UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUSAN MOSES, on behalf of herself and all others similarly situated, Plaintiff, v. APPLE HOSPITALITY REIT, INC., Defendant.	Case No.1:14-cv-03131 (DLI) (SMG)

AMENDED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Plaintiff Susan Moses ("Plaintiff"), on behalf of herself and the proposed Settlement Class (as defined below), has reached a proposed settlement of the above-captioned class action lawsuit (the "Action" or the "Class Action") for a total of $5,500,000.00 in cash (the "Settlement"). This Memorandum of Law is an amended version of the May 5, 2017 Memorandum of Law in support of Plaintiff's motion for preliminary approval of settlement (ECF No. 48), and addresses questions raised by Judge Gold during conferences held on June 6, 2017 and July 7, 2017.

Plaintiff and Defendant Apple Hospitality REIT, Inc. ("Defendant" or "AHR") reached an agreement to resolve the Action after a January 2017 private mediation with Hon. Theodore H. Katz, U.S. Magistrate Judge (Ret.) (JAMS) after arm's-length negotiations and review of information and documents obtained from AHR and David Lerner Associates (the sole managing dealer for the Apple REIT Seven, Inc. ("A7") and Apple REIT Eight, Inc. ("A8") offerings).

If approved, the proposed Settlement resolves all claims in the Action on behalf of Dividend Reinvestment Programs (DRIPs) investors in A7 and A8. The proposed settlement class ("Settlement Class") class definition is: Any person in the United States who participated in the DRIPs for Apple REIT Seven and/or Apple REIT Eight from July 17, 2007 to June 27, 2013 inclusive[1].

Plaintiff now respectfully moves the Court for an Order (1) preliminarily certifying the Settlement Class for the purposes of settlement; (2) preliminarily approving the terms of the Settlement as set forth in the revised Stipulation of Settlement (annexed to accompanying

[1]Excluded from the proposed Class are: (a) Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest in Defendant; (b) Defendant's legal representatives, predecessors, successors and assigns; and (c) any persons who affirmatively exclude themselves from the Class pursuant to the procedures described in the Notice.

Declaration of Christopher J. Gray dated August 21, 2017 ("Gray Decl.") as Ex. 1); (3) approving the form and method for providing notice of the Settlement to the Settlement Class; (4) preliminarily certifying Plaintiff as class representative; (5) appointing Interim Class Counsel pursuant to Fed. R. Civ. P. 23(g); and (6) scheduling a Final Fairness Hearing at which the request for final approval of the proposed Settlement, the Plan of Allocation of Settlement proceeds, and counsel's fee application will be considered. Defendant does not oppose the motion.

In preliminarily approving the Settlement, this Court must satisfy itself that this action may proceed as a class action, and then approve the form, content, and means of notifying the preliminarily certified Settlement Class of the existence of the action and of the terms of the Settlement. The Court should also set deadlines for counsel to mail and publish the notice, for Settlement Class members to opt-out of the Settlement Class, for Settlement Class members to object to the terms of the settlement, and for Settlement Class members to file claims. Lastly, the Court should set a date for a final hearing to determine whether it will approve the Settlement as fair, reasonable, and adequate. A form of proposed order setting forth a schedule for these events is annexed to the Gray Decl. as Ex. 2.

The proposed Settlement merits preliminary approval, as where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007).

II. RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Class Action arises out of sales of shares in A7 and A8 (together with AHR, the "Apple REITs") pursuant to their respective DRIPs. As part of the DRIPs, Defendant represented to Plaintiff and the Class that the DRIP sale price "[would] be based on the fair market value of [the REITs'] units as of the reinvestment date as determined in good faith by [their] board[s] of directors from time to time."[3] But Plaintiff alleges that, in reality, the $11.00 DRIP share sale price did not reflect a meaningful estimate of the underlying or realizable value of the units. The Apple REITs further agreed to price the DRIP shares utilizing the most recent price at which an unrelated person had purchased units of the Apple REITs or, if that price was not indicative of fair value, to utilize good faith judgment in determining the share price of the DRIP. Despite these agreements, throughout the life of the DRIPs, Apple REITs shares were consistently sold at an artificial price of $11 per share that did not reflect fair value.

On April 22, 2014, Plaintiff filed suit[4] against AHR alleging that AHR, successor to A7 and A8, shortchanged its investors who were participants in the Apple REITs' DRIPs by failing to comply with its obligation to price shares distributed via the DRIPs at fair market value. On June 27, 2014, Plaintiff amended her complaint. Judge Irizarry dismissed the amended complaint with leave to replead in an Order dated March 9, 2015, permitting Plaintiff to replead only her claim for breach of contract. Plaintiff filed her Second Amended Complaint ("SAC") on April 6, 2015 alleging a breach of contract regarding the DRIPs, and Defendant again filed a motion to dismiss. On September 30, 2016, Judge Irizarry issued a Memorandum Opinion granting in part and denying in part Defendant's Motion to Dismiss Plaintiff's SAC, which asserts claims on

[3] *See* Apple REIT Seven, Inc., Registration Statement (Form S-3), at 9 (July 17, 2007); Apple REIT Eight, Inc., Registration Statement (Form S-3), at 8 (Apr. 23, 2008).
[4] Plaintiff filed this suit in state court, but Defendant removed the case to this Court.

