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New York Supreme Court

Appellate Division – First Department

IN RE EMPIRE STATE REALTY TRUST, INC. INVESTOR LITIGATION

JOINT BRIEF FOR DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

As the Court knows from a prior appeal in this action,[1] in early 2012 several class actions were brought challenging the proposed consolidation and IPO (the "Transaction") of multiple entities then supervised by Malkin Holdings, including Empire State Building Associates, the entity that owned the fee title and master lease to the Empire State Building. After months of hard fought negotiations, Class Counsel and counsel for the Defendants reached a settlement, which included a $55 million settlement fund for investors, among many other provisions. That settlement—as well as the underlying claims in the class actions—were then subjected to exhaustive review by the Supreme Court (Sherwood, J.S.C.), who approved it. Only 12 of the approximately 4500 investors opted out of the settlement, and distribution of the settlement funds awaits only conclusion of all appeals. The Transaction was successfully consummated, and the IPO took place in October 2013.

Throughout this process, a tiny group of investors unsuccessfully sought to stop or disrupt the Transaction, which was approved by overwhelming supermajorities of investors. Unfortunately, one of them has filed this appeal, reprising a handful of the many spurious arguments presented below. As we explain below, they are patently meritless.

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[1] *See In re Empire State Realty Trust, Inc. Inv. Litig.*, 114 A.D.3d 570 (1st Dep't 2014).

First, Appellant tries to make it appear that the process by which the Settlement was agreed and approved was infected by "collusion" of some kind, and that the few specific issues he raises were never addressed. (Br. 19-23). Nothing could be further from the truth: this matter was litigated far more intensively than the ordinary class action: the Class Plaintiffs and Defendants conducted extensive discovery over a six-month period of disclosure and negotiations, including extensive document exchanges and interviews with the principals. The objectors then aggressively challenged even the *preliminary* approval of the Settlement, which Justice Sherwood granted after extensive argument, then made a number of additional submissions to the Court, sought a stay of the final settlement hearing from this Court, which was denied, and made voluminous submissions challenging final approval of the Settlement, which were considered during a final settlement hearing (and ultimately rejected by Justice Sherwood).

Second, and not surprisingly, the arguments Appellant has raised in this Court are frivolous, especially given the abuse of discretion standard on this appeal. *See Hibbs v. Marvel Enters. Inc.,* 19 A.D.3d 232, 232-33 (1st Dep't 2005). For example, he contends that the ESBA investors were short-changed and should have been separately represented even though every one of the named Plaintiffs, represented by Class Counsel, was an ESBA investor, ESBA investors will receive approximately 70% of the Settlement fund, and it is undisputed that every one of

the allegedly “ESBA specific” issues affected at least one other property. Similarly, Appellant claims that the “meager” (Br. 33) $55 million settlement fails to compensate investors for the so-called “overrides” (Br. 26-30) at ESBA and 60 East 42nd Street. Yet that very claim was the subject of extensive discussion and negotiations between Defendants and Class Counsel, who ultimately concluded that the claim was not particularly strong, as did Justice Sherwood after his own review of the evidence. (R.29) (“Class Counsel investigated this claim and concluded that there was a ‘substantial risk’ that on a motion for summary judgment the court would conclude . . . that the Malkin Defendants are entitled to payment of the overrides . . . . Defendants have set forth proof which they contended shows that their defense is well supported. Class Counsel’s decision to discount the value of this claim is reasonable.”). And the assertion that counsel for the parties “agreed to lie” (Br. 34) about the creation and implementation of a tax-deferred option is wholly unsupported and outrageous but regrettably in keeping with the Appellant’s conduct throughout this matter.

The Orders appealed from should be affirmed.

COUNTERSTATEMENT OF QUESTION PRESENTED

Did Supreme Court (Sherwood, J.S.C.) abuse its discretion in approving a class action settlement, when that settlement provided a $55 million settlement

fund for investors, as well as deal protection features and enhanced disclosures, and only 12 of the approximately 4500 investors opted out?

Justice Sherwood properly approved the settlement, and this Court should affirm.

COUNTERSTATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

A. The Formation and Structure of the Investments at ESBA

1. Malkin Holdings and the Helmsley Estate

Malkin Holdings and its predecessors ("Malkin Holdings"), since the 1940s, served as Supervisor of properties in New York City and its suburbs. (R.678-79). This portfolio included well-known properties, including the Empire State Building ("ESB") and One Grand Central Place, and grew out of the partnerships among Lawrence A. Wien, the founder of Malkin Holdings' predecessor and the recognized pioneer of real estate syndication, Peter L. Malkin, and Harry B. Helmsley. (R.678-79).

The basic structure and operation of the ESB investment remained uniform for decades. At ESB (and other investments), separate partnerships were formed to own the fee/master lease and operating lease interests. ESBA, which owned the fee and master lease, consisted of a large group of passive investors. Empire State Building Company ("ESBC"), the operating lessee, was a smaller group of investors with operational control over ESB. The Helmsley Estate owned

approximately 63% of ESBC. (R.663-64). Under the Helmsley will, it was required to liquidate that interest (as well as its interests in the other properties in this action) in an orderly fashion, with proceeds going to a charitable trust. (R.663).

2. The ESBA Partnership Agreement

To obtain favorable single-level tax treatment as a partnership, rather than two levels of taxation as a corporation, and to protect individual investors from personal liability, Mr. Wien developed a unique structure to acquire properties like ESB, which involved establishing fee owner partnerships like ESBA.

The partners were a small number of individuals, generally Mr. Wien, Mr. Malkin and another Malkin Holdings partner. Since inception, ESBA had three partners (later members), all affiliated with Malkin Holdings. The ESBA Partnership Agreement required unanimity at the partner level on certain fundamental transactions (R.529, 687-88), such as disposal of any partnership asset.

