were projected to be worth $304,000,000 to Defendants, which reduced by that amount the proceeds that the

Participants and other investors would have received, and the additional voting rights inflated Defendants' voting power to more than 30% in ESRT.

52. To craft their entitlement to the override payments, Defendants manipulated the plain, specific, and limited language of the override solicitations, perverted their intent, and misapplied the voluntary consents. The REIT was not the type of transaction clearly set forth by the language of the override solicitations. The proposed REIT transaction was completely alien to the events contemplated by the override solicitations. The transaction involved neither a cash distribution, nor an immediately ascertainable liquid value for the shares that the Participants would receive in exchange for their interests in ESBA.

53. Defendants' self-dealing and failure to consider the Participants' interests was subtle, but egregious. As evidence of Defendants' intent, the initial Form S-4 provided a mechanism for Defendants only, not the Participants, to avoid paying taxes on the transaction by electing to receive operating unit securities ("OP shares") in ESRT in lieu of Class A shares. Defendants initially offered the Participants only marketable Class A shares which would have caused each Participant to incur huge tax liabilities. As originally intended by Defendants, the Participants would face thousands of dollars in tax liability and, left without any cash revenue from the transaction and with ESRT shares that were illiquid during a prolonged lock-up period, would be forced to liquidate other investments upon which they relied for income. At the same time, Defendants would be rewarded with over $300 million in tax-free gratuitous payments, deducted from the Participants' allocated shares and designated as voluntary overrides, along with other enormous personal benefits. In July, 2012, prodded by SEC, Defendants revised the proposal and included an option to allow Participants to receive the same type of tax-deferred securities.

Defendants continue to characterize this revision as consideration for settlement of class action litigation pending in New York State Court at the time.

54. No aspect of the proposed consolidation was the result of arms-length negotiation. The entire process of structuring the REIT was undertaken at Defendants' sole discretion and remained completely within their control, including the use of ESBA funds without the Participants' consent. Defendants neither involved the Participants nor took steps to provide independent representation on their behalf, an omission that Defendants acknowledge could have resulted in a substantially different outcome.

55. As further evidence of the gross advantage taken by Defendants in their capacity as agents of the Participants, the S-4 disclosed for the first time that Defendants and ESBC had appropriated for themselves all patent and trademark rights to the name "Empire State Building." The SEC filings disclosed that, in an application for trademark registration, dated May 13, 1999, and registered December 12, 2000, ESBC and Defendants had listed themselves as the applicants and owners of record, despite ESBA's rightful ownership of the Building as confirmed in a 1999 court ruling. The registration was made without the knowledge or approval of the ESBA Participants, who had a superior claim to the intellectual property, and to whom Defendants owed a duty of honesty, integrity, good faith and fair dealing. In addition, ESBC's appropriation of the intellectual property rights violated the Participation Agreements by disposing of a partnership asset without the Participants' unanimous consent.

C. <u>The First Class Action</u>

56. Following the February, 2012, initial filing of the Form S-4, several investors filed five class action lawsuits in March, 2012, challenging the proposed REIT. Defendants negotiated a settlement with the class representatives in September, 2012, before the

class was certified or any responsive pleading was filed. On April 30, 2013, Honorable Peter Sherwood of the Supreme Court of the State of New York, County of New York, presided over a fairness hearing on the proposed settlement and certification of the class. At the fairness hearing and in an opinion approving the settlement, dated May 17, 2013, the Court stated that the settlement precluded any further actions seeking equitable relief to prevent the consolidation. However, a party who opted out of the settlement retained the right to pursue a claim for damages against Defendants. Consequently, this right cannot be abrogated by Plaintiffs' consents pursuant to the buy-out provision, precisely because a forced waiver of this nature would nullify any rights reserved by opting out of the settlement, and the impact of such application of the buy-out provision was not disclosed in the Form S-4.

57. Each Plaintiff in this action properly and timely opted out of the class action settlement, and has not otherwise agreed to any settlement with Defendants. A list of the parties who opted out of the settlement, which includes Plaintiffs, was presented to Judge Sherwood on April 30, 2013, and was approved by him as part of his ruling. Additionally, no Plaintiff is barred from bringing the claims set forth herein by any prior action or other lawsuit.

D. <u>Solicitation of Consents to the Consolidation</u>

58. Following approval of the final revised S-4, Defendants mailed the final Form S-4 to each of the Participants and began the process of soliciting consents from the Participants on January 21, 2013, by employing a proxy solicitation firm, MacKenzie Partners Inc., as well as communicating directly with individual Participants. While some Participants freely supported the REIT, many others were opposed to the consolidation or remained undecided.