behalf of a putative class consisting of current and former A7 and A8 DRIP participants and alleges that (as held in the Court's prior Order) the agreement between Apple REITs and their shareholders via the REITs' Form S-3s constituted a contract, and that Apple REITs breached their contract with Plaintiff and the Class by mispricing shares sold through the DRIPs. (SAC ¶¶ 2, 4)

The Form S-3s (registration statements creating the DRIPs) indicated that the price for DRIP shares/units sold "will be based on the fair market value for our units as of the reinvestment date as determined in good faith by our board of directors from time to time." (SAC ¶ 23) The S-3s further stated that the A7/A8 boards would price shares based on (a) the "most recent price at which an unrelated person has purchased our units represents the fair market value of our units" or, if the price is not indicative of fair value then; (b) in its good faith judgment, "our board determines that there are other factors relevant to such fair market value." *See* Apple REIT Eight, Form S-3, p. 8; Apple REIT Seven Form S-3, pp. 9-10.[6]

The parties then engaged in discovery, including a production of documents by Defendant. In January 2017, the parties engaged in a private mediation with Hon. Theodore H. Katz, U.S. Magistrate Judge (Ret.) and agreed in principle to settle the Class Action on the terms that are now before the Court. The mediation before Judge Katz was professional but aggressively conducted, and lasted the entire day. The parties were ultimately able to reach a memorandum of understanding that formed the framework of the agreement that has now been reduced to the Stipulation of Settlement.

Under the proposed Settlement, Defendant will pay $5,500,000.00 in cash to resolve the claims of Plaintiff and the Class. The Class (and each member of the Class) is limited solely to

[6] The S-3 filings are annexed to the complaint as Exhibit 1.

the Settlement Fund for the satisfaction of all Released Claims against all Released Parties (which include AHR, A7 and A8, and the Apple REITs' present and former directors, partners, principals, officers, employees, agents, trustees, attorneys, insurers, reinsurers, parents, subsidiaries, affiliates, divisions, representatives, predecessors, administrators, and assigns).

Under the proposed Plan of Allocation 85% of the Net Settlement Fund will be allocated to DRIP shares purchased between July 22, 2011 and January 13, 2012 for Apple REIT Seven and between July 22, 2011 and February 19, 2013 for Apple REIT Eight less any shares redeemed. 15% of the Net Settlement Fund will be allocated to DRIP shares purchased between July 17, 2007 and July 21, 2011 as well as January 14, 2012 to June 27, 2013 for Apple REIT Seven and April 23, 2008 to July 21, 2011 as well as February 20, 2013 to June 27, 2013 for Apple REIT Eight less any shares identified as redeemed by the class administrator.

Plaintiff now seeks certification of the Settlement Class, which is defined as follows: Any person in the United States who participated in the DRIPs for Apple REIT Seven and/or Apple REIT Eight from July 17, 2007 to June 27, 2013 inclusive.

III. REQUIREMENTS FOR CERTIFICATION OF A SETTLEMENT CLASS

"Courts often certify classes for settlement purposes, and it is not uncommon for courts to certify settlement classes on a preliminary basis, at the same time as the preliminary approval of the fairness of the settlement, solely for the purpose of settlement, deferring final certification of the class until after the fairness hearing." *In re Take Two Interactive Secs. Litig.*, No. 06 Civ. 803 (RJS), 2010 U.S. Dist. LEXIS 143837, at *16 (S.D.N.Y. June 29, 2010). "Before approving a class settlement agreement, a district court must first determine whether the requirements for class certification in Rule 23(a) and (b) have been satisfied." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). The United States Supreme Court has recognized that the

requirements for approving a settlement class are lower than those for a litigated class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Rule 23(a) sets forth the following four prerequisites to class certification: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy of representation. Where, as here, the plaintiff alleges that a class may be maintained under Rule 23(b)(3), a court may grant class certification if "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008).

Fed. R. Civ. P. 23(e) requires judicial approval for the compromise of class claims. This consists of a two-step process: preliminary approval and a subsequent fairness hearing. At preliminary approval, the standards are more relaxed than those applied upon a motion for final approval. *See Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007). The Court's function at this stage is "to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *In re Prudential Sec., Inc. Limited. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

"Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007), citing *Manual for Complex Litigation, Third* § 30.41 and quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *accord Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009).

A. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable, but not impossible. *Take Two*, 2010 U.S. Dist. LEXIS 143837, at *18. ". . . [N]umbers in excess of forty generally satisfy the numerosity requirement." *Id.* at *18-19 (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). Here, documents produced by AHR and sole managing dealer for sale of the subject Apple REITs offerings, show that the Class is larger than 10,000 members. Numerosity is easily met.

B. Rule 23(a)(2): Commonality

The commonality element of Rule 23(a)(2) requires that "questions of law or fact are common to the class." *In re EVCI Sec. Litig*, No. 05-10240, 2007 U.S. Dist. LEXIS 57918, *37 (S.D.N.Y. July 27, 2007). The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a single issue common to all members of the class. Therefore, this requirement is easily met in most cases. *Newberg on Class Actions*, § 3.10 (4th). Here, Plaintiff alleges multiple common issues, including whether: (i) the Apple REITs' boards valued the DRIP shares issued to Plaintiff and the Class consistent with the S-3;(ii) Apple Hospitality REIT and/or its predecessors breached their promises about valuation set out in the S-3 by selling shares of A7 and A8 stock to Plaintiff and the Class pursuant to the DRIP at inflated prices that did not reflect such shares' true economic value; and (iii) the sum of damages and disgorgement of unjust enrichment due to Plaintiff and the Class. (SAC ¶ 66)

C. Rule 23(a)(3): Typicality

Rule 23(a)(3) requires that the representative's claim be typical of those of the members of the class. A representative's claim is typical if each class member's claim arose from the same course of conduct and is based on the same legal theories. But "typical" does not mean identical.