At inception, each partner's interest in the partnership was separately syndicated to "Participants", through a separate joint venture. Each partner served as the "Agent" for his joint venture. The rights and duties of Participants were contained in three separate, identical joint venture agreements (each a "Participating Agreement"). (R.345, 508). At ESBA, each of the three partners'

interests was syndicated into 1,100 “participation” interests, which were sold for $10,000 each. (R.660). However, the partners (later members) and their affiliated persons owned a substantial economic interest in ESBA (approximately 8%). (R.1344).

3. The Participating Agreements

Under the Participating Agreements, each Participant gave his or her partner discretion to act for the joint venture in virtually all matters. (R.1401). The Participating Agreements acknowledged the broad authority the partners—as the sole partners in ESBA—possessed. (*E.g.*, R.1402 (“It is acknowledged that the Agent has the power, as a partner in the partnership, to dissolve the partnership”)).

However, to give ESBA the decentralized management attributes of a general partnership for tax purposes, the Participating Agreements required each partner to obtain consent of 100% of his joint venture’s Participants before acting on limited fundamental transactions, such as mortgaging or selling the property. (R.1401).

Obtaining unanimity would have been practically impossible, of course: it would have allowed a small minority to create deadlocks, thwart the will of a supermajority and paralyze ESBA on fundamental decisions. Therefore, the Participating Agreements also provided that, if Participants holding 80% of each of the three joint ventures approved a proposed action, the partner could, after giving

non-consenting Participants written notice and an opportunity to join in approval, buy on behalf of the joint venture the interests of any continuing non-consenting Participant for their remaining book value, but not less than $100—permitting the required unanimity. (R.1402-03).

4. The Participants' Approval of Overrides at ESBA and 60 East

In 1991, during a solicitation seeking consent to purchase the fee title to ESB, Malkin Holdings requested that each Participant in ESBA voluntarily agree to permit Malkin Holdings to share in that Participant's share of the proceeds of a "Capital Transaction", as that term was defined in the solicitation. (R.441-42, 461-63). The agreement was voluntary, in that each Participant could agree or not agree to share such proceeds with Malkin Holdings without any potential adverse impact on their interests. (R.461-65). 81% of the Participants agreed to the voluntary compensation that Malkin Holdings requested in the 1991 solicitation. (R.506).

The voluntary compensation program asked each Participant to agree to pay to Malkin Holdings, among other things, "10% of the Net Proceeds from any Capital Transaction after a return to the Participant of such Participant's Remaining Cash Investment". (R.462). The solicitation defined "Capital Transaction" as follows:

> "Capital Transaction" shall mean any one or more of the following transactions: (i) the original incurrence or

> refinancing of any indebtedness of Associates or any joint venture in which Associates has an interest, (ii) the sale, exchange, condemnation (or similar eminent domain taking), casualty or other disposition of all or any substantial part of the Property, the Master Lease or Associates' interest in the Property or the Master Lease held through any joint venture in which Associates has an interest, (iii) the liquidation and dissolution of Associates or (iv) any similar transaction or event, the proceeds of which are deemed attributable to capital in accordance with generally accepted tax or accounting principles.

(R.463).

In 2001, during another consent solicitation seeking permission to purchase the fee interest in ESB, Malkin Holdings asked each Participant who had not previously agreed to the voluntary compensation (that is, the remaining 19% of Participants) to do so. (R.505-06). The terms of the 2001 voluntary program were identical to the 1991 program. An additional 13.5% of the Participants agreed, for a total of 94.5%.

With respect to 60 East 42nd Street Associates L.L.C. ("60 East")[2], the override, which is not a voluntary override, represents a contractual obligation of 60 East payable pursuant to a consent of Participants in 1968 and provides that "after the Participants have received distributions equal to a return at the rate of 14% on their cash investment in any year, all additional amounts paid out shall be

[2] As noted by Justice Sherwood, Appellant is not a Participant in 60 East and therefore lacks standing to object to that override. (R.29).

allocated 90% to Participants and 10% to [Malkin Holdings] as additional compensation." (R.1410).

B. The Conversion of ESBA to a Limited Liability Company

In September 2001, after 9/11, the partners converted ESBA to an LLC. This conversion was critical, since the master lease with the then-fee owner arguably required ESBA to rebuild ESB if it was destroyed. (R.504). While Appellant[3] asserts that the conversion took place to "insulate the Agents" from liability to third parties (Br. 9), in fact it was to protect Participants, who are required to indemnify the Agents for any liability. (R.1403-04).

C. The Proposed Transaction and the Solicitation Process

On November 29, 2011, Malkin Holdings disclosed in an SEC filing that it had "embarked on a course of action that could result in [ESBA] becoming part of a newly formed public REIT." (R.522). The Transaction's benefits included the option to receive securities on a tax-deferred basis and what the sponsors believed would be more stable distributions with greater potential for increased distributions; greater access to financing; and a modern corporate governance structure. Further, each Participant would receive the ongoing option to own liquid, publicly traded securities, rather than an illiquid participation interest.

[3] This brief refers to "Appellant" and not "Appellants". On March 17, 2014, Alan Kovacs, on behalf of objectors Hope Ratner and Mark Esses filed a motion requesting permission to join the Appeal. We opposed that motion on March 28, 2014. Pending this Court's decision on the outstanding motion, these papers only refer to Appellant, Alan L. Kovacs, as Trustee of the Hilda Kovacs Family Trust of 2000.