59. To obtain the requisite number of consents, Defendants embarked on a campaign of misinformation and harassment. A majority of the Participants are elderly

individuals. Defendants took advantage both of the circumstances and of their position of trust and authority as agents, through relentless contacts with individual Participants. Along with representatives of MacKenzie Partners Inc., both Peter Malkin and Anthony Malkin personally solicited Participants through multiple telephone calls, often conveying inconsistent, confusing, and false information with the intent to persuade or intimidate the Participants. Peter Malkin himself directly contacted Participants, making materially false statements, which he knew at the time to be false, with respect to the value of the proceeds that the Participants would receive in the consolidation. In addition, Defendants attempted to prevent certain ESBA Participants from voicing dissent or communicating with other Participants by, among other means, refusing to provide an investor list despite repeated requests and their legal obligation to do so, attacking certain Participants' character and standing, repeatedly threatening litigation, and even going so far as to threaten the dissenting Participants' family members.

60. Defendants also sent letters to the Participants containing materially false and misleading information. In a solicitation letter filed with the SEC, dated December 31, 2012, and received by the Participants two weeks before commencement of the voting period, Defendants stated that failure to approve the REIT could result in dire consequences. The letter warned that failure to approve the REIT could disrupt the ongoing renovation program and cause a shortfall in funds necessary for payment of ESBA's mortgage. Defendants made these statements knowing that they were false, and with the intent of intimidating and coercing the Participants. Defendants failed to take corrective action for five months, and the threats remained outstanding throughout most of the solicitation period. On May 13, 2013, buried in an SEC quarterly filing, Defendants finally admitted that their statements had not been true. The retraction, however, was never sent to the Participants, and this omission resulted in an untold number of

fraudulently obtained consents. Three days later, Defendants announced that the solicitation, infected by this, as well as other false and misleading information, had achieved 99% of its objective.

61. In addition, Defendants solicited consents through numerous letters recommending approval of the consolidation with reiterations of financial rewards and other benefits to the Participants. Omitted from these communications was any reiteration of the benefits that Defendants stood to derive, or the list of conflicts of interest that Defendants faced in representing both sides of the transaction. Defendants instead relied on disclaimers inserted in the written communications which, among other partial disclosures, referred the Participants back to the Form S-4, as a means of absolving themselves of any inconsistencies, misrepresentations, or conflicts of interest inherent in their communications.

62. Regardless of their disclaimers, the conflicts of interest conceded in the Form S-4 remained patently irreconcilable with Defendants' agency obligations to the Participants. In the face of such conflicts, rather than acknowledge their inability to fulfill their fiduciary duties in good faith, or recuse themselves from the solicitation process, Defendants instead improperly attempted to inoculate themselves against claims for breaches of fiduciary duties by relying on the same disclaimers they had used to absolve themselves of securities violations. Defendants thereby attempted to waive their fiduciary duties on the Participants' behalf. These attempts to circumvent their fiduciary obligations, therefore, resulted in a separate breach by Defendants with each communication that attempted to manipulate the Participants through use of this disclaimer.

63. Defendants manipulated the solicitation period. The solicitation period established in the S-4 was set to remain open for sixty days. Defendants commenced the solicitation period on January 21, 2013, requiring a closing deadline of March 25, 2013. Unable

by that deadline to obtain consents from the 80% super-majority required to trigger the forced buy-out provision, Defendants unilaterally extended the solicitation for an indeterminate period of time, and failed to disclose a new closing date, despite the Participants' attempts to make them identify one. This failure to disclose facilitated Defendants' coercion of the outstanding Participants who had either opposed or withheld consent through abstention.

64. With no deadline pending, Defendants were able to manipulate the buy-out provision and dangle it like a sword over the remaining Participants. Relying on the fact that many of the Participants were retirees who traveled frequently, Defendants warned the Participants that they risked loss of their investment for $100 merely by being away from home during the ten-day notice period under the buy-out provision. Rather than disclose a closing date or any time frame around which the Participants could arrange their schedules, Defendants advised that the Participants could avoid the problem merely by changing their votes in advance of receiving the buy-out notice. Faced with this dilemma, many Participants elected to consent, switching "no" votes to "yes" in order to avoid unintended loss of their units by default.

65. In late May, 2013, Defendants declared without validation that they had obtained consents from Participants owning 80% of ESBA. To the extent that Defendants had obtained the requisite super-majority consent, they did so fraudulently, through a complex scheme of omission, material false statements, and misrepresentations.