In re EVCI Career Colleges Holding Corp. Sec. Litig.,2007 U.S. Dist. LEXIS 57918, at *39 (S.D.N.Y. Jul. 27, 2007). Typicality is satisfied as long as "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendants liability." *Take Two*, 2010 U.S. Dist. LEXIS 143837, at *20 (quoting *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009)). Because Plaintiff and all other Class members purchased Apple REITs shares pursuant to the DRIPs at prices of $11.00 a share that did not reflect the contract price for the shares, Plaintiff alleges Defendant breached the contracts set forth in the Registration Statements on Form S-3, the claims of all class members derive from the same legal theories and allege the same set of operative facts. *See Take Two*, 2010 U.S. Dist. LEXIS 143837, at *21; *In re Oxford Health Plans, Inc.*, 199 F.R.D. 119, 123 (S.D.N.Y. 2001); *see also Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170 (LGS) (KNF), 2017 U.S. Dist. LEXIS 118022 at *10-11 (S.D.N.Y. July 27, 2017) (granting contested class certification motion and holding plaintiff was typical where "[d]efendants used a consistent method to calculate all the proposed class members' RAA benefits, the alleged errors in that method would have applied across the class").

D. Rule 23(a)(4): Adequacy

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. This requirement has traditionally entailed a two-pronged inquiry: first, the moving party must show that the interests of the representative parties will not conflict with the interests of Settlement Class members, and second, that counsel chosen by the representative parties is qualified, experienced, and able to vigorously conduct the proposed litigation. *EVCI*, 2007 WL 2230177, at *13. To satisfy this requirement, the Second Circuit explained that "[a]dequacy entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of

other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Flag Telecom*, 574 F.3d at 35 (internal quotation marks omitted). Pursuant to Federal Rule of Civil Procedure 23(g), adequacy of class counsel is now considered separately from the determination of the adequacy of the class representatives. In any event, both prongs of the adequacy requirement are satisfied here.

1. Adequacy of the Proposed Class Representative: Plaintiff has no interests that are antagonistic to those of the members of the proposed Settlement Class. Plaintiff participated in the DRIP program during the Class Period, purchasing A8 shares pursuant to the DRIP both inside and outside the Tender Offer Period (as defined below).[7] Plaintiff, as the proposed class representative, has vigorously prosecuted the claims of all class members. Plaintiff's interests are congruent with and not antagonistic to other Settlement Class members' interests. Further, Plaintiff has standing to represent all Class members. In *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012) ("*NECA*")[8], the Second Circuit held that a named plaintiff can only represent a class if the plaintiff can show that (1) the named plaintiff has suffered an actual injury based on defendants' illegal conduct and (2) "that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other

[7] The Court also inquired about previously Proposed Class Representatives Alfred and Frances Woods. While counsel believe that adding class representatives at this stage is permissible (*See Manual for Complex Litigation, Fourth* § 21.26 (it is "unnecessary for a class member to have filed an individual action in order to qualify as a class representative"); *Noble v. 93 University Place Corp.*, 224 F.R.D. 330 (S.D.N.Y. 2004) ("Nunez can serve as the class representative, even though he is not a named plaintiff… defendants have not identified, nor has a review of the case law revealed, a requirement that class representatives must sue individually"), the Woods are withdrawing from the case.

[8] In *NECA*, a case in which plaintiff sought to represent the purchasers of 17 different mortgage-backed securities, the court held that the absent class members' claims were sufficiently similar to those of the named plaintiff because the offering documents for each of the mortgage-backed securities purchased by class members contained "similar if not identical statements" about the originators' underwriting guidelines, and the defendants "issued, underwrote, and sponsored every" certificate from each of the relevant trusts. *Id.* at 162. The court concluded that the named plaintiff had the right incentives to adequately represent the entire class, despite the fact that plaintiff had purchased securities in only two of 17 offerings at issue, because, *inter alia*, the relevant proof for all of the claims would be sufficiently similar. *Id.* at 164.

members of the putative class by the same defendants." *Id*. at 162. "When this standard is satisfied, the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members that the named plaintiff may properly assert claims on their behalf." *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 161 (2d Cir. 2014).

As the Second Circuit later emphasized, standing to bring suit on behalf of the class depends on whether "the plaintiff had the right incentives" to vigorously represent the claims of all class members, which largely depends on whether "the proof contemplated by all [plaintiffs'] claims would be sufficiently similar." 775 F.3d at 161. Here, Plaintiff, who purchased shares in A8 but not A7, adequately represents purchasers of shares of both A7 and A8 as liability is based on identical contractual language in the Form S-3s and Defendant, through its predecessors, issued and sponsored both offerings. Plaintiff has "the right incentives" to aggressive prosecute claims of both A7 and A8 purchasers, as "the proof contemplated by all [plaintiffs'] claims would be sufficiently similar." *See* 775 F.3d at 161[9].

