PRELIMINARY STATEMENT

In Defendant-Respondents' alternate universe, from the moment ESBA became a limited liability company, and at all times since then, 100 percent of the "members" have owned only 8 percent of the "membership interests."

Respondents abandon – indeed actively refute – the lynchpin of the very Order they want this Court to affirm: that if Appellants "*either*" are "members" or own "membership interests" they are entitled to the statutory appraisal remedy. The dual requirement they seek to exploit –the statute conjunctively requires that the dissenter be both a member and own a membership interest – is satisfied here: the Legislature said only that assignees who are not properly admitted as members cannot assert dissenter's appraisal rights. This unremarkable proposition follows tautologically from the fact that non-admitted assignees have no voting rights and therefore cannot ever truly be "dissenters." Participants are admitted members.

The interpretation advanced by Respondents is untenable because it has "non-members" owning 92 percent of the "membership interests" *from the inception* of ESBA, despite the free transferability of membership interests. Many of the Participants are original Participants and, therefore, they were admitted as members upon ESBA's LLC conversion under LLC Law Section 602(a). For Participants who acquired their interests after September 30, 2001, the Participation Agreements provide that Participations, which are public securities,

are freely transferrable and, subject to only administrative conditions, grant all qualified assignees "the same rights and obligations as the transferor." Thus, post-conversion assignees were admitted as members of ESBA upon fulfillment of these administrative conditions under LLC Law Section 602(b)(2).

The only plausible reading of the governing documents – and Defendant-Respondents' admissions in their own SEC filings – is that the 2001 Conversion Agreement makes the Participants both members and owners of membership interests. The Conversion Agreement ratifies the Participation Agreements, which declare the Participants to be the owners of "fractional interests" in membership (formerly partnership) interests nominally titled in the "Agent" for the benefit of the joint-venture Participants.

Betraying their well-founded lack of confidence, Respondents do all they can to stop this Court from considering the real issue presented here – whether Defendant-Respondents' S-4 registration statement violated New York's LLC Law when it threatened the Participants with a confiscatory forced buy-out of Participations, valued by Defendants at over $300,000 each, for one-three-thousandth that figure ($100). Instead, they ask the Court to consider whether the proposed Consolidation is a good deal, provides liquidity, has been in the works a long time, has been expensive, or is something a lot of ESBA Participants supposedly approved.

Regardless, Defendant-Respondents' self-laudation is *ipse dixit*. The six Appellants are the tip of the iceberg. Hundreds if not thousands of ESBA participants have huddled bi-weekly on conference calls and anxiously await this Court's decision in the hopes that they can escape the grotesquely unfair REIT transaction forced down their throats, whereby Defendant-Respondents take hundreds of millions of dollars in benefits they do not deserve at the expense of the Participants.

Bewilderingly, Respondents argue that Participants are not entitled to Section 1002's fair value remedy because the Agents control ESBA. But members need not have voting rights. Regardless, here Participants must consent to the REIT transaction, which is why Defendant-Respondents promulgated their *in terrorem* S-4 registration statement in the first place.

Respondents' reliance on Delaware law is intentionally misleading. Appraisal rights are *not* guaranteed under Delaware's LLC Act. Respondents' Delaware authority stands for the unremarkable proposition that under Delaware's expressly permissive appraisal rights statute, LLCs are permitted to abrogate (or guaranty) appraisal rights by contract.

As controlling law admonishes, the Court should treat with appropriate skepticism the self-serving claims of Class Counsel, who settled before pleadings were concluded. Their agenda is singular – preservation of their $11.6 million fee

award. The claimed overwhelming approval by Participants is the manifest product of irresistible coercion; "consents" procured under the threat of economic annihilation,[1] a feature of the deal Class Counsel strategically allowed to continue – despite originally asserting claims of undue coercion (though without saying the LLC Law was violated) – because they quickly realized that selling out their clients on that claim was the key to earning their huge fee.

Respondents' claim that the REIT deal offers the holy grail of "liquidity" is brazenly hypocritical: media reports abound that Defendant-Respondents, in violation of their fiduciary duties, have refused to consider a number of qualified cash offers (which alternatively give Participants the tax-free option of remaining as investors in the Empire State Building, as opposed to some homogenized conglomeration of inferior properties) including one which was for substantially in excess of the highest values Malkin assigned to the Empire State Building.[2] This Court's enforcing the LLC Law will only open the door to a non-self-dealing

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1 See, e.g., Adam Pincus, *Empire State Building Investor Asks FBI to Probe IPO Filings*, THE REAL DEAL (September 12, 2013 4:24 PM) at: http://therealdeal.com/blog/2013/09/12/empire-state-building-investor-asks-fbi-to-probe-ipo-filings/

2 See, e.g., David M. Leavitt, *Thor Offers $1.4 Billion for Empire State Building Title*, BLOOMBERG (Sept. 10, 2013 12:20 AM ET) at: http://www.bloomberg.com/news/2013-09-10/thor-offers-1-4-billion-for-empire-state-building-title.html.

transaction that will enable Participants to harvest the true value of the property they – and only they – own.