66. On June 12, 2013, Defendants proceeded to send letters pursuant to the buy-out provision to every Participant who had rejected the transaction, informing them that the requisite super-majority consent had been obtained, and threatening to forfeit their investments for $100 if they did not change their votes within ten days. Defendants' written representations were

fraudulent because Defendants knew that many of the consents had been improperly obtained, and their representations were part of a fraudulent scheme to coerce the remaining Participants.

E. Defendants' Refusal to Consider Alternative Offers

67. Beginning in June, 2013, Defendants faced another obstacle to their proposed consolidation. Several real estate developers and investment firms began making unsolicited offers to purchase the ESB, including an offer for the purchase of ESBA alone. As the ESB represented substantially more than half the value of the proposed REIT, lending both its name and prestige to ESRT, the removal of either the ESB or ESBA would have prevented the consolidation, thereby depriving Defendants of the enormous revenues and other advantages that they had orchestrated for themselves. Indeed, Defendants had stipulated in the S-4 that the effectuation of the consolidation and formation of the REIT were conditioned upon securing approval of the transaction by the Participants. Having usurped the Participants' opportunity to directly receive competitive proxy solicitations through the Poison Pill Amendment, Defendants positioned themselves to unilaterally evaluate and approve these offers.

68. On June 18, 2013, Cammeby's International Group submitted a $2 billion cash offer for the ESB. A series of higher offers followed shortly thereafter. On June 27, Phillips International submitted a $2.1 billion bid. Also, on June 27, Thor Equities submitted its first bid, which exceeded $2.1 billion. On July 3, a group led by Reuven Khane extended a $2.25 billion offer. Then, on July 12, Moni Shababo of Brazil further ratcheted up the bidding to $2.3 billion. On August 8, Thor Equities submitted a bid of $1.2 billion for ESBA, plus a bid of $575 million for the Helmsley Estate's interest in ESBC.

69. Defendants refused to engage in discussions or otherwise seriously entertain any of these offers, dismissing both the credibility and good faith of the offering entities,

notwithstanding the premium above the $1.18 billion exchange value assigned to ESBA as part of the REIT. Still, despite Defendants refusal to engage, the bidding war for the ESB continued.

70. On September 9, 2013, Thor Equities submitted a $1.4 billion offer for ESBA alone, including an option for the Participants to retain tax-deferred ownership interests in the ESB. Thor Equities' final unsolicited offer for ESBA was $200 million higher than the exchange value Defendants had assigned to ESBA in the proposed REIT transaction, and approximately $600 million higher than the post-IPO value of the ESRT stock ultimately allocated to the Participants.

71. Defendants were not required to complete the IPO at the time the bids were received and, as agents, owed a fiduciary duty to Plaintiffs to maximize the potential benefit to the Participants by exploring the offers in good faith. Furthermore, Defendants had not yet closed the solicitation period. The Participants, therefore, retained the right to change or retract any previous consents to the REIT proposal in light of the escalating outside offers. Defendants failed to disclose this material fact to the Participants, refusing to allow the Participants to exercise their rights to withdraw their consents. Defendants instead persisted in pursuing their own self-interests by summarily rejecting the offers in favor of implementing the REIT to their own advantage.

72. In June, 2013, Defendants sent a letter to the Participants that disclosed the existence of the offers and claimed to be evaluating their merits. This claim, however, was false and misleading. Contrary to their claims, Defendants made no effort to pursue the offers, totally disregarded the bidders, and refused to engage in negotiations or good faith discussions with any of them.

73. In late summer, 2013, Defendants hired an outside financial advisor, Lazard Freres & Co. LLC (“Lazard”), allegedly for the purpose of evaluating the unsolicited bids. Lazard

apparently undertook no real substantive analysis of the offers, and made no concrete recommendations. Rather, in its report ("Lazard Report"), Lazard proceeded simply to outline the REIT process, summarize the various bids, and list the pros and cons of each alternative, excluding the final Thor Equities offer which was not included in Lazard's analysis. Despite requests, Defendants refused to provide the Participants with a copy of the Lazard Report, and failed to disclose any material information supporting their determination to ignore the offers.

74. On September 18, 2013, Defendants filed an 8-K report with the SEC announcing that consents to the REIT had been obtained from 100% of the Participants, and officially closing the period during which the Participants could change or retract their consents. On September 19, 2013, Defendants stated in a letter to the Participants that they would not entertain any independent bids for the ESB and would proceed with the consolidation and IPO.

75. Simultaneously, Defendants announced that the Participants would receive approximately only $800 million in REIT stock as part of the exchange, which was $600 million less than the rejected Thor Equities offer. Defendants' IPO price also valued the ESB at $1.6 billion, which was $700 million less than the highest unsolicited offer for the ESB submitted only a few weeks earlier.