2. Rule 23(g): Adequacy of the Proposed Class Counsel: Fed. R. Civ. P. 23(g) requires a court to assess the adequacy of proposed class counsel. To that end, the court must consider the following: (1) the work counsel has done in identifying or investigating potential

[9]*See also Fernandez v. UBS AG*, 222 F. Supp. 3d 358 (S.D.N.Y. 2016) (finding that plaintiffs met the second criterion set forth in *NECA* because, *inter alia*, their "underlying allegations regarding defendants' misconduct--as alleged--applies to all twenty-three Funds and the Funds are all alleged to be structured the same way and to hold the same types of assets by the same defendants"); *Kurtz v. Kimberly-Clark Corp.*, No. 14-cv-1142, 2017 U.S. Dist. LEXIS 44576 at *142 (E.D.N.Y. Mar. 27, 2017) (applying *NECA* and granting contested class certification where plaintiff purchased one of several brands of purportedly "flushable" wipes manufactured by same defendant, because defendant's materially similar representation on the labels of all of the products and all claims would be subject to "[t]he same proof"); *Caufield*, 2017 U.S. Dist. LEXIS 118022 at *17-18 (applying *NECA* and granting contested class certification where plaintiff was deprived of benefits under one of two appendices to a retirement plan, because plaintiff "alleged that she personally has been denied benefits as a result of the four alleged errors and that all putative class members have been denied benefits based on the same alleged errors- albeit under a different appendix in some cases").

claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 182 (S.D.N.Y. 2005). Proposed interim class counsel have substantial experience in securities litigation and class actions, as set forth in their firm biographies filed with the Court. *See* Gray Decl. Exhs. 5-7 (firm biographies of proposed Interim Class Counsel).

E. Rule 23(b)(3): Predominance and Superiority

After meeting the threshold requirements of Rule 23(a), a plaintiff must show that the proposed class meets the requirements of Rule 23(b)(3). Under Rule 23(b)(3), the Court must find that the questions of law or fact common to the members of the class predominate over any question affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Predominance

Common questions of law and fact predominate and a class action is the superior method available to fairly and efficiently litigate this class action involving the sale of securities. The "predominance test generally is 'readily met in certain cases alleging consumer or securities fraud.'" *Take Two*, 2010 U.S. Dist. LEXIS 143837, at *26 (quoting *Amchem*, 521 U.S. at 625 (internal quotation marks and citations omitted))'

The Court's 23(b)(3) inquiry should be directed primarily toward the issue of liability. Indeed, "[w]here, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied." *Smilow v. S.W. Bell Mobile Sys. Inc.*, 323 F.3d 32, 40 (1st Cir. 2003). When common questions represent a significant aspect of a case and they can be resolved in a single action, class action status is appropriate. *See* 7A Wright,

Miller & Kane, *Federal Practice and Procedure: Civil 2d, § 1788*, at 528 (1986). "Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." *Smilow*, 323 F.3d at 39. Here, if Class members brought separate claims, they would be required to show many of same common facts to prove liability.

2. Superiority

Superiority factors include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3). Many, if not most, of the Settlement Class members are individuals for whom prosecution of a complex damages action on their own behalf does not provide a realistic or efficient alternative. Plaintiff believes no difficulties will be encountered in the management of this class action and Settlement. Here a class action is the superior method of adjudication and satisfies the requirements of Rule 23(b)(3).

IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. Overview of Preliminary Approval Pursuant to Rule 23(e)

Preliminary approval of the Settlement is the first step that must be taken before the Court can consider final approval of the Settlement. *See* 4 H. Newberg & A. Conte, *Newberg on Class Actions* (4th ed. 2002), at ¶ 11.25, p. 38. If the Court determines that preliminary approval is appropriate, the Court should then consider the form, content, and means of proposed notices to the Class and set deadlines for counsel and the claims administrator to disseminate and/or publish the notice, for Settlement Class Members to opt-out of the Settlement Class, for

Settlement Class members to object to the terms of the Settlement, and for briefing on final approval and any objections. Lastly, the Court should set a date for a final hearing to determine whether it will approve the Settlement as fair, reasonable, and adequate ("Final Fairness Hearing"). *See Manual for Complex Litigation (Fourth)*, § 21.632 (2004).

B. Preliminary Fairness Review

1. The Negotiations Were Fair, Conducted at Arm's-Length, and Supervised by a Highly Experienced Mediator

For the preliminary review of the Settlement for fairness, the Court should first consider the circumstances surrounding the negotiations to ascertain whether any aspect thereof raises an inference of collusion. *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1043 (1st Cir. 1996); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). Here the proposed Settlement for $5,500,000 in cash is the product of extensive negotiations that spanned the course of several months and included an all-day mediation before a nationally regarded mediator, Hon. Theodore Katz, U.S. Magistrate Judge (Ret.). The negotiations were at all times hard-fought and at arm's length, and have produced an excellent result for the Class. There are absolutely no facts that could be taken even to hint at collusion.

2. Proposed Interim Class Counsel are Highly Experienced and Capable

Pursuant to Rule 23(g), a court that certifies a class must appoint class counsel, who must "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Under this Rule, the court evaluates counsel according to (1) their work in identifying and investigating plaintiffs' claims, (2) their experience in similar litigation, (3) their knowledge of applicable law, and (4) the resources they will commit to prosecuting the action. Fed. R. Civ. P. 23(g)(1)(C)(i); *see Iglesias-Mendoza v. LaBelle Farm, Inc.*, 239 F.R.D. 363, 375 (S.D.N.Y. 2007). These criteria are met by all three of proposed Interim Class Counsel.