In late 2011 through early 2012, Malkin Holdings solicited consents from investors in the private entities (*i.e.*, non-SEC reporting, as opposed to publicly-registered entities) it supervises (the "Private Entities"). (R.680). Investors in all the Private Entities whose consent was required voted for the Transaction. (R.1428 ¶ 10). Further, though several of these entities had buy out provisions similar to ESBA's, *every* investor who voted against the Transaction was allowed to, and did, change his or her vote after the required supermajority consent was achieved, avoiding the buy out. (R.1428 ¶ 10).

In February 2012, Malkin Holdings filed an S-4 Registration Statement with the SEC (which included a draft Solicitation). (R.1083). Over the next 10 months, Malkin Holdings received SEC comments, had extensive discussions with SEC staff, and publicly filed six S-4 amendments. In December 2012, the SEC declared the S-4 effective, and the Solicitation was then mailed to Participants. The final Solicitation was over 1,000 pages.

D. Procedural History

1. The Class Actions

On March 1, 2012, plaintiff Leon Meyers filed a putative Class Action Complaint against Malkin Holdings and affiliated parties (the "Malkin Defendants"); the REIT and the Operating Partnership; and the Helmsley Estate. (R.127). Four other investors then filed similar Complaints (collectively, the

"Class Complaints"). (R.168). The Class Complaints made various claims about the Transaction, including that the buy out provisions were unlawful.

By Order dated June 25, 2012, Justice Sherwood consolidated the Actions and appointed Co-Lead Counsel for the Class. (R.172).

2. The Settlement Negotiations and Agreement

The Defendants and Class Counsel engaged in six months of intensive discussions concerning a potential settlement. That process involved extensive, voluntary production of documents to Class Counsel, interviews by Class Counsel of representatives of the Defendants and third parties, and protracted negotiations.

In September 2012, the parties reached a Settlement. (R.162-85). The Settlement Agreement includes: (1) a $55 million fund for investors (under which ESBA Participants receive from $8,350-$9,836 per original $10,000 investment in addition to their share of REIT securities or other consideration from the Transaction); (2) deal protections; and (3) supplemental disclosures, which were included in the effective Form S-4. (R.254-66). In addition, Defendants acknowledged that allowing Participants to elect to receive OP units provides Participants with substantial benefit that is valued at over $100,000,000. (R.233).

The settlement also included a broad release of claims which includes:

> All claims . . . of any kind or nature whatsoever, whether known or unknown, contingent or absolute, disclosed or undisclosed, hidden or concealed, matured or unmatured, and whether individual, class, derivative, representative,

> legal, equitable or any other type or in any other capacity, that have been, could have been or in the future can or might be asserted in the Action by Plaintiffs or the putative Class members, in their capacities as Participants in the Public LLCs and/or Private Entities, arising out of or relating directly or indirectly to any of the facts alleged in the Complaints or in any other court, tribunal or proceeding or relating to the acceptance, rejection, consummation, or failure to consummate the Consolidation or any Third Party Transaction . . . against any Released Persons in connection with the transactions, acts or occurrences described in the Complaints or relating to the Proposals . . ..

(R.177-78).

3. Appellant's Series of Unsuccessful Applications Below

On January 28, 2013—shortly after the investor solicitation began—Appellant and others filed a motion objecting to preliminary approval of the Settlement and preliminary certification of the Settlement Class and cross-moved to intervene and create a sub-class of only ESBA investors. (R.620-53). In opposing preliminary approval and seeking to intervene, investors challenged the alleged "one-sided valuation process" undertaken by Duff & Phelps and the 50/50 split of value between ESBA and ESBC (R.325-27), claims which were clearly raised in the original Class Action complaint (R.144-46).

On February 19, 2013, those same ESBA Participants, joined by Appellant, attempted to move by order to show cause to enjoin the (then-ongoing) SEC-approved solicitation of consents from Participants. That application sought to

raise more than a dozen objections to the Transaction, once again virtually all of which had already been raised by Class Counsel, including the application of the 10% voluntary capital override. (*See* Emergency Affirmation of Stephen B. Mesiter, dated Feb. 19, 2013 at ¶¶ 31-47 (as found in Supplemental Record)).

At a hearing on February 21, 2013, Justice Sherwood explained that he had refused to sign the order to show cause because it had been brought by non-parties. (R.1286:4-9). Justice Sherwood also denied the motion to intervene and to create a subclass as untimely (R.1304:20-1305:24), noting the litigation had been ongoing for nearly a year; and that the litigation, the SEC disclosure process and the Transaction had been widely publicized. Justice Sherwood also preliminarily approved the settlement and certified the Class (R.1323:2-4), in spite of arguments from counsel for the proposed intervenors that, *inter alia*, the 50/50 allocation between ESBA and ESBC was "wrong" and benefitted ESBC (R.1293:14-94:9); that ESBA Participants were differently situated than the other members of the class (R.1294:15-19); and that the override did not apply to this transaction because it was "not a sale or financing". (R.1295:7-11).

At the same time, Justice Sherwood invoked CPLR 907(2) to allow the proposed intervenors to argue that the buy out provisions were inconsistent with the appraisal provisions of New York's Limited Liability Company Law. (R.1306:24-1307:7) ("I'm going to allow you the opportunity to participate for that

limited purpose."). Justice Sherwood then directed that the Class Notice be modified specifically to inform the class members about Appellant's LLC Law claim. (R.1323:13-17). The Notice as modified was sent to the Class.

On March 15, 2013, the proposed intervenors again attempted to move by order to show cause, this time to move the deadline for opting out of the Settlement. Justice Sherwood refused to sign the order for lack of standing.

On April 29, 2013, Justice Sherwood heard oral argument on the LLC Law issue. The Malkin Defendants, the Helmsley Estate, and Class Counsel all took the position that there was no appraisal remedy. On April 30, 2013, Justice Sherwood denied the proposed intervenors' LLC Law claim, a ruling this court affirmed. *See In re Empire State Realty Trust, Inc. Inv. Litig.*, 114 A.D.3d 570 (1st Dep't 2014).