F. The IPO

76. On October 1, 2013, Defendants launched the IPO, which resulted in a sale of stock in the REIT valued at $13 per share. At the same time, each Participant was forced to relinquish his or her investment in ESBA, and received instead 17,206 shares in ESRT worth $223,678 for each original ESBA unit, after deduction of the voluntary override payment. The ESRT stock that the Participants received was worth 30% less than the 32,380 shares worth $323,803 per ESBA unit represented as the exchange value in the Form S-4. The exchange value

for each Participant's interest was imprinted above the signature line of that Participant's consent form, and was emphasized directly in individual telephone communications by Defendants to Participants during the solicitation process.

77. In contrast, Defendants received enormous financial compensation and other advantages, which resolved numerous conflicts of interest in Defendants' favor. After exercising their overrides to extract 10% of the value from 94% of the ESBA Participants, as well as from investors in other consolidated properties, Defendants received stock in ESRT worth $491 million. In addition, Defendants received 30.4% of the voting rights of ESRT, generous corporate benefits, stock options, personal tax indemnities worth over $1 billion, and subsidization of their less valuable suburban investments. Additionally, the Helmsley Estate sold its investments through the IPO process, relinquishing control to Defendants of ESRT, the surviving entity.

78. In soliciting consents from the Participants and from investors in the other consolidated properties ("Legacy Investors"), Defendants repeatedly made materially false statements and failed to disclose material information regarding the costs of the REIT transaction. Defendants were charging fees to the Participants and Legacy Investors on an ongoing basis for planning and implementation of the REIT project, the existence of which neither the Participants nor Legacy Investors had prior knowledge. Defendants represented in the Form S-4 that, if the REIT were approved, the Participants and Legacy Investors would be "reimbursed for the consolidation expenses previously paid…out of the proceeds from the IPO," and that ESRT would "bear all consolidation and IPO expenses." This statement proved to be materially false. At the same time, Defendants threatened that, if the Participants and Legacy investors refused to approve the consolidation, Defendants would not reimburse the transaction costs.

79. After completion of the IPO, Defendants made reimbursements to the consolidated properties in the REIT, which in turn distributed the reimbursed funds to the Participants and Legacy Investors. The amounts reimbursed, however, were substantially less than the actual consolidation and IPO expenses. More significantly, the Defendants immediately, upon completion of the IPO, re-imposed the full complement of transaction expenses on the Participants and Legacy Investors without disclosure to the Participants and Legacy Investors, and in direct violation of Defendants' prior statements to the contrary.

80. Defendants perpetrated their fraudulent transfer of the transaction costs secretly and deliberately. On October 1, 2013, the IPO set the market value of the REIT at $3,126,450,010, which market value was the determinant of the number of shares of ESRT to be allocated to each Participant and Legacy Investor. Defendants then reduced the established market value by $234,259,388, comprised of $110,000,000 in project planning costs, $89,513,000 in consolidation transfer taxes, $20,803,888 in IPO underwriting fees, and $13,942,500 in other REIT expenses. The value of each consolidated entity was thereby reduced by that entity's respective percentage of the more than $234 million in transaction costs, and each Participant and Legacy Investor derived shares in the REIT on the basis of the thus reduced entity values. Consequently, in excess of $234 million of consolidation and IPO expenses were again levied on all of the Participants and Legacy Investors, wrongfully decreasing by approximately 7.5% the number of shares that they were allocated in ESRT in exchange for their now extinguished interest in the consolidated entities.

81. In Defendants' notification to the Participants and Legacy Investors of their computation of share allocation in the REIT, Defendants fraudulently omitted two material facts, that the market value of the REIT was $3.126 billion, and that they had reduced that amount by

$234 million in consolidation and IPO expenses. The Participants and Legacy Investors thus paid the transaction costs twice: first, by the reduction of their distributions from earnings; and second, by the direct and immediate reduction of their equity in the new entity. As a direct result of Defendants' fraudulent transfer of the REIT expenses, ESBA's exchange value percentage of 28.23% was applied to the reduced capitalization of $2.892 billion, thereby allocating to the Participants 28.23% of the planning costs, taxes, and underwriting fees, or $66 million in transaction costs. The Legacy Investors suffered a proportionate diminution in the value of their ESRT shares for consolidation and IPO costs which were allocated to them by Defendants both fraudulently and in gross violation of their fiduciary duties.

CONCLUSION

82. On account of Defendants' fraudulent scheme, Plaintiffs have been forced to relinquish their ESBA investments and accept in exchange shares of stock, insufficient in both quantity and quality, in a substantively different entity with a variety of assets, many of which grossly underperform the ESB over the short and long-term.