Once through their sales pitch, Respondents double-down on their effort to stop this Court from reaching the merits, by asserting that Appellants lack standing to bring this appeal. (Pl. Br. 10; Def. Br. 57-60.) For openers, this Court has already considered and rejected the standing argument. Appellants previously sought a stay pending appeal. Respondents opposed, arguing that Appellants lacked standing. While the Court denied the stay, its order begins "an appeal having been taken…" Yet if Respondents are correct that Appellants lack standing then an appeal has not been taken – at least not by a party with standing. The order thus rejects the standing argument.

Regardless, the lower court specifically allowed Appellants to intervene under CPLR 907(2) to advance the LLC Law claim, and had no authority – indeed never attempted – to insulate its decision thereon from appellate review. Justice Sherwood expressly contemplated this Court's review when he asked, at the hearing on the proposed settlement, whether Appellants had sought a stay pending appeal. Respondents' alternative procedural objection to this appeal – that the settlement release bars the appeal – is hopelessly illogical and circular; by its terms, the settlement is not effective unless and until all appellate review has

concluded (without reversal) and the REIT transaction has closed by December 15, 2015.

Finally, Defendant-Respondents stoop to arguing that devastating evidence considered by the lower court and appearing in the record – ESBA's K-1 forms and the 2011 "poison pill" amendment – cannot now be considered by this Court. However, Respondents never objected below or here to the Record, and regardless of whether the 2011 amendment is *ultra vires*, it is probative as an admission against interest by Defendant-Respondents—they authored it.

Nor does the lower court's afterthought alternative holding – that the proposed consolidation is not a "consolidation" under the statute – save the Order. The Legislature expressly stated that the LLC Law "shall not be construed to limit the accomplishment of a merger or of any of the matters herein *by any other means* provided for in an operating agreement *or any other agreement*…." LLC Law §1004(e) (emphasis supplied). Here, the consolidation – called just that thousands of times by Defendant-Respondents – is accomplished via a "Contribution Agreement" – which is an agreement "other" than the operating agreement of ESBA. Section 1004(e)'s "by any other means…or by any other agreement" command has no analogue in the BCL, and correspondingly BCL Section 902(a)(3)'s mandate that a certificate of merger or consolidation state share conversion terms nowhere appears in the LLC Law. There is simply no such thing

as a "*statutory* merger or consolidation" when it comes to LLCs; or said another way, all transactions which *effectively* accomplish a merger or consolidation are statutory under the LLC Law.

The Court should make short shrift of Respondents' attempts to pitch the Court to disregard the law in order to save their "multi-billion dollar" deal. Insult aside, early on the SEC warned Defendant-Respondents that "Section 1002(e) of [the LLC Law] appears to provide for a right of appraisal in circumstances such as the consolidation," and yet they proceeded. (R. 327.) They did so at their peril. The Court should uphold the law and reverse the Order.

ARGUMENT

I. UNDER THE GOVERNING DOCUMENTS, PARTICIPANTS ARE MEMBERS AND HOLD MEMBERSHIP INTERESTS

The lower court said "[i]f [Appellants] are "members" *or* have "membership interests," they have statutory appraisal rights even though such rights are not provided for in the Buy Out Provision." (R. 14.) (Emphasis supplied.)

Attacking the lynchpin of the Order, Respondents now contend that even if Participations qualify as "membership interests," the Participants are nevertheless not "members," as such term is defined in LLC Law Section 102(q). (Def. Br. 24.) Section 102(q) defines "member" as:

> [A] person who has been admitted as a member of a limited liability company in accordance with the terms and provisions of this chapter and the operating agreement and has a membership interest in a

> limited liability company with the rights, obligations, preferences and limitations specified under this chapter and the operating agreement.

Relying on the statutory definition's dual requirement that a member be admitted as a member and own membership interests, Respondents argue that even if Appellants own membership interests, they are not members because they have never been admitted as members. (R. 18; Pl. Br. 14-15; Def. Br. 24-25.) Respondents' argument fails because the very instrument forming ESBA as an LLC itself incorporates by reference another agreement – the Participation Agreement – unambiguously stating that the Participants are members.