4. The Prior Application to this Court

On April 30, 2013, the proposed intervenors and others moved in this Court to stop the Final Settlement Hearing scheduled for May 2, 2013—even though that hearing had been scheduled for over two months. They argued that "if the settlement is consummated before this appeal is decided, there will be no effective relief for the proposed intervenors or the other ESBA Participants who want to exercise their appraisal rights". (May 17, 2013 Reply Memorandum of Law in Further Support of Motion For a Stay Pending Appeal, at 4-5).

Their motion for interim relief to stop that hearing was denied by Justice Freedman. On June 18, 2013, after full briefing, this Court denied the stay motion.

5. Justice Sherwood Approves the Settlement

Despite aggressive efforts by Appellant and others opposed to the Transaction, only 12 of the 4,536 Participants who are class members opted out of the class.

On May 2, 2013, Justice Sherwood held a hearing on the Settlement (R.31-94), and on May 17, 2013, he issued an order approving it (R.25).

At the May 2 hearing, Justice Sherwood addressed the class certification (R.45), fairness (R.87-91) and the terms of the settlement (R.92). Justice Sherwood heard from the objectors to the settlement, including Appellant himself. (R.57-84).

Justice Sherwood agreed that the case was a proper class action and certified the class, noting that there had been no opposition to class certification. (R.45). In certifying the class, Justice Sherwood noted that all five prerequisites of CPLR 901 were satisfied, including commonality and typicality. (R.45:19-46:23). Justice Sherwood noted his satisfaction with the adequacy of representation of both Class Counsel and the named plaintiffs. (R.46:20-47:7).

In addition to examining the factors for class certification, Justice Sherwood reviewed the guidelines for approval of a class action settlement: fairness of the

settlement, adequacy, reasonableness and the best interests of the class members. (R.87:14-19) ("Adequacy requires . . . [a] balancing of value of the settlement against the present value of the anticipated recovery following a trial on the merits discounted for the inherent risks of the litigation."). Justice Sherwood also reviewed the other factors: opinion of counsel, lack of collusion, counsel and class representatives' adherence to fiduciary standards. (R.87:25-88:25).

Justice Sherwood noted that there had been extensive discovery (review of thousands of documents, conversations and interviews, forensic accounting and real estate appraisal experts) and that Class Counsel recognized that there were substantial obstacles that they would be required to overcome in order to achieve a successful result and that there were substantial risks of continuing the litigation. (R.88:13-89:24).

Justice Sherwood reviewed the factors considered by Class Counsel, including: (1) the alleged undervaluation of the lessors' interest with respect to the Empire State Building and other buildings (R.90:3-4); (2) the payment of override interests (R.91:16-23); (3) the acquisition by the REIT of the management and construction companies owned by certain of the defendants (R.91:24-92:5); (4) the alleged unfair tax consequences of the transaction as originally structured (R.92:6-10); (5) the alleged failure to put in place certain protections for participants with

respect to the offering (R.90:8-10); and (6) alleged misleading or incomplete disclosures in connection with the approval of the transaction (R.90:10-12).

Reviewing the issues raised by Class Counsel, Justice Sherwood noted that they had analyzed the strengths and weaknesses of their claims, stating that Class Counsel considered Defendants' view of the facts and found them to be not insubstantial. (R.90:24-91:7).

> As I said, you addressed the alleged unfair tax structure issue and came to an understanding that deferred taxes indefinitely. And, according to defendants the new structure has a value of in excess $100 million.
>
> I know that the objectors have questioned whether or not those numbers are fair estimates or not, but I also note that, quite frankly, that no evidence has been offered to the Court to suggest that the defendants' assessment is wrong, and there certainly was no evidence of any collusion between the plaintiffs and defendants here.
>
> I am completely satisfied that this settlement is the result of arm's length and intense negotiation between parties who had very different perspectives and very different interests with the plaintiffs' interests being fully aligned with all members of the class and the defendants' interests being associated with that of the proponents of the consolidations.
>
> So, I am fully satisfied that there is no evidence of collusion here.

(R.92:17-93:8).

Counsel for the proposed intervenors complained that "class counsel takes credit for, it's unquestionable on this record that class counsel's efforts had nothing

to do with the tax structure" (R.68:26-69:4) and went on to accuse Defendants' counsel of "being mendacious" in attributing credit to plaintiffs' counsel.

Justice Sherwood explicitly rejected that argument:

> But I look at the time line, and that is not true, number one. And, number two, the defendants here said, hey, the plaintiffs, plaintiffs' counsel have a lot to do with that. So, in the face of those two things, I don't get your argument.

(R.69:10-15).

Appellant complained about the ESBA override (*e.g.*, R.77:3-6 ("with respect to the Empire State Building['s] subsidiaries, there is clearly a question as to whether or not I or any other participant who signed the [override] consent understood fully.")).

Justice Sherwood, however, stated that concerning "whether the consolidation triggered defendants' entitlement for payment to override interest, I gather that plaintiffs, after they looked at a very substantial number of documents and looked at the agreements and looked at the law, you came to the conclusion that there is no there-there on that one. And so, with respect to that claim it was discounted, properly, quite substantially." (R.91:16-23).

Appellant asserted that "[t]he question under Delaware [sic] is whether or not the additional disclosures, quote, 'significantly altered the total mix of information made available.'" (R.81:13-15). Appellant went on to assert:

> [T]here was a key disclosure that was not made….[and] it was key [sic] that [it] related to financial information which allows myself or other participants to determine what the value of our current investment is….[The disclosure] says, Oh, by the way, we've estimated cash flows for purposes of determining exchange values, so we can say how much Empire State Building is going to get and how much 60 East 42nd Street is going to get.
>
> But, they say we can't use those for any other purpose.
>
> Now, I know that if I were class counsel on this case I would have required the prospectus to specify why they can't be used by Alan Kovacs and other participants for purposes of determining what I can estimate the value of my current estimate is.