83. At the same time, Defendants have received hundreds of millions of dollars and other personal benefits at Plaintiffs' expense. Defendants' actions also cost Plaintiffs millions of dollars in lost opportunities to receive greater value from the sale of their units, as well as losses stemming from the devaluation of the ESB, the over-valuation of ESBC relative to ESBA, the misallocation of IPO expenses, the skimming of ESBA revenue by Defendants through the unilateral increase of supervisory fees and the capitalization of those fees for services that had not been performed, and for the expropriation of equity interests and appurtenant voting rights through the improper collection of overrides.

FIRST CLAIM

SECURITIES FRAUD AND MISREPRESENTATION IN VIOLATION OF SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SEC RULE 10B-5

84. Plaintiffs repeat and reallege paragraphs 1 through 83.

85. Plaintiffs' claim under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 relies on the forced sale doctrine as articulated by *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir. 1967), and it progeny. Defendants' misrepresentations and omissions in soliciting approval for the roll-up transaction put Defendants in a position to force the sale of Plaintiffs' ESBA units.

86. The ownership structure of the ESB was unique and created unprecedented conflicts of interest and complexities, and the REIT transaction maximized Defendants' opportunities to confuse and exploit the Participants.

87. In soliciting consents for the proposed consolidation and to facilitate the IPO, Defendants made numerous and repeated false or misleading statements of material fact about the transaction, including but not limited to, the payment of ESBA's mortgage, the transaction costs of the consolidation, and the value of the Participants' proceeds from the transaction, upon which they intended the Participants to rely, all in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. By way of example:

i. In a solicitation letter sent to Participants dated December 31, 2012, Malkin Holdings reported on the annual statement of operations, and stated that, "From the additional rent of $28,780,449 for 2011, $10,330,449 was set aside for i) *debt service* on the portion of the mortgage attributable to the purchase of the fee position in 2002, ii) costs relating to the proposed consolidation of the Empire State Building and other entities into Empire State Realty

Trust, Inc." The letter further states, "Associates has incurred approximately $16,200,000 toward the proposed consolidation and IPO through September 30, 2012. As set forth in the S-4 on file with the SEC, when the proposed consolidate and IPO are concluded, *proceeds of the IPO will fund a special distribution to Participants from a reimbursement of all Associates' advances. There will be no reimbursement if the IPO is not concluded.*.... If the consolidation and IPO are not concluded, it is possible that the operating lessee may use cash flow for expenditures to improve the building and conclude leases, resulting in *immediate and sustained reductions or cessation of overage rent*, or may either defer or not make such expenditures…If the operating lessee exercises its right to use cash flow rather than to use financing, *your distribution from overage rent may decrease or cease*."(Emphasis added). The letter falsely stated that overage rent was used to pay debt service, and falsely implied that failure to approve the consolidation would reduce overage rent and would thereby reduce or eliminate Participants' distributions and impair the ability to pay debt service on the mortgage. In fact, the sublessee pays debt service separately from overage rent, which by definition does not carry with it any obligation to pay debt service. Malkin Holdings on May 13, 2013, filed a correction with the SEC that admitted the falsity of its December 31, 2012 solicitation, stating, "The original Basic Rent payable by Sublessee is more than sufficient to pay debt service," but this admission of error was not circulated to Participants and was made only after the Defendants had attained nearly all of the consents required for the consolidation.

ii. False and misleading statements concerning the value of the transaction include a telephone call on February 13, 2013, from Peter Malkin to Lois Bruml, an owner of three original investment units. In the phone call, which was recorded on the recipient's answering machine, Mr. Malkin stated: "Hi, Lois. It's Peter Malkin, uh, a voice from the past and

an old friend of, uh, Gus, um, calling just to follow-up with regard to the consent we're awaiting from you with regard to the proposal to, uh, create a real estate investment trust, uh, which would give you, uh, we think some terrific advantages. Um, the results of it would be that your existing $35,000 interest, uh, in Empire State Building Associates, uh, actually, technically $33,750, uh, would be converted into over $1 million of stock listed on, uh, the exchange, uh, and New York Stock Exchange, um, and, uh, you have the papers." Mr. Malkin's statement that the three units would convert to $1 million worth of stock was false. Only if the exchange value were realized in the IPO would such a value be realized, and Mr. Malkin knew, as he stated repeatedly in the S-4, that the actual IPO value was likely to be substantially less than the exchange value. In fact, the value realized in the IPO was 30% less than what Mr. Malkin indicated in his phone call.