Proposed Class Counsel are highly experienced in this type of litigation. *See* Gray Decl. Exhs. 5-7. In addition, counsel have done substantial work in identifying and investigating plaintiffs' claims and demonstrated their knowledge of the applicable law by asserting legal claims that survived dismissal and resulted in the parties reaching resolution. Further, counsel have advanced sufficient resources to fund the litigation to date, and stand at the ready to expend the necessary financial resources and do the work necessary to successfully complete the case.

3. The Settlement Falls within the Range of Possible Approval

Courts presume that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations between well-informed counsel. *See Wal-Mart*, 396 F.3d at 116 (noting strong "presumption of fairness" where settlement is product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery); *In re Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 WL 4537550, at *13 (S.D.N.Y. Nov. 8, 2010)(same). Here, the Settlement was achieved only after arm's-length negotiations, and after Plaintiff's counsel had carefully investigated and reviewed the underlying facts.

V. CONSIDERATION TO CLASS MEMBERS UNDER THE PROPOSED SETTLEMENT

At the July 7, 2017 conference, the Court asked Plaintiff's counsel to provide further information regarding the percentage of potentially recoverable damages provided by the proposed Settlement, and the litigation risk justifying settlement on the terms proposed herein. Plaintiff now addresses these issues as follows:

A. Percentage of Potential Classwide Damages Recovered. Plaintiff's expert analysis, which will be furnished to the Court upon request, shows that the potential classwide

damages herein are between $22.1 million and $40.6 million.[10] Damage calculations and possible recovery herein would likely depend on a "battle of the experts" as Defendant has advised counsel that its experts' calculations of the potential classwide damages are (unsurprisingly) substantially lower. Further, the risks involved in the litigation bring this well within (and significantly above) the historic range of approval for class settlements in securities cases.[11] Here, Plaintiff's preliminary analysis suggests that the proposed settlement consideration of $5.5 million represents between 13.5% and 24.9% of potentially recoverable damages (based on the range of potential classwide damages of between $22.1 million and $40.6 million.

B. Litigation Risk Justifies The Proposed Settlement

At the July 7, 2017 hearing, the Court requested additional briefing concerning the litigation risks justifying settlement. The settlement presents an excellent recovery to class members in that it allows a substantial per share payment to the class members without the risks involved in continued litigation. Here, there is both potential liability and damages risk.

[10]Plaintiff's counsel at the hearing asserted a preliminary estimate of maximum classwide damages between $40-$80 million. The higher estimated range was based in part on the compounding, *i.e.*, class members would receive damages based on the previous share dividends they would have received if they had been issued a larger number of Apple REITs shares under the DRIPs during each monthly issuance of shares. Potential defenses to Plaintiff's damages calculations are discussed below.

[11] *See* Cornerstone Research, *Securities Class Action Settlements 2016 Review and Analysis*, at p. 6, accessible at http://securities.stanford.edu/research-reports/1996-2016/Settlements-Through-12-2016-Review.pdf (securities class actions in 2016 settled for an average of 9% and median of 8% of estimated classwide damages); *see also In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 U.S. Dist. LEXIS 152275 at *20 (E.D.N.Y. Oct. 23, 2012) (approving settlement in which 17.5% of actual damages were recovered); *In re China SunengerySec. Litig.*, 2011 U.S. Dist. LEXIS 53007, at *15 (S.D.N.Y. May 13, 2011) (noting that the average settlement in securities class actions ranges from 3% to 7% of the class' total estimated losses); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02-MDL-1484 (JFK), 2007 U.S. Dist. LEXIS 9450 at *33 (S.D.N.Y. Feb. 1, 2007) (approving settlement representing approximately 6.25% of estimated damages and characterizing recovery as "at the higher end of the range of reasonableness of recovery" in securities class actions).

1. Liability Risk Based On Judge Irizarry's Opinion

Judge Irizarry's September 30, 2016 Order denying in part Defendant's motion to dismiss (ECF No. 30) was undoubtedly favorable to the Plaintiff. While a number of other putative class cases have been brought against the Apple REITs, several have been dismissed. *See In re Apple REITs Litig.*, No. 11-cv-2919 (KAM), 2013 U.S. Dist. LEXIS 48565 at *19 (Apr. 3, 2013) (dismissing Securities Act claims of, *inter alia*, A7 and A8 purchasers); *Wenzel v. Knight*, No. 3:13-cv-432, 2015 U.S. Dist. LEXIS 70536 at *3-4 (E.D. Va. Jun. 1, 2015) ("*Wenzel*") (rejecting plaintiff's contention that stock sold in the A8 DRIP "was worth less than the dollar amount of the cash dividend declared and paid to non-electing A-8 holders" and dismissing case); *Lewis v. Del. Charter Guar. & Trust Co.*, No. 14-cv-1779 (KAM), 2015 U.S. Dist. LEXIS 42521 at *41-42 (E.D.N.Y. Mar. 31, 2015) (dismissing class action claims against IRA custodian and managing dealer). Indeed, *Wenzel*, a parallel action to this case filed in the Eastern District of Virginia after the commencement of this case, was dismissed. *See* 2015 U.S. Dist. LEXIS at *3-4. Chief Judge Irizarry distinguished *Wenzel* in footnote 5 of Her Honor's opinion dated September 30, 2016 (ECF No. 30), stating "In that case, the Court did not address explicitly the allegations pled by Plaintiff here that other individuals purchased units for less than $11.00 per unit. In *Wenzel*, the plaintiff only alleged that a third-party buyer had offered to purchase shares for less than $11.00 per share and that the company had rejected this offer." Op. at 2, f.n. 5.