(R.81:16-21, 82:6-16).

Justice Sherwood responded: "It strikes me that you just have a difference of opinion with them . . . . But class counsel considered the argument and made some judgments about it, didn't they? . . . . You just don't like the judgments they made." (R. 82:26-83:2, 83:9-10, 83:12-13).

Justice Sherwood also considered the number of objectors compared to the size of the class, noting that there were only a handful of objectors and opt-outs, which weighed in favor of settlement. (R.93:11-19). Justice Sherwood noted that counsel on both sides were well-experienced, the case was complex and Justice Sherwood was satisfied that the settlement was reached after good faith arm's length negotiations and exchange of extensive amounts of information. (R.93:26-

94:3). Justice Sherwood also noted that the complexity of the law and the facts supported the approval of the settlement. (R.94:8-10).

6. The Decision and Order

In a five-page Decision and Order supplementing his eight-page findings at the settlement hearing (R.26-30), Justice Sherwood considered and rejected the various objections raised, finding that "[t]he terms of the proposed settlement are fair, reasonable, adequate and in the best interests of the class". (R.30).

Justice Sherwood reviewed the factors courts typically consider when deciding whether to approve a proposed settlement of a class action (likelihood that plaintiffs will succeed in the merits of their claim, extent to which the parties support the proposed settlement, judgment of counsel, whether the parties bargained for the settlement in good faith, and the complexity and nature of the issues of law and fact); reviewed his discussion of these considerations at the fairness hearing; and concluded that the evidence weighed in favor of the final approval of the settlement, noting that over 90% of the members of the class supported the proposed settlement and that of the approximately 4,500 class members, only 11 opted out and only 17 objected. (R.26-27).

Justice Sherwood then considered objections that the proposed settlement failed adequately to compensate ESBA Participants for an alleged "wrongful application" of a 10% voluntary override payment to the Malkin Defendants

previously consented to by 94% of the ESBA Participants. (R.1157). Justice Sherwood noted that this was the principal allegation set forth in the class action complaint, Defendants vigorously disputed the claim (and that defense was well-supported), Class Counsel investigated the claim and concluded there was a substantial risk that on a motion for summary judgment Justice Sherwood would conclude that the Malkin Defendants were entitled to the override payments. (R.29).

Justice Sherwood also considered objections that the settlement inadequately compensated the ESBA Participants for the Malkin Defendants' alleged misallocation of value and debt among ESBA and ESBC. Justice Sherwood noted that this was another allegation in the class action complaint, and that Class Counsel relied on an expert to evaluate the strengths and weaknesses of the claim, including proof of the longstanding agreement (followed for over sixty years) of the joint venture partners to divide the economic benefits and burdens equally, and concluded that there was a substantial risk that plaintiffs' challenge to the valuation and methodology used by Defendants' consultant would be unsuccessful. (R.29-30). Class Counsel concluded that the settlement fairly reflected the strengths and risks associated with that claim. (R.30). Justice Sherwood concluded that there was no showing that Class Counsel's judgment was not arrived at in good faith. (R.30).

Justice Sherwood also considered the objection that the settlement failed to compensate the ESBA Participants for implementation of a "poison pill" provision in the 2011 amendment of the LLC agreement and concluded that the objection was meritless. (R.30). Justice Sherwood considered the other claims of Objectors and found them insufficient to warrant rejection of the proposed settlement. (R.30). "The terms of the proposed settlement are fair, reasonable, adequate and in the best interests of the class." (R.30).

7. Subsequent Developments Concerning the Transaction

In a May 31, 2013 SEC filing, Malkin Holdings stated that it had received the necessary approval for the Transaction:

> As of May 29, **we have received more than the required 80% supermajority of votes needed from each of the groups in Associates to approve the consolidation and IPO.** As of such date, approximately 92.9% of all interests have voted (Bold in Original).

(Empire State Realty Trust, Inc., Form 425 (May 31, 2013)). In a June 12, 2013 letter to Participants in ESBA, Malkin Holdings stated that, given that approval, "the solicitation . . . is terminated effective today." (Empire State Realty Trust, Inc., Form 425 (June 12, 2013)).

In an 8-K filed August 29, 2013, Malkin Holdings disclosed that no investor had been bought out; every investor who originally voted no changed his or her vote, avoiding any buy out. ESRT went public on the NYSE on October 2, 2013.

ARGUMENT

I. THE LAW FAVORS CLASS ACTION SETTLEMENTS, AND APPROVAL OF THE SETTLEMENT IS REVIEWED ONLY FOR ABUSE OF DISCRETION

There has long been a general policy favoring the settlement of litigation, particularly in the context of class actions. *See Williams v. First Nat'l Bank of Pauls Valley*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context.") (internal quotation marks omitted); *see also Hallock v. State*, 64 N.Y.2d 224, 230 (1984) (noting that settlements are favored by the courts particularly where they are agreed to in open court).