iii. On May 5, 2013, Anthony Malkin, in a phone call with Jason and Jordan Green, ESBA Participants, described the consolidation, urged them to vote in favor of it, and offered to answer questions. When Jordan Green expressed concern that it was upsetting for his folks to lose any voting power, Mr. Malkin replied: "They don't have any voting power." The statement was false and Mr. Malkin knew it was false because the Participation Agreements reserve voting power on limited items for the Participants. Mr. Malkin made the statement to induce the listeners to vote in favor of the proposed consolidation. Alternatively, if Mr. Malkin actually believed that the "poison pill" amendment had changed the rights under the Participation Agreements so that Participants no longer had voting rights, then his failure to disclose that in the Form S-4 was a material omission.

iv. The promise in the December 31, 2012 letter to repay transaction costs if the consolidation were approved was repeated in the Form S-4. For example, page 93 of the S-4 states: "If your subject LLC approves the consolidation and your subject LLC is

consolidated with the company, the company will bear all consolidation expenses…If the consolidation closes, but the subject LLC does not participate in the consolidation, the subject LLC will bear its proportionate share of all consolidation expenses." See also, S-4 at 272. The promise to repay all consolidation expenses was false, and Defendants made the promise knowing it was false with the intent to mislead the Participants and induce them to vote in favor of the proposed consolidation. In fact, Defendants reduced the proceeds received in the IPO by $234,259,388, comprised of $110,000,000 in project planning costs, $89,513,000 in consolidation transfer taxes, $20,803,888 in IPO underwriting fees, and $13,942,500 in other REIT expenses. The value of each consolidated entity was thereby reduced by that entity's respective percentage of the more than $234 million in transaction costs.

v. When it was initially filed with the SEC, the Form S-4 provided tax favored treatment to Defendants but not to the Participants. In July 2012, the Form S-4 was amended to allow Participants to convert their ESBA interests to Operating Partnership Units of ESRT in lieu of Class A shares, the same conversion privilege previously offered only to Defendants. Regarding this feature, the S-4 states: "Consequently, any deferred tax gain allocable to the operating partnership units that you receive in connection with the consolidation could be triggered any time, and your share of the liabilities of the operating partnership could be reduced at any time and no promise can be made to you that you will continue to enjoy the benefit of deferring any gain that would otherwise have been recognized had you received common stock in the consolidation." Form S-4 at 147. By contrast, Defendants' telephone scripts for use in its proxy solicitation, which were filed with the SEC on April 18, 2013, state, "We want to make sure you know that this tax deferral treatment is well established . . .." The switch in the description of the tax effects of the OP securities from a "new structure that is unique and has never been used before"

to "well established tax deferral treatment" is stark and not readily explainable. The change is entirely inconsistent with the disclosures set forth in the S-4. That statement was misleading, and was made to induce Participants to vote in favor of the consolidation.

88. Defendants made these statements with intent to defraud, knowing they were false or misleading, or with reckless disregard for their truth.

89. In their efforts to obtain approval from the Participants for the roll-up transaction, Defendants also failed to disclose material facts that the Participants would have reasonably considered in evaluating the proposed REIT transaction. These included, but were not limited to, omissions of material facts about the consolidation, its closing date, the independent third-party offers, the Participants' right to change their votes while the offers were pending, the meaning or effect of the Poison Pill Amendment, and the allocation of transaction costs. These omissions of material facts were made with the intent to mislead or confuse the Participants and, through complexity and secrecy, were rendered undiscoverable in any reasonable or timely manner.

i. Among the omissions of greatest impact was the failure to provide a definite closing date for the solicitation period. The registration statement (Form S-4) states repeatedly that consents will be solicited for sixty days, and that the solicitation will end at the end of that 60-day period. *See* S-4 at pages 20, 90, 318. Although the Form S-4 indicates that the supervisor may extend the expiration date of the solicitation period, it does not state that the solicitation can be extended indefinitely. Furthermore, the Form S-4 states that application of the buyout will not occur until after a participant who has voted against the proposal is given notice that a supermajority in his group has been attained and has been provided an opportunity to change his vote in order to avoid the buyout. The Form S-4 states explicitly that this will not happen

"before the expiration of the 60-day solicitation period as the same may be extended." Form S-4 at page 318. This is reinforced by the hypothetical timeline provided on page 20 of the Form S-4, which posits a supermajority achieved on day 46, and the notice triggering the Buyout being sent out on day 61. The Defendants, however, did not follow the procedure set forth in the Form S-4. The solicitation period established in the Form S-4 was set to expire on March 25, 2013. Unable by that deadline to obtain consents from the 80% super-majority required to trigger the forced buy-out provision, Defendants unilaterally extended the solicitation for an indeterminate period. In a letter to investors dated March 22, 2013, Defendants stated that the solicitation will remain open "until we announce its termination, but not to terminate in any case before the earlier of the Court's ruling on such LLC matter or May 2, 2013." The court on April 30, 2013, decided the LLC issue, upholding the buyout provision. However, no new termination date for the solicitation of consents was thereafter set. This failure to disclose a new termination date created fear and uncertainty among the Participants as to when they might receive a buyout notice and caused a substantial number to vote in favor of the consolidation in order to avoid the risk of missing a buyout notice and thereby losing their investment.