Distinguishing *Wenzel*, Judge Irizarry refused to grant Defendant's motion to dismiss, and held that the pleading herein satisfied Rule 8. But Judge Irizarry left a liability uncertainty in opining that the contract was simply ambiguous and not necessarily a clear breach by Defendant. Specifically:

> Here, the term "our units" is susceptible to more than one reasonable interpretation because nowhere does this provision or the S-3 define whether "our units" means units

> purchased directly from the company, or units purchased from third-parties. For instance, the fact that an individual may own A8 units and sell them to a third-party does not make those units any less Defendant's units, or affect Defendant's ability to refer to those units as "our units". . .[citation omitted] As such, this ambiguity presents an issue of fact that cannot be resolved properly at this stage of the litigation.

Ultimately, Plaintiff is confident in her argument. But there is a liability risk moving forward in that the interpretation of the contract represented by the S-3s could hinge on a number of factors, including Defendant's contention that it sold shares under the DRIPs at the $11.00 per share price that it said that it would charge, and whether it was practically impossible for Defendant to track all third-party sales. Also, there is a dispute as to the admissibility of the SEC Order (Consent Order in Administrative Proceeding File No. 3-15750, Securities Act of 1933 Release No. 9548, hereinafter the "SEC Order"[12]) addressing some of the same issues in this case, and if all or parts of the order are deemed inadmissible, Plaintiff would also potentially need to obtain admissible evidence to establish the facts set forth in the SEC Order.

There is also the risk a jury could potentially come to the same conclusion on the law as Judge Gibney in *Wenzel:*

> Wenzel argues that the "[d]efendants had a *contractual obligation* to modify the per unit price to reflect additional factors relevant to the determination of fair market value, such as those considered relevant by any generally accepted method of valuation." Pl.'s Brief 11-12 (emphasis added). But no such obligation is reflected by the language on pricing in the Form S-3. Instead, the agreement makes clear that the DRIP unit price would start at $11.00 each and continue at that price "unless and until the board decides to use a different method for determining the fair market value of [the DRIP] units." The agreement imposed no duty on the board to monitor, evaluate, or appraise the share values. Instead, it gave the board *discretionary* power to change the valuation method for DRIP shares.

2015 U.S. Dist. LEXIS 70536 at *3-4.

Moreover, absent settlement, Defendant would have strongly opposed the motion for class certification, and potentially would have filed a motion for summary judgment. While

[12] The SEC Order is accessible at https://www.sec.gov/litigation/admin/2014/33-9548.pdf.

Plaintiff believes that she has strong arguments in favor of granting contested class certification and in opposition to summary judgment, such motions would have presented material litigation risk. In all of the circumstances, litigation risk renders Plaintiff's chances of prevailing on liability at trial far less than certain.

2. Litigation Risk As To Damages

The range of possible damages that could be established here varies depending on the assumptions and methodology adopted. After careful review, Plaintiff's damages expert concluded that the total damages that Plaintiff would be reasonably likely to be able to prove at trial would be between $22.1 and $40.6 million. But if Defendant's damages arguments were accepted, damages could be much lower or recovery could be eliminated entirely. In light of all of these risks, Plaintiff and her counsel believe that the $5.5 million proposed Settlement, representing between 13.5% and 24.9% of likely recoverable damages, is fair, reasonable and adequate and warrants preliminary and ultimately final approval by the Court.

According to Plaintiff's expert, the classwide damages scenario based on comparing the tender offer prices to the $11 per share purchase price yields about $22 million in damages- totaling $12,739,097 for AR7 shareholders and $9,396,563 for AR8 shareholders- a total of $22,135,660. Plaintiff's expert also performed other damages calculation methodologies, based on comparing the $11.00 a share sale price under the DRIPs with the Apple REITs' book value and a valuation based on earnings multiples derived from publicly-traded REITs with similar underlying assets, which yield higher potential damages of from $34.7 million (book value) up to $40.6 million (comparison with value of publicly-traded REITs). Plaintiff's expert analysis will be furnished to the Court upon request.

Defendant has advised counsel that its experts' calculations of the potential classwide damages are substantially lower- placing damages at a maximum of $5.6 million. Plaintiff of

course would vigorously dispute this contention, but the extent of damages would almost certainly be a hotly contested issue if this litigation proceeded without settlement. Further, the methodology for calculating damages suggested by the September 30, 2016 Order (ECF No. 30) has inherent complexities. Under the Court's ruling, Plaintiff may attempt to prove that Defendant should have priced shares sold in the DRIPs based on prices paid in the tender offers- between $3.00 and $5.50 a share- because these were at times the "the most recent price at which an unrelated person has purchased our units." But there could also have been transactions in the secondary market at prices much higher than the tender offers that could "reset" the contract price as representing "the most recent price at which an unrelated person has purchased our units." Significantly, the DRIP shares were issued once per month, around the 15th of every month. Accordingly, it could be argued that an unrelated person purchasing a single share of Apple REITs at a price higher than the tender offer purchase price before a given month's issuance of shares under the DRIPs would "reset" the price, and arguably lower the Class's damages.

In short, Plaintiff faces substantial litigation risk with respect to the scope of damages based on competing expert testimony expected to be presented by the parties, as well as the inherent complexities in fixing the sum of damages on the unique facts herein.