Under Section 602, a member is "admitted" as a member either at the LLC's inception or conversion (602(a)) or after (602(b)). Original Participants and Participants who acquired their Participations prior or ESBA's LLC conversion on September 30, 2001 were "admitted" as members upon ESBA's conversion since the Conversion Agreement explicitly ratifies the Participation Agreements. (R. 107.) Under LLC Law Section 602(a), a so-called "initial" member is admitted on the later of: (1) the effective date of the articles of organization; or (2) as provided in the operating agreement or the records of the LLC. ESBA's records reflect that original Participants have held their interests since January 1, 1962. Thus, original ESBA Participants (and pre-conversion assignees) were admitted as members of ESBA on the effective date of its articles of organization, September 30, 2001.

For the few ESBA Participants who acquired their interests after ESBA's LLC conversion, Section 10(a) of the Participation Agreements guarantees the transferee of a Participation the right to become a member "with the same rights and obligations as the transferor," subject only to administrative conditions.[3] (R. 102-103.) Upon compliance with these conditions, the transferee is "admitted" as a member under LLC Law Section 602(b)(2).[4] Respondents do not contend – and the Record does not reflect – that any non-original Participants failed to satisfy the administrative conditions.

A. The Agents Conveyed Their Entire Partnership Interests (which Later Became Membership Interests) to a Joint Venture of Participants, Retaining Nothing Except Their Interests as Participants

On its face, the Participation Agreement conveys the Agent's partnership interest *in its entirety* to the joint venture of Participants established by that agreement to own that partnership interest. The Participation Agreement's stated purpose is to establish ownership of "The Property," defined as the Agent's "one-

[3] These administrative conditions are: (i) that the transferee is an individual of full age or an entity; (ii) duplicate originals are delivered to the Agent; (iii) the transferee accepts the transfer in writing; and (iv) instruments evidencing the transferee's authority to accept the transfer are delivered to the Agent as required. (R. 103.)

[4] LLC Law Section 602(b)(2) provides: "After the effective date of the articles of organization, a person may be admitted as a member…in the case of an assignee of a membership interest of a member who has the power, as provided in the operating agreement, to grant the assignee the right to become a member, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power." See also LLC Law §604(b).

third (1/3) interest in the partnership." (R. 97.) The Participation Agreement provides that "[i]t is acknowledged that for all purposes of this agreement the contribution of each Participant to the capital of the partnership (herein called a "capital contribution") and his fractional interest in The Property are as set forth below opposite his signature." (R. 97-98) The signature page reflects the amount of the Participant's capital contribution and the fractional interest conveyed in return for the Participant's investment. (R. 105.) The fractional interests conveyed by each Agent adds up to 100 percent of the Agent's one-third partnership interest. That is, each Agent conveyed his entire one-third interest and retained no interest in ESBA in his capacity as a Partner (now member) of ESBA. Further, the Agents themselves contributed not a red cent to the Partnership in their capacity as Agents – they only made a contribution if and to the extent they happened separately to be Participants.

Defendant-Respondents attempt to get around the explicit "fractional interest" language of their own document by arguing that the Participants "own (through a joint venture) fractional economic stakes in the member's membership interest," and that they "purchased from one of the three Agents only a share of such Agent's economic interest in ESBA." (Pl. Br. 13; Def. Br. 26.) However, neither the word "economic" nor "stake" appears in the Participation Agreements. Rather, "The Property" conveyed is defined as the Agent's "one-third (1/3) interest

in the partnership," the Participation Agreement "establish[es] the ownership" of that interest, and declares that "fractional interests" in the partnership interest – not fractional economic stakes therein – are conveyed to and owned by the Participants (and only the Participants). This arrangement is confirmed by the 1961 Prospectus – also authored by Defendant-Respondents – which was used to solicit capital contributions from the original Participants. It states "the purchasers of Participations will share proportionately in the ownership of the partnership interests in Associates." (R. 317, ¶4.) There is no mention of "economic stakes" there either; and Participants' "ownership" of the "partnership interest" while fractional ("proportionately") is unambiguously declared.

Thus, each Participant who purchased a single, whole Participation in 1962 for $10,000 became the owner of a 1/1,100th "fractional interest" in a one-third partnership (now membership) interest. As the signature page of the Participation Agreement demonstrates, that is precisely how the Participations were apportioned – as a fraction with 1,100 as the denominator. (R. 105.)

Defendant-Respondents reiterated this as recently as this year in ESBA's 10-Q for the quarterly period ending March 31, 2013:

> The respective interests of the Members in Registrant and in Sublessee *arise solely from ownership of their respective participations in Registrant* and, in the case of Peter L. Malkin, his family entities' ownership of member interests in Sublessee. *The members as such receive no extra or special benefit not shared on a*

pro rata basis with all Participants in Registrant or members in Sublessee...[5]

Defendant-Respondents try to pass off this devastating admission as a description of their "economic rights," though qualifying language to that effect once again nowhere appears. They claim that the quoted language "does not mean that the members are not the actual members," noting "the 10-Q expressly describes them as 'Members,'" (Def. Br. 27; emphasis in original.)