In advancing this policy, determinations concerning class certification and the approval of class action settlements are vested in the sound discretion of the trial court. *Weinberger v. Kendrick*, 698 F.2d 61, 72 (2d Cir. 1982) ("In part to realize [the] advantages of settlements negotiated by litigants, we have long recognized that a district court's disposition of a proposed class action settlement should be accorded considerable deference."); *City of N.Y. v. Maul*, 14 N.Y.3d 499, 509 (2010) ("The determination of whether a lawsuit qualifies as a class action under the statutory criteria ordinarily rests within the sound discretion of the trial

court.") (internal quotation marks omitted); *Hibbs v. Marvel Enters., Inc.*, 19 A.D.3d 232, 232-33 (1st Dep't 2005) (applying abuse of discretion standard to trial court's determination regarding approval of class settlement); *In re Colt Indus. Shareholders Litig.*, 155 A.D.2d 154, 159 (1st Dep't 1990) ("It is well established law that class certification is a question vested in the sound discretion of the court" and that "the language of the class statute was intentionally made broad to allow for judicial decision or elaboration"), *mod. on other grounds*, 77 N.Y.2d 185 (1990); *Klurfeld v. Equity Enters., Inc.*, 79 A.D.2d 124, 131 (2d Dep't 1981) ("The statute grants wide discretion to the court in determining the feasibility and propriety of a class action.").

Indeed, the trial judge is in the best position to determine the fairness of a class settlement because he "is exposed to litigants and their strategies, positions and proof". *Wal-Mart Stores, Inc.*, 396 F.3d at 117 (quoting *Joel A. v. Guiliani*, 218 F.3d 132, 139 (2d Cir. 2000)); *Weinberger*, 698 F.2d at 73 (describing trial court's unique position with respect to determining the fairness of class settlement). The trial judge "is on the firing line and can evaluate the action accordingly." *Wal-Mart*, 396 F.3d at 117. Accordingly, the trial judge's examination of the strengths and weaknesses of the parties' contentions and claims at issue is accorded "considerable deference". *Maywalk v. Parker & Parsley*

Petroleum Co., 67 F.3d 1072, 1079-80 (2d Cir. 1995) (affirming approval of class settlement).

Thus, where based on a detailed factual record and careful consideration of all statutory factors, a trial court's determination certifying a class and approving a class settlement will not lightly be disturbed. *Rosenfeld*, 237 A.D.2d at 199-200 (affirming trial court's approval of class settlement, which was based on its review of all statutory factors); *Heights 75 Owners Corp. v. Thurman*, 134 A.D.2d 484, 484 (2d Dep't 1987) (affirming class certification in light of facts before the trial court).

Here, there is no evidence to suggest, and Appellant has presented none, that Justice Sherwood violated his duties under CPLR Article 9 in approving class certification and class settlement.

The facts before Justice Sherwood were more than sufficient to justify his finding that the class certification was proper. It was undisputed that every named plaintiff in the Class Action was an ESBA investor, the named plaintiffs and the Class claims involved a single Transaction, and there were common questions of law and fact regarding the fairness of the process used in reaching the terms of the Transaction, which were central to the claims at issue.

Further, Appellant's contention that certification was improper because there were issues unique to some members of the Class certification is simply wrong.

As explained above, commonality and typicality were obviously satisfied on these particular facts, and in any event New York courts have upheld class certification notwithstanding the fact that certain facts may be unique to some class members and not others. *See Maul*, 14 N.Y.3d at 513 (upholding class certification and noting that "the fact that questions peculiar to each member may remain after resolution of the common questions is not fatal to the class action.") (internal quotation marks omitted); *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 6 (1st Dep't 1986) (commonality is satisfied "even where there are subsidiary questions of law or fact not common to the class."); *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 98-99 (2d Dep't 1980) (upholding class certification and noting that "the rule requires predominance, not identity or unanimity, among class members").

In addition, Justice Sherwood had before him comprehensive arguments made by Class Counsel, Defendants' Counsel and Appellant's Counsel both with respect to preliminary approval and final approval of the Settlement. (*See, e.g.*, R.203-19 (motion papers in support of preliminary approval of class settlement), R.299-311 (objections to preliminary approval of class settlement), R.620-33 (various investor affidavits opposing preliminary approval of settlement), R.34:20-35:17 (noting that the Court will hear from all objectors and counsel), R.838-969 (papers submitted in support of motion for attorneys' fees), R.999-1022

(arguments in favor of final approval of class settlement); R.1125-45 (objections to final approval of class settlement), R.1221-1248 (same)).

In fact, all parties, including Appellant, were provided with ample opportunity to present the arguments for and against class certification and approval of the class settlement. Justice Sherwood considered all of these arguments, held a hearing on these issues, and made detailed factual findings with respect to the application of statutory factors favoring class certification and approval of class settlement. (*See* R.86:22-94:16 (examining statutory factors in favor of approving class settlement); R.28-30 (rejecting objections made by numerous investors to the Settlement); R.99-104 (approving request for attorneys' fees)).

Such careful consideration of the arguments, based upon a detailed and comprehensive factual record, must be accorded particular weight by the reviewing court. *Weinberger*, 698 F.2d at 74 (affirming district court's approval of class settlement where the court had sufficient materials before it to evaluate the settlement and came to the correct conclusion). In short, Justice Sherwood's determinations approving class certification and finding that the class settlement was fair, adequate, and in the best interests of the class members was a proper exercise of his discretion. *Rosenfeld*, 237 A.D.2d at 199-200 (affirming trial court's approval of class settlements based on facts before the trial court).

II. JUSTICE SHERWOOD CORRECTLY APPROVED THE SETTLEMENT, WHICH WAS FAIR AND REASONABLE

Appellant's specific objections to the Settlement are meritless.

A. Objections Concerning the Overrides Are Without Merit

Appellant raises a series of complaints relating to the overrides, not one of which has any merit.[4]

1. The ESBA Override Applied to the Transaction

a. The overrides applied by their express terms

At ESBA, 94% of the investors *voluntarily* agreed to permit Malkin Holdings to share in those investors' share of proceeds from a "Capital Transaction". (R.1157). The Transaction qualifies as a "Capital Transaction" on multiple, independently sufficient grounds.