VI. THE PLAN OF ALLOCATION

A. The Plan of Allocation takes into consideration the risks to different class members

During the June 6, 2017 telephone conference, the Court inquired about the proposed Plan of Allocation contained in the Stipulation of Settlement, and requested an explanation of the reasoning behind same. The proposed Plan of Allocation (excerpted) is as follows[13]:

[13] All capitalized terms below have the meanings set forth in the Stipulation of Settlement (ECF No. 48-2).

> 85% of the Net Settlement Fund will be allocated to DRIP [*i.e.*, Dividend Reinvestment Program] shares purchased between July 22, 2011 and January 13, 2012 for Apple REIT Seven and between July 22, 2011 and February 19, 2013 for Apple REIT Eight.
> * * *
> 15% of the Net Settlement Fund will be allocated to DRIP shares purchased between July 17, 2007 and July 21, 2011 as well as January 14, 2012 to June 27, 2013 for Apple REIT Seven and April 23, 2008 to July 21, 2011 as well as February 20, 2013 to June 27, 2013 for Apple REIT Eight… .

The former periods ("Tender Offer Periods"), as to which 85% of the Net Settlement Fund is allocated, begin when purchases of Apple REITs shares under certain third-party tender offers began on July 22, 2011 and end upon the filing of amended Registration Statements on Form S-3[14] that modified the language concerning how the sale price for shares of Apple REITs sold under the DRIPs would be determined.

Plaintiff's counsel have weighed the strengths and weaknesses of the claims and believe that under Judge Irizarry's Memorandum and Order dated September 30, 2016 (ECF No. 30), purchasers during the Tender Offer Periods have stronger claims than purchasers outside those periods. In her ruling, the Court held in relevant part as follows:

> Defendant first argues that the term "our units" means shares purchased directly from A7 and A8 and, therefore, cannot include units purchased through third-party tender offers. (Def's. Mem. at 10-11.) The Forms S-3 indicate that the price is "determined at all times based on the most recent price at which an unrelated person has purchased our units." Here, the term "our units" is susceptible to more than one reasonable interpretation because nowhere does this provision or the S-3 define whether "our units" means units purchased directly from the company, or units purchased from third-parties.
> * * *
> Next, Defendant argues that it is not feasible that the Apple REITs promised to value the units according to the last price paid in any and all private sales of Apple REIT units. (Def's. Mem. at 11.) Once again, Defendant's reading of the contractual language is just one possible interpretation of the provision and the ambiguity cannot be resolved on a motion to dismiss. Without clear contractual language leading to Defendant's

[14]The amended Registration Statements contain the identical language as follows as regards pricing of Apple REITs shares sold under the DRIPs:"[t]he market value of our units and the unit price of units purchased from us under the plan will not be based on an appraisal or other valuation of us, our net assets, or the units, and will not necessarily reflect our value, earnings, net worth or other measures of value, but rather will be deemed equal to the most recent price at which an unrelated person has purchased our units *from us*." [Emphasis supplied].

interpretation, the Court will not insert words into the contract that the parties did not include.

Under the Court's ruling, Plaintiff may attempt to prove that Defendant should have priced shares sold in the DRIPs based on prices paid in the tender offers, between $3.00 and $5.50 a share. The prices at which the tender offerors purchased shares during the Tender Offer Periods are a matter of public record. By contrast, purchasers of Apple REITs shares during periods before the Tender Offer Periods, *i.e.*, before July 22, 2011, might need to provide evidence of the prices paid for Apple REITs shares in the limited secondary market in order to prove damages.[15] Purchasers *after* the Tender Offer Periods may also face additional difficulties in prevailing on their claims because the revised language concerning pricing in the amended S-3s arguably removes ambiguity by indicating that the price for DRIP sales "will be deemed equal to the most recent price at which an unrelated person has purchased our units *from us* [*i.e,* from A7 and A8]." (emphasis supplied)

The plan of allocation is a method that permits the equitable distribution of limited settlement proceeds to eligible class members. *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). "As a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *Alleyne v. Time Moving & Storage Inc.*, 264 F.R.D. 41, 52 (E.D.N.Y. 2010)[16].

[15] Plus, Apple REITs were redeeming all shares that shareholders sought to have redeemed at prices of $10.12 a share or more until January of 2011.

[16] A reasonable plan of allocation may consider the relative strength and value of different categories of claims. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004); *see also In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262 (RWS) 2002 U.S. Dist. LEXIS 22663 at *54 (S.D.N.Y. Nov. 26, 2002) (Sweet, J.) (allocation formulas reflect the comparative strengths and values of different categories of the claim). "[N]othing requires a settlement to benefit all class members equally. Such a rule would itself result in an inequitable windfall to certain class members, to the detriment of others." *Global Crossing*, 225 F.R.D. at 462.

The Plan of Allocation[17] is not a material term of the Stipulation of Settlement. Defendant takes no position as to the Plan of Allocation, and if the Court grants preliminary approval, the Court retains discretion to adopt it, adopt it with modification or devise a different plan of allocation at the final approval stage. *See* Revised Stipulation of Settlement, Gray Decl., Ex. 1 at ¶ 1(s) and ¶ 12.3.