But if the purported "sole members"– the Agents – possess no interest in ESBA other than that which arises "solely from their ownership of their respective Participations," then it follows tautologically that they derive no interest in ESBA by virtue of them being "members." This can only be so because, as noted above, the agent-members conveyed the entirety of their interests to the Participants and the Participants were explicitly recognized to be the sole (fractional owners) of the partnership (now membership) interests. Defendant-Respondents confirm this when they add: "[t]he Members as such receive no extra or special benefit not share on a pro rata basis with all Participants." Id.

As Defendant-Respondents boast, they own 8 percent of the membership interests in ESBA. (Def. Br. 4, 25, 50.) Who owns the other 92 percent? If

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[5] http://www.sec.gov/Archives/edgar/data/32776/000119312513216499/d516775d10q.htm (Emphasis supplied.) Though Defendant-Respondents concede that their SEC filings are the proper subject of judicial notice, they nonetheless criticize Appellants for citing ESBA's 2013 10-Q for the first time on appeal. (Def. Br. 27.) Defendant-Respondents filed the 10-Q on May 13, 2013 and thus it was not available during the proceedings below.

Defendant-Respondents derive no interest in ESBA other than that which arises from their Participations, then their supposed member status is irrelevant in determining the extent of their membership interest. What then makes the Participations owned by other Participants of any lesser or different status?

Appellants' reading of the governing documents is further corroborated by Defendant-Respondents' own words in the 2011 "poison pill" amendment to the ESBA LLC Agreement. (R. 115-131.) Defendant-Respondents disingenuously argue that Appellants cannot rely upon the 2011 Amendment because they argued below that it was adopted without the consent of the Participants. (Def. Br. 27.) While that is true, that makes it no less authoritative as an admission by Defendant-Respondents.

In the 2011 Amendment, Defendant-Respondents created "three new series (series A-1, A-2 and A-3) of equity membership interests…which provide protections similar to those under a shareholder rights plan for a corporation." (R. 116.) These "equity membership interests" were issued simultaneously with the execution of the 2011 Amendment ("The Company *hereby* issues an aggregate of 3,300 Class A Common Units…"), and were "deemed to have been *simultaneously* distributed to the holder of Participation ...." (R. 119-120; emphasis supplied.) That the defensive (*i.e.*, Malkin-protecting) annihilation of economic and voting rights was not triggered (*because the poison pill worked)* – no "Acquiring Person"

exceeded the threshold 6 percent of Participations – is irrelevant; the new series of "equity membership interests" were nonetheless issued to the Participants. .

Similarly baseless are Defendant-Respondents' procedural objections to Appellants' K-1s. (Def. Br. 28.) As the record demonstrates, a letter to the lower court enclosing a sample K-1 was filed via NYECF and emailed to Justice Sherwood's court attorney. No Respondent (or the court) raised any objection. Although Appellants perfected this appeal on July 20, 2013, Respondents failed to move to strike that portion of the record, raising no objection to the inclusion of the K-1 in the record until serving their opposition brief nearly six weeks later, on September 4, 2013. Thus, Respondents have waived any objection to their inclusion.

In any event, Defendant-Respondents' nonchalant explanation that there is no "participants" box is meritless. Our courts routinely rely on K-1s and other tax documents as conclusive evidence of membership status in an LLC. Man Choi Chiu v. Chiu, 38 A.D.3d 619, 621 (2d Dep't 2007); Bobrow v. Liebman, 839 N.Y.S.2d 431, at *8 (Sup. Ct. N.Y. Cnty Apr. 16, 2007); Out of the Box Promotions LLC v. Koschitzki, 841 N.Y.S.2d 821, at * 3 (Sup. Ct. Kings Cnty May 10, 2007), aff'd, 55 A.D.3d 575 (2d Dep't 2008).

In any event, if Respondents were correct, they would have issued three not 3,000 K-1s and the three "members" would have received all distributions and

remitted the 3,000 Participants their respective "economic stakes" and issued them 1099 forms.

Defendant-Respondents also point to a July 24, 2002 Advisory Opinion of the Department of Taxation and Finance, in which it was determined that that the participants of 1350 Broadway Associates would not be considered members for purposes of the annual LLC filing fee upon conversion to an LLC. The Opinion is predicated on the explicit assumption that "the agreement between a Partner and the applicable Participant will be treated as an assignment of a membership interest under section 603 of the Limited Liability Company Law." Id. at p. 3. In other words, the Opinion assumes (but does not determine) that Participants are mere unadmitted assignees. Regardless, it relates to a separate partnership, subject to a separate agreement, it determines member status for an entirely different purpose (a tax), and is not binding on this Court.