The 1991 Solicitation for the override (which contains identical operative provisions to the 2001 and 2008 Solicitations) states:

> By executing such Authorization section, the Participant *will enter into an agreement* with WM&B as follows: 1.

[4] We note that even if the override objections had any merit—and they do not—the standard is not whether Defendants would actually prevail on the merits, but whether their defenses pose a risk to the class's ultimate ability to obtain a recovery. (R.88) ("The plaintiff[s] and their counsel also recognize that there were substantial obstacles that they would be required to overcome in order to achieve a successful result, be it by virtue of settlement or court decision or verdict."); *see also Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 365 (S.D.N.Y. 2002)("Plaintiffs' Counsel recognized that Defendants planned to mount a strong defense to the claims asserted, and that there were substantial risks in proving the claims asserted. These risks as to liability militated in favor of the Settlement"). Such risk certainly existed here, as Justice Sherwood correctly found.

> The Participant will pay to WM&B (a) 10% of the Net Proceeds from any Capital Transaction . . . .

(R.462) (emphasis added).

The 1991 Solicitation (like the 2001 and 2008 Solicitations) then defines "Capital Transaction" as follows:

> "Capital Transaction" shall mean any one or more of the following transactions: (i) the original incurrence or refinancing of any indebtedness of Associates or any joint venture in which Associates has an interest, (ii) the sale, exchange, condemnation (or similar eminent domain taking), casualty or other disposition of all or any substantial part of the Property, the Master Lease or Associates' interest in the Property or the Master Lease held through any joint venture in which Associates has an interest, (iii) the liquidation and dissolution of Associates or (iv) any similar transaction or event, the proceeds of which are deemed attributable to capital in accordance with generally accepted tax or accounting principles.

(R.463).

The S-4 for the Transaction provided that ESBA and the other public ownership groups "will contribute their assets subject to their liabilities to the operating partnership of the company or a subsidiary of the operating partnership." (R.1351). The "Contribution Agreement", through which this contribution of assets is effected, states that "the Operating Partnership intends to *acquire*, directly or indirectly, the right, title and interests (including fee interest, ground leasehold interests and operating leasehold interests, as applicable) of the Contributing Entities in the Contributed Properties". (R.1398) (emphasis added).

The contribution of the ESBA interest in ESB under the Contribution Agreement is therefore a "sale" of "all or any substantial part of the property". *PL Diamond LLC v. Becker-Paramount LLC*, 16 Misc. 3d 1105(A), at *7 (Sup. Ct. N.Y. Cnty. 2007) ("[T]he ordinary meaning of the term 'sale' is 'the transfer of property or title for money or other consideration.'" (quoting *Anthracite Capital, Inc. v. MP-555 West Fifth Mezzanine*, 2005 WL 1155418, at *7 (S.D.N.Y. May 17, 2005))); *Gotham Partners, L.P. v. High River Ltd. P'ship*, 2005 WL 6239404, at *5-6 (Sup. Ct. N.Y. Cnty. Aug. 25, 2005) (same), *aff'd*, 33 A.D.3d 453 (1st Dep't 2006). Accordingly, the ESBA overrides applied to the Transaction.

Furthermore, the Contribution Agreement also states that "Contributor [that is, ESBA] desires to, and the Operating Partnership desires Contributor to, contribute to the Operating Partnership, all of Contributor's Property Interest, free and clear of all Liens . . . *in exchange for . . . limited partnership interests (the 'OP Units') in the Operating Partnership, shares of Class A Common Stock and/or shares of Class B Common Stock . . . on the terms and subject to the conditions set forth in this Agreement*". (R.1398 (emphasis added)). That is, in "exchange" (another term specifically included within "Capital Transaction") for their current interests, the Participants received OP Units or REIT shares, providing an additional textual basis to trigger the ESBA overrides. *See, e.g.*, *PL Diamond*, 16 Misc. 3d, at *7 (transfer of interest in property in exchange for assumption of

transferor's debt was sale regardless of fact that parties structured transaction as a contribution to defer taxes); *Paddington Partners v. Bouchard*, 730 F. Supp. 1241, 1244-45 (S.D.N.Y. 1990) (transfer of shares pursuant to a "second step" merger is a sale); *Plaza Operating Partners Ltd. v. Maison Mendessolle*, 144 Misc. 2d 696, 699 (Civ. Ct. N.Y. Cnty. 1989) (transfer of general and special partnership interests to another partnership with similar principals is a sale).

Moreover, there can be no real dispute that the Transaction also fell under the even broader, commonly understood definition of "disposition." *See, e.g.*, *Lubin v. Belco Petroleum Corp.*, 1978 WL 1110, at *5 (S.D.N.Y. Aug. 24, 1978) (disposition of shares where relinquishment of put option resulted in a "marked change in . . . investment position"); *Doniger v. Rye Psychiatric Hosp. Ctr., Inc.*, 122 A.D.2d 873, 876 (2d Dep't 1986) (proposed judicial dissolution of hospital constitutes a "disposition" within meaning of shareholder agreement); *Murphey v. Hillwood Villa Assocs.*, 411 F. Supp. 287, 293 (S.D.N.Y. 1976) (forfeiture of securities without consideration is a "disposition").[5]

[5] Accordingly, the contention that "ambiguities . . . must be construed against the drafter" (Objection of Alice P. Henkin dated March 23, 2013 at 6 (as found in Supplement Record)) is inapplicable because there is no ambiguity. *Walters v. Great Am. Indem. Co.*, 12 N.Y.2d 967, 969 (1963) ("We are not to interpret where there is not reasonable doubt concerning what the parties really agreed upon." (internal quotation marks omitted)). This doctrine is, in any event, one of last resort, *Albany Sav. Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997) (under New York law, *contra proferentem* applies "only as a matter of last resort after all aids to construction have been employed without a satisfactory result" (internal quotation marks omitted)), and cannot overcome the clear language that, as set forth above, shows that the overrides applied.

b. Appellant's resort to "expressio unius" fails

Appellant's efforts to avoid this dispositive analysis through an unavailing resort to *expressio unius* fail. (Br. 27). Although far from clear, Appellant appears to argue that because Participant consent is required for conversion of ESB to a REIT, but REIT conversion is not mentioned in the override documents, the override does not apply to the Transaction. This argument fails for two independent reasons.