B. The Minimum Per Share Consideration To Be Received By Class Members Inside And Outside The Tender Offer Period

In response to the Court's questions at the July 7, 2017 conference, Kurtzman Carson Consultants, LLC (KCC" or the "Claims Administrator") the proposed claims administrator herein, has calculated the per-share consideration, net of attorneys' fees, payable to Class members inside and outside the Tender Offer Period under the proposed Plan of Allocation.[18]

KCC determined that there were 709,686.93 unredeemed Apple REIT Seven DRIP shares purchased within the dates defined for the 85% Pool and 1,648,734.21 unredeemed Apple REIT Eight DRIP shares purchased within the dates defined for the 85% Pool, for a total of 2,358,421.14 unredeemed DRIP shares in the 85% Pool. (Hughes Decl., ¶ 4) Therefore, before deduction of attorneys' fees/expenses and any other costs that may be approved, Class Members would receive approximately $1.98 per unredeemed DRIP share in the 85% Pool. *Id.*

Further, KCC identified that in total, there were 10,878,408.25 unredeemed Apple REIT Seven DRIP shares purchased within the dates defined for the 15% Pool and 7,645,476.03 unredeemed Apple REIT Eight DRIP shares purchased within the dates defined for the 15% Pool, for a total of 18,523,884.28 unredeemed DRIP shares in the 15% Pool. (Hughes Decl., ¶ 5)

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[17] The proposed Plan of Allocation is subject to modification by the Court. In appropriate circumstances, a district court may exercise its "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members more equitably." *Beecher*, 575 F.2d at 1016.

[18] *See* Declaration of Justin R. Hughes dated August 21, 2017 ("Hughes Decl.").

So, before costs that may be approved for payment from the Settlement Fund, Class Members would receive approximately $.04 per unredeemed DRIP share in the 15% Pool. *Id.*

Accordingly, if the maximum attorneys' fees permissible under the Stipulation of Settlement were requested and awarded, and the maximum of $150,000 in litigation expenses permissible under the Stipulation of Settlement expended and reimbursed, Class Members would receive approximately 63.94% of these sums, or a minimum of approximately $1.26 per unredeemed DRIP share in the 85% Pool and $0.025 per unredeemed share in the 15% Pool.

VII. THE PROPOSED NOTICE TO SETTLEMENT CLASS MEMBERS SATISFIES RULE 23(C)(2)(B)

A. Amended Proposed Stipulation, Summary Notice, Long Form Notice

Per this Court's remarks at the July 7, 2017 conference, the parties amended the Stipulation of Settlement, Long-Form Notice, and Summary Notice (Gray Decl. Exhs. 1, 3 and 4). The amended documents track the Court's input on the content and form of the documents.[19]

B. The Notice Program Complies With Rule 23 and Comports with Due Process

Rule 23(e) requires that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval" and as a part of the approval process, the "court must direct notice in a reasonable manner to all class members." Rule 23(e)(1).

Here, the Notice, as revised in light of the Court's suggestions at the July 7, 2017 conference, contains all necessary information in an easily-accessible format.

Plaintiff has engaged KCC, an experienced settlement administrator, and requests that KCC be approved by the Court as Claims Administrator. KCC will cause the Summary Notice to

[19]The (Proposed) Order Preliminarily Approving Settlement, Providing for Notice and Scheduling Hearing ("Preliminary Approval Order", annexed to Gray Decl. as Ex. 2), directs that within 30 calendar days of its entry, Plaintiff shall cause to be mailed by first class U.S. Mail a notice (the "Notice", Gray Decl. Ex. 3) to all identifiable Class members.

be published once in the PR Newswire or similar newswire service. Further, Defendant has already provided data and approved its use by the Claims Administrator for the purpose of identifying and giving actual notice by U.S. mail to each A7 and A8 DRIP purchaser.

The Parties ask this Court to approve the manner of providing notice, which includes individual notice by mail to all Class members who can be reasonably identified and additional publication notice is the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23. *See Dorn v. Eddington Sec., Inc.*, No. 08 Civ. 10271 (LTS), 2011 WL 382200, at *4 (S.D.N.Y. Jan. 21, 2011); *In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008);

VIII. PROPOSED SCHEDULE OF EVENTS

Plaintiff believes that the Court should schedule the Final Fairness Hearing at least one hundred twenty (120) calendar days after entry of the Preliminary Approval Order. The Parties propose the schedule below (setting forth additional deadlines) for the Court's consideration (consistent with the proposed order annexed to the accompanying Gray Decl. as Exh 2):

Event	Time for Compliance
Deadline for mailing Settlement Notice and Claim Form to the Class ("Notice Date")	30 days after entry of Preliminary Approval Order
Deadline for publishing Summary Notice	10 business days after the Notice Date
Filing of briefs in support of final approval of Settlement, Plan of Allocation, and Lead Counsel's fee and expense request	110 calendar days after entry of Preliminary Approval Order
Receipt deadline for objections and requests to opt out of Class	100 days after Preliminary Approval Order
Filing of reply memoranda in support of final approval of Settlement, Plan of Allocation, and Lead Counsel's fee and expense request and responses to any objections	5 days before Final Fairness Hearing

Event	Time for Compliance
Final Fairness Hearing	120 days after Preliminary Approval
Deadline for submitting Claim Forms	180 calendar days after Notice Date

VII. CONCLUSION

Based upon the foregoing reasons and authorities, Plaintiff respectfully requests that the Court grant the instant motion in its entirety, and grant such other and further relief as the Court shall deem just and proper.

Dated: New York, New York
August 21, 2017

Respectfully submitted,

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