B. Restrictions on Participants' Control Over ESBA Do Not Render LLC Law 1002 Inapplicable

The lower court held that the Participants are not members and do not hold membership interests because they do not possess "a member's aggregate rights in a limited liability company" or a "member's right to vote and participate in management of the limited liability company." (R. 18.) That was error for two reasons: one, Participants do have a right to vote (if they did not, this appeal would

not exist); and two, nothing in section 102(r)(A)(iii) requires that a member have voting or management rights.

Respondents dedicate considerable effort to contrasting the Agents' level of involvement in and control over ESBA's business and affairs with that of the Participants. (Pl. Br. 13) (participants "agreed to a structure that gave them very little control," agents have always maintained "complete operational control over ESBA"); (Def. Br. 4) (members "have full control over ESBA's affairs," participants have "no management rights"). Respondents' dubious observations are not supported by the governing documents; in any event, the Participants' level of "control" or "authority," or complete lack thereof, have no bearing on whether they are members and they certainly are not determinative of whether Participants have appraisal rights under Section 1002.

The LLC Law expressly authorizes members to restrict voting rights and participation in management among classes of members. The imposition of such restrictions, of course, does not result in members losing their status as members. By way of analogy, a corporation can have voting and non-voting stock, but the holders of each are still called "shareholders."

Section 102(r) defines "membership interest" as:

> [A] member's aggregate rights in a limited liability company, including, without limitation: (i) the member's right to a share of the profits and losses of the limited liability company; (ii) the member's right to receive distributions from the limited liability company; and

> (iii) the member's right to vote and participate in the management of the limited liability company.

Subsection (iii) does not require a member to have voting rights; it merely declares that if he has any, those rights are included in the package of rights defined in the aggregate as the "membership interest." Indeed, Section 418(a), which provides for classes and groups of members "having such rights, powers, preferences and limitations as the operating agreement of such limited liability company may provide," permits the voting rights of a class or group of members to be abrogated in their entirety:

> "The operating agreement may grant to or withhold from all or one or more classes of member the right to vote upon any matter on the basis of capital contributions, capital commitments or capital accounts or on a per capita class or other basis."

Similarly, there is no requirement that a member participate in the management of the LLC. Under Section 408(a), if the operating agreement so provides, "the management of the limited liability company shall be vested in a manager or managers or class or classes of managers." Section 408(b) provides that management decisions can be "by the affirmative vote of a majority of the managers." That is, if the operating agreement so provides, there is no requirement that non-manager members participate in management or even vote on matters pertaining to management of the LLC.

C. Pre-Conversion Decisions Have No Bearing on Whether Participants Get the Protections of LLC Law Section 1002

Citing Studley v. Empire State Bldg. Assocs., 249 A.D.2d 7, 670 N.Y.S.2d 839 (1st Dep't 1998) and Koppel v. 4987 Corp., 1999 WL 608783 (S.D.N.Y. Aug. 11, 1999), Respondents maintain that this and other courts "squarely have rejected indistinguishable efforts by Participants in Malkin-supervised investments to expand their status." (Def. Br. 30; Pl. Br. 22.)

In Studley, this Court held that an ESBA participant could not sue derivatively on behalf of ESBA because he was not a general or limited partner of ESBA. 249 A.D.2d at 8. Similarly, In Koppel, the district court held that because the plaintiff-participants were not partners or limited partners in ESBA, they did not have standing to proceed derivatively. 1999 WL 608783, at * 6. In both cases, the court analyzed the status of participants under the General Partnership Law (which, notably, does not have a dissenter's rights statute). Of course, the concept of standing is intentionally narrow to avoid overburdening the courts. Thus, whether only the Agents can sue derivatively on behalf of ESBA has no bearing on whether the mandatory dissenter's rights guaranteed by Section 1002 were conferred upon the Participants when ESBA was converted into an LLC in 2001.

II. THE LLC LAW GOVERNS THE PROPOSED CONSOLIDATION

LLC Law Section 1001(a) provides:

> As used in this article, "merger" means a procedure in which two or more limited liability companies or other business entities merge into a single limited liability company or other business entity that shall be one of the constituent limited liability companies or other business entities, and "consolidation" means a procedure in which two or more limited liability companies or other business entities consolidate into a single limited liability company or other business entity that shall be a new limited liability company or other business entity to be formed pursuant to the consolidation.

The legislature could have left it there – the term “a procedure” is generalized and broad. But they wanted to be sure they were understood, so they added Section 1004(e) to make clear that however the merger or consolidation was accomplished, and by whatever legal agreement, it would be treated as such under Section 1002:

> The provisions of this subdivision shall not be construed *to limit the accomplishment of a merger or of any of the matters referred to herein by any other means provided for in an operating agreement or other agreement or as otherwise permitted by law*, including that the operating agreement of any domestic limited liability company to the merger or consolidation (including a domestic limited liability company formed for the purpose of consummating a merger or consolidation) shall be the operating agreement of the surviving or resulting domestic limited liability company.