ii. Defendants failed to disclose to Participants that Defendants were making no good faith assessment of independent purchase offers received between May and October 2013 and that they had no intention of responding to the offers.

iii. Defendants disclosed in the Form S-4 that the operating agreement for ESBA LLC had been changed through the Poison Pill Amendment, but they failed to disclose in the Form S-4 that the changes deprived the Participants of the ability to receive directly any tender offers for their shares that independent bidders might have made. Defendants also failed to disclose that the changes effected by the Poison Pill Amendment purported to allow Defendants

to make decisions on leasing and other major issues without a vote of the Participants, a clear violation of the Participation Agreements.

iv. Defendants failed to disclose to Participants that the solicitation of consents remained open through September 18, 2013, and that the Participants retained the right up through that date to change their votes if they were in favor of exploring the independent purchase options.

90. Defendants' misrepresentations and omissions were part of an elaborate scheme or artifice designed to defraud the Participants into approving the REIT proposal, and ultimately to place themselves in a position to force a sale of Plaintiffs' ESBA units.

91. Defendants' fraudulent scheme was successful in achieving Defendants' desired outcome. A requisite number of the Participants reasonably relied upon Defendants' misrepresentations, and were misled or confused by material facts omitted by Defendants, to enable Defendants to attain the consent of 80% of Participants and thereby to coerce Plaintiffs by threatening confiscation of their units through a forced buy-out.

92. As a direct and proximate result of Defendants' misrepresentations and omissions made in connection with their efforts to solicit consents for the roll-up transaction, Plaintiffs have been damaged in an amount measured by the difference in value between the investment they were forced to relinquish but would have retained were it not for the consolidation, and the value in ESRT stock that they received as a result of the consolidation, an amount believed to be in excess of $20 million.

SECOND CLAIM

SECURITIES FRAUD AND MISREPRESENTATION IN VIOLATION OF SECTION 14(A) OF THE SECURITIES ACT OF 1934 AND SEC RULE 14A-9

93. Plaintiffs repeat and reallege paragraphs 1 through 92.

94. Defendants' actions during the solicitation of consents for the consolidation, in addition to violating Section 10(b) of the Securities Exchange Act and Rule 10b-5, also violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. Specifically, Defendants issued the following false and misleading proxy solicitations:

i. The promise in the Form S-4 to repay transaction costs if the consolidation were approved violated Section 14(a) and Rule 14a-9. Page 93 of the Form S-4 states: "If your subject LLC approves the consolidation and your subject LLC is consolidated with the company, the company will bear all consolidation expenses…If the consolidation closes, but the subject LLC does not participate in the consolidation, the subject LLC will bear its proportionate share of all consolidation expenses." The promise to repay all consolidation expenses was false, and Defendants made the promise knowing it was false with the intent to mislead the Participants and induce them to vote in favor of the proposed consolidation. The fact that the promise was false did not come to light until October 16, 2013, when one of the Plaintiffs obtained a copy of a memorandum from an ESRT employee detailing the market value of the IPO and the transaction costs that were deducted from the proceeds.

b. Defendants failed to disclose in the letters sent to Participants on October 30, 2013, the price received for the assets sold in the IPO or the precise manner in which the number of shares of ESRT were allocated to each individual Participant. Failure to disclose the actual proceeds of the IPO and the costs deducted from the proceeds rendered false the statements in the Form S-4 that describe how each Participant's ESBA investment would be converted to ESRT shares. The Form S-4 illustrates the conversion following the IPO using a hypothetical $10 per share IPO price on page 60 of the Form S-4. Nowhere in that discussion is

there any disclosure that transaction costs would be deducted from the IPO proceeds. Rather, the illustration indicates that there is a direct relationship of cash to shares on a $10 per share basis without any adjustment for transaction costs. The illustration on page 60 of the Form S-4 is therefore false and misleading.

95. Defendants were at minimum negligent with respect to the truth of these false or misleading statements.

96. Defendants' false and misleading proxy statements were an essential link in effecting the consolidation transaction.

97. As a direct and proximate result of Defendants' false and misleading proxy solicitations, Plaintiffs have been damaged in an amount measured by the difference in value between the investment they were forced to relinquish but would have retained were it not for the consolidation, and the value in ESRT stock that they received as a result of the consolidation, believed to be in excess of $20 million.