Id. (Emphasis supplied.)

Here, the consolidation – called just that thousands of times by Defendants – is accomplished via the “Contribution Agreement” – which is an agreement “other” than the operating agreement of ESBA. Section 1004(e)’s “by another means or by other agreement” command has no analogue in the BCL, and

correspondingly BCL 902(a)(3)'s mandate that a certificate of merger or consolidation state share conversion terms nowhere appears in the LLC Law. A merger or consolidation accomplished by any means is thus a "*statutory* merger or consolidation" when the surviving or new company is an LLC.

Section 1004(e) is a legislative codification of the *de facto* merger doctrine. Indeed, subsections (a) and (b) provide for the surviving LLC's assumption of its constituent entities' debts, obligations and lawsuits. See LLC Law §1004(a) and (b).

But even where the legislature has not explicitly provided, the courts have filled in the gaps. For example, in Barasch v. Williams Real Estate Co., Inc., 939 N.Y.S.2d 739 (Sup. Ct. N.Y. Cnty Nov. 3, 2011), aff'd, 100 A.D.3d 562 (1st Dep't 2012), is instructive. In Barasch, the respondent undertook a complex, multi-step transaction in which its operating assets came to be owned by a new entity, in which the former owner held only a 35 percent interest, and an 'acquiring' company received a 65 percent interest. Id. at *2. Upon petitioner's notice that she intended to exercise her statutory appraisal rights under BCL Section 623, respondent posited a comparable argument to that which Respondents advance here, that each stage of the transaction constituted a "mere movement of assets to a wholly owned subsidiary," and thus did not constitute a disposition of 'all or

substantially all' of respondent's assets triggering petitioner's appraisal rights under BCL 623. Id. at *6.

In summarily rejecting respondent's argument, the court held:

> Because I find that this transaction, which was not made in the usual or regular course of the business, *effectively constituted* a transfer of "substantially all of the assets" of Williams Oldco requiring shareholder approval, petitioner's motion for partial summary judgment on her cause of action seeking an appraisal of the fair value of her shares in Williams Oldco is granted.

Barasch, 939 N.Y.S.2d at *8 (emphasis supplied.). This Court affirmed, noting that plaintiff opted to exercise her appraisal rights "instead of, for example, seeking to enjoin the transaction," holding that defendant was "estopped from denying that it disposed of substantially all of its assets." 100 A.D.3d at 527.

There is no question that the transaction at issue here is "effectively a consolidation." It is indisputable that the proposed consolidation is not being undertaken in the ordinary course of ESBA's business. After the consolidation is effected, ESBA's ordinary business operations will cease and the REIT will assume ESBA's liabilities; the ESBA Participants and Defendant-Respondents will continue to be the owners of the REIT; and ESBA's management, personnel, physical location, assets and general business operas will remain the same after the Consolidation. Like the respondent in Barasch, Respondents here should be "estopped" from claiming the "proposed consolidation" is not one.

Respondents' heavy reliance on Delaware law in an attempt to deprive Participants of statutory appraisal rights afforded to them under the New York LLC Law is intentionally misleading. (Pl. Br. 21, 23; Def. Br. 23 n. 2, 35, 42-43 n. 7, 48-49.) While the Delaware LLC Act *permits* LLCs to privately provide for *contractual* appraisal rights in an operating agreement or plan of merger, there is no statutory requirement that they be provided. See Del. C. §18-120. The entirety of Respondents' Delaware authorities stand for the unremarkable proposition that under Delaware's permissive appraisal statute, LLCs are permitted to abrogate (or create) appraisal rights by contract.

Defendant-Respondents also claim that permitting Participants to exercise appraisal rights under the LLC Law would "do violence" to a Delaware principle of law under which "action taken under one section of the [Delaware General Corporate Law] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections *under which the same final result might be attained by different means*." (Def. Br. 42-23 n. 7; emphasis in original.) Setting aside the absurdity of constraining New York statutory rights in favor of Delaware's common law (which indisputably does not govern here), as New York courts have recognized, Delaware's so-called "doctrine of independent legal significance" has no place in the jurisprudence of this state. MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 965 N.Y.S.2d 284, 298 (Sup. Ct. N.Y. Cnty

2013) (rejecting doctrine in *de facto* merger context; noting absence of New York authority applying doctrine "for this or any other purpose.")