98. Alternatively, Plaintiffs have suffered damages due to the failure to reimburse transaction costs, as promised in the Form S-4, by an amount calculated at $20,000 for each original ESBA unit, or a total of $660,000 in damages for the twelve Plaintiffs' interests in the ESB, plus an additional proportionate amount for interests in other consolidated properties formerly held by Plaintiffs Gordon, Halper, and Machleder.

THIRD CLAIM

SECURITIES FRAUD AND MISREPRESENTATION IN VIOLATION OF SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SEC RULE 10B-5 AND SECTION 14(A) OF THE SECURITIES ACT OF 1934 AND SEC RULE 14A-9

99. Plaintiffs repeat and reallege paragraphs 1 through 98.

100. As described in Paragraph 31, the voluntary overrides were not binding contracts. The original solicitations for the voluntary overrides made an aleatory promise—a promise of an uncertain and unquantified amount—in exchange for the overrides, and therefore no contract was formed. The S-4 repeatedly refers to the overrides as "voluntary," and acknowledges their non-contractual nature by admitting that they are not supported by any consideration: "[T]he supervisor [i.e., Malkin Holdings] did not pay any consideration for the overrides." (S-4 at page 61).

101. The voluntary overrides were projected in the S-4 to be worth $304 million to Defendants and were a critical part of the REIT proposal. Notwithstanding the disclosures in the S-4, Defendants fraudulently sought to induce the ESBA investors to vote in favor of their proposed REIT consolidation, including application of the overrides, by making false and misleading statements regarding the overrides. In a letter to ESBA investors dated February 26, 2013, entitled "Attention Investors: Misinformation Alert" ("Misinformation Alert"), Defendants stated that the "voluntary overrides" were in fact "binding contracts." The Misinformation Alert was filed with the SEC on February 27, 2013, pursuant to Rule 425.

102. The purpose of the Misinformation Alert was to counter objections to the statements in the S-4 that Defendants were "entitled" to receive override interests as part of the REIT consolidation, which objections had been set forth in a letter written by Plaintiff Robert A. Machleder to Peter L. Malkin, copies of which were sent to all investors, including Plaintiffs, and to the SEC.

103. Defendants' false and misleading statements that the voluntary overrides constituted "binding contracts" directly contradicted the admission in the S-4 that Defendants "did not pay any consideration for the overrides." This newly contrived "contract" concept,

which was repeated four times in the Misinformation Alert, was the first time that Defendants had employed this characterization of the voluntary overrides since the inception of their solicitations.

104. Through their Misinformation Alert, Defendants sought to: (i) justify their claim to the overrides; (ii) deny that the investors had any right to challenge or demand the withdrawal of the overrides or that consents be re-solicited; (iii) preclude any investor from exercising his/her right to withdraw a prior override consent; and (iv) induce each consenting investor to not abstain or vote against their proposals. The Misinformation Alert concluded with an appeal: "we urge that you vote 'FOR' the proposals."

105. Investors relied on the Misinformation Alert in approving the REIT transaction, and by failing to exercise their rights to cancel, rescind or withdraw their consents to the voluntary overrides.

106. Defendants' actions concerning the voluntary overrides violated Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j, and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9.

107. As a direct and proximate result of Defendants' violation of Sections 10(b) and 14(a), Plaintiffs have suffered damages measured by the value of the override interests fraudulently converted from their ownership to Defendants' ownership on October 3, 2013, plus dividend distributions at the rate of $0.34 per annum per converted ESRT share. Each override interest was converted at the rate of approximately $24,854.00 per original $10,000 investment unit. The benefit derived by Defendants from their exercise of the override interests of all investors exceeded $200,000,000. Plaintiffs' damages for fraudulent inducement of override

interests total over $819,000.00, not including appurtenant voting rights and future income therefrom.

WHEREFORE, Plaintiffs respectfully request that this Court grant them the following relief:

1. On the First Claim under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, a judgment against Defendants, jointly and severally, in an amount to be proven at trial, plus punitive damages, interest, costs, and expenses, including reasonable attorney's fees;

2. On the Second Claim under Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9, a judgment against Defendants, jointly and severally, in an amount to be proven at trial, plus punitive damages, interest, costs, and expenses, including reasonable attorney's fees; and

3. On the Third Claim under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, and Section 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9, a judgment against Defendants, jointly and severally, in an amount to be proven at trial, plus punitive damages, interest, costs, and expenses, including reasonable attorney's fees; and

4. Such other legal and equitable relief as this Court deems just and proper.

Dated: New York, New York
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