III. RESPONDENTS CANNOT SUBVERT THE LLC LAW'S MANDATORY APPRAISAL REMEDY

A. LLC Law Section 1002(f) is Not a Default Provision

Where the Legislature saw fit to allow provisions of the LLC Law to be overridden by an LLC's operating agreement,[6] it incorporated express language to that effect into the statute. See, e.g., LLC Law §203(d) (LLC is formed on the date of filing of the Articles of Organization "or at any time later specified in the Articles of Organization," not to exceed 60 days); §402(a) ("Except as provided in the operating agreement," members shall vote in proportion to their share of the profits in accordance with Section 503); §414 ("Except as provided in the operating agreement," managers may be removed or replaced with or without cause by a vote of a majority in interest of the members).

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[6] Tellingly, both Defendant-Respondents and Plaintiff-Respondents premise their argument that ESBA's Operating Agreement overrides the purported "default provisions" of the statute on the Participation Agreement, to which the ESBA Participants are party, and not the Partnership Agreement (or any amendment thereto), to which only the Agents are party. (Pl. Br. 20-23; Def. Br. 46-48.) Thus, Respondents contend that it is the Participation Agreement that serves as ESBA's Operating Agreement. This alone compels the conclusion that the ESBA Participants are members. See LLC Law §102(u): "'Operating agreement' means any written agreement *of the members* concerning the business of a limited liability company and the conduct of its affairs and complying with section four hundred seventeen of this chapter" (emphasis supplied); see also LLC Law §417(a): "Subject to the provisions of this chapter, the members of a limited liability company shall adopt a written operating agreement that contains any provisions not inconsistent with law or its articles of organization relating to (i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents, as the case may be."

Section 1002(f) contains no such qualifying or limiting language. Rather, it mandates that a dissenting member "*shall* not become or continue to be" a member of the surviving entity, but "*shall* be entitled to receive in cash" the fair value of his or her interests as of the day prior to the effective date of the merger or consolidation. (emphasis supplied).

Defendant-Respondents premise their supposed right to override the Legislature's mandate on the phrase "unless otherwise provided in the operating agreement" appearing in LLC Law Section 1002(h). (Def. Br. 46-47.) Defendant-Respondents argue that subsection (h) "expressly recognizes that existing LLCs may vary the terms of Section 1002," and that applies it to "*all* Section 1002's merger procedures." (Id.) Blackletter principles of statutory construction and the legislative history of LLC Section 1002 dictate otherwise.

Section 1002(h) provides:

> A limited liability company whose original articles of organization were filed with the secretary of state and effective prior to the effective date of this subdivision shall continue to be governed by this section as in effect on such date and shall not be governed by this section, unless otherwise provided in the operating agreement.

If Defendant-Respondents were correct that the phrase "unless otherwise provided in the operating agreement" applies to Section 1002 in its entirety, the provisions of Section 1002(c) calling for a meeting on twenty-days' notice "or such greater notice as the operating agreement may provide," and approval of the

agreement of merger by a majority of the members in interest, "[s]ubject to any requirement in the operating agreement requiring approval by any greater or lesser percentage," would be rendered superfluous. Therefore, Respondents' reading should be rejected. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 222 (1991) ("[a]ll parts of a statute are intended to be given effect and…and a statutory construction which renders one part meaningless should be avoided".)[7]

Regardless, the legislative history of Section 1002 demonstrates that Section 1002(h) has no application to Section 1002(f). Section 1002(f) appeared in the LLC Law as originally enacted in 1994, but Section 1002(h) did not. See 1994 Sess. Law News of N.Y. Ch. 576 (S. 7511–A, A. 11317–A). Rather, Section 1002(h) was added to the statute in conjunction with a 1999 amendment (here irrelevant) to Section 1002(c).

As originally enacted, Section 1002(c) provided that an agreement of consolidation or merger was required to be approved on behalf of the LLC "by the members representing at least two-thirds in interest of the members," unless

[7] Defendant-Respondents' caselaw offers them no quarter. In Sealy v. Clifton, 933 N.Y.S.2d 805, 810-13 (Sur. Ct. Kings Cnty 2011), the Surrogate's Court actually applied the LLC Law's default rules, upon finding that the operating agreement at issue did not otherwise provide, as expressly permitted by Sections 606 (withdrawal) and 401-402 (management). Similarly, Nimkoff v. Central Park Plaza Associates, LLC, 2010 WL 2324158 (Sup. Ct. Nassau Cnty 2010), which Defendant-Respondents contend is "on point," is addressed to LLC Law Sections 701(b), 417(b) and 407(b), each of which contain classic default language allowing the parties to vary the statute in the articles of organization or operating agreement.

otherwise provided in the operating agreement. Id. In 1999, the legislature amended Section 1002(c) to lower the "default" approval threshold from two-thirds to a simple majority, as it appears in the statute today. See 1999 Sess. Law News of N.Y. Ch. 420 (S. 1640–A, A. 2844–A). In connection with this amendment, the legislature added subsection (h), providing a limited exception to the simple-majority "default" rule added by the 1999 amendment – for LLCs whose "original articles of organization" were adopted prior to the 1999 amendment. *Thus, the sole effect of subsection (h) is that where a pre-1999 operating agreement is silent on the required vote for a merger or consolidation, the former two-thirds default provision continues to govern.* Plainly, Section 1002(h) does not provide a "grandfathering" exception to the appraisal rights afforded by Section 1002(f), which appears in the statute today exactly as it did when it was enacted in 1994.

IV. NEW YORK PUBLIC POLICY REQUIRES THAT THE ESBA PARTICIPANTS' APPRAISAL RIGHTS BE ENFORCED

The statutory fair value guarantee "protects the minority shareholder from being forced to sell *at unfair values* imposed by those dominating the corporation while allowing the majority to proceed with its desired merger." Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 567-68, 473 N.E.2d 19, 25 (1984) (emphasis supplied); see also Willcox v. Stern, 18 N.Y.2d 195, 202, 219 N.E.2d 401, 404 (1966) ("The remedy of an appraisal and payment for one's shares affords *fair and*

just compensation to dissenting stockholders while allowing the overwhelming majority to proceed with the merger.") (Emphasis supplied.) Ironically, Defendant-Respondents' purported justification for the buyout – that it "preserved the critical unanimity requirement while enabling transactions supported by the great majority," and that its purpose "is to aid in the implementation of the decisions of the overwhelming majority" – echoes the Court of Appeals' articulation of the benefits conferred on the majority, but inexplicably omits the concomitant protection guaranteed the minority by the statutory remedy. (Def. Br. 52, 53.)

The LLC Law's statutory scheme strikes a careful balance – it strips dissenters of their common law right to enjoin an "unfair" transaction and relegates them to receiving fair value and not becoming shareholders in the surviving company, but protects them by guaranteeing to them a judicial appraisal remedy. Here, Defendant-Respondents are happy to take advantage of the first part as long as they are not burdened by the second part. They cannot have it both ways.

V. RESPONDENTS' BAD FAITH PROCEDURAL OBJECTIONS ARE BASELESS

As an initial matter, this Court has already addressed – and implicitly rejected – Respondents'' standing argument. Appellants previously sought a stay pending Appeal. In opposing the motion for a stay, Movants argued that Appellants lacked standing. While the Court denied the stay, it allowed the appeal to continue after hearing the standing argument and stated in its order "an appeal

having been taken…" without any mention of said appeal having been taken by a party without standing.

Regardless, CPLR Section 5511 provides that "[a]n aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." To be "aggrieved" a party "must have a direct interest in the controversy which is affected by the result, and the adjudication must have a binding force against the rights, person or property of the party." DiMare v. O'Rourke, 35 A.D.3d 346, 347, 825 N.Y.S.2d 273, 274 (2d Dep't 2006) (internal citations omitted).

Appellants are Participants in ESBA and thus they undeniably have "a direct interest in the controversy." If Appellants are not permitted to prosecute their appeal, the lower court's ruling that they are not entitled to the statutory protections of LLC Law Section 1002 will "have a binding force" against Appellants' rights and property. Appellants are "aggrieved parties" under CPLR Section 5511 and they have standing to prosecute this Appeal.

Respondents' assertion that this Appeal is barred by the settlement release is likewise unavailing. By its terms, the settlement is not effective until it receives "Final Court Approval," defined in the settlement stipulation to mean an "order dismissing the Action with prejudice and that such order is finally affirmed on appeal or is no longer subject to appeal and the time for any petition or reargument,

appeal or review has expired." Appellants have timely appealed the lower court's order approving the settlement but have yet to perfect that appeal and of course the vote will need to re-solicited under a revised S-4 statements should Appellants succeed here. Therefore, the settlement release is not yet effective and Defendant-Respondents' assertion that the settlement is a "valid, binding agreement, implemented by the Supreme Court's Final Judgment and Order" is demonstrably untrue. (Def. Br. 58 n. 11.)

CONCLUSION

Defendant-Respondents chose to ignore the early-on SEC warning that the $100 forced buy-out appeared to violate Section 1002. The Court should swiftly reject their impudent request for a judicial engraftment onto the statute to the effect – "unless the remedy would adversely affect Tony Malkin or Leona Helmsley's charities."

The confiscatory buy-out violates the statute. Defendant-Respondents opted into the LLC Law regime and cannot now cherry-pick which sections apply (§609) and which do not (§1002). Participants are members and hold membership interests, as the controlling documents say and as Defendant-Respondents have repeatedly acknowledged by their words and deeds. They do not become privileged to violate the statute by saying the proposed consolidation is not one, Delaware has no mandatory appraisal right, the losing parties lack standing, or that

the fair value guarantee is an optional default provision, nor because Class Counsel decided the forced buy-out was in their own interests.

Dated: New York, New York
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