First, Appellant fails to cite the operative language of the overrides. Instead, Appellant cites the cover letter from Malkin Holdings (Br. 29-30), which describes that proposal in more general terms, and then "urged" the Participants "to review" the attached statement "that provide the details" of the override program. (R.437). The statement contains the actual language, which is the definition of "Capital Transaction" set forth above, and which very clearly applied to the Transaction, as noted.

Second, even by its terms, Appellant's argument fails. The fallacy of Appellant's argument is that ESBA was not "convert[ed] . . . into a real estate investment trust", which would have involved changing ESBA from a limited liability company to a REIT. (Br. 28). It instead concluded a form of sale as set forth in the disclosure documents upon which investors voted, through a contribution of its assets, to a REIT that has other properties and shareholders as

well, in addition to a new management structure governed by a board of directors that consists of six newly appointed independent directors. The REIT has a different asset base, stockholder base, governance structure, and management team.

2. The 60 East Override Applied to the Transaction

Appellant is not a Participant at 60 East and lacks standing to object to those overrides, as Justice Sherwood correctly found. (R.29, n.6) ("The Kovacs Objector lacks standing to object to the override applicable to 60 East 42nd Street Associates. For this reason, his objection related thereto is rejected."). Appellant's only response to this point is his *ipse dixit* that he "was entitled to raise any claim related to the unreasonableness of the settlement". (Br. 21 n.11). Appellant cites no authority for the proposition that he can object to matters relating to the settlement that do not concern him, and he cannot. *See, e.g.*, *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dep't 2006) ("The Court of Appeals has defined the standard by which standing is measured, explaining that a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law.").

The objection to the settlement based on the 60 East override was in any event meritless. As noted in a Memorandum Malkin Holdings gave 60 East Participants on this point, the operative provision of the 1968 solicitation provides:

"I recommend that effective January 1, 1968, after the participants have received distributions equal to a return at the rate of 14% on their cash investment in any year, all additional amounts paid out shall be allocated 90% to participants and 10% to Wien, Lane, Klein & Malkin as additional compensation." (R.1410).

Thus, the override applied to "all additional amounts" that are "paid out". The term "amounts paid out" is more than broad enough to encompass the consideration (including securities and cash) 60 East will distribute or "pay out" in connection with the Transaction. The letter that Appellant cites in support of his challenge to the 60 East override (Br. 29-30) asserts that the override was limited to "distributions to participants consisting of cash flow." That assertion is simply wrong: the sentence to which the letter refers is an introductory paragraph that briefly summarizes the history of the investment. (R.1410). The reference to "cash flow" there merely describes the nature of the distributions that had been made to date; nothing in that sentence or elsewhere in the 1968 Solicitation suggests that the use of the phrase "cash flow" was intended to restrict the "amounts" to which the override applies.

Further, the word "distributions", while including amounts paid out of cash flow, is a broad term that plainly encompasses the consideration received by Participants in 60 East in the Transaction. In fact, the Consent Solicitation statement for the Transaction explicitly stated that 60 East will "distribute" the

Transaction consideration to Participants: "each subject LLC will receive capital transaction proceeds from its contribution of assets to the company and *distribute* such proceeds to all its interest holders including the participants and the supervisor". (R.1369) (emphasis added).

The conclusion that "distributions" encompasses the consideration Participants will receive in the Transaction is supported by the standard definition of the word. Black's Law Dictionary defines "distribution" as "[t]he giving out or division among a number, sharing or parceling out, allotting, dispensing, apportioning." That is exactly what occurred here. *See Mostel v. Petrycki*, 25 Misc. 3d 929, 934 (Sup. Ct. N.Y. Cnty. 2009) ("return … of $300,000 of … invested capital was a distribution pursuant to Limited Liability Company Law § 102(i)").

Accordingly, it is no surprise that a 60 East Participant responded to the letter on which Appellant relies, and strongly disagreed with it, correctly asserting that the 60 East override applied to the Transaction. (R.1412-13).

B. Objections to the Joint Venture Allocation Are Without Merit

Appellant seeks to challenge the "joint venture" allocation of value between ESBA, the fee owner of the building, and Empire State Building Company L.L.C. ("ESBC"), the long-term net lessee. This allocation was far from "arbitrary", as the Appellant asserts. (Br. 31).

When investments such as ESBA were formed in the 1950s and early 1960s, the intent of those involved, including Peter L. Malkin, "from the beginning was to achieve the economic attributes of a 50/50 joint venture" in a tax-advantaged structure. (R.1084). The fee and lease partnerships effectively divided profits from building operations on a 50/50 basis through the lessee's payment of 50% of building profits as overage rent to the fee owner. (R.1085). To borrow against the entire building, or to sell the entire building, required the cooperation of both positions, and as a result there was historically an effective equal sharing of borrowing costs and loan or sale proceeds in all of the two-tier public and private entities. (R.1085).

Specifically to encourage the lessee to perform capital work at the building, lease extensions were authorized by a vote of the Participants specifically in connection with capital improvement programs at all such public and private entities other than at ESB (where third party ownership of the fee title prevented such lease extensions, until the recent ESBA acquisition of ESB fee title in 2002). The effect of the lease extensions was to induce the lessee to perform improvements and to ensure that all improvement costs would continue to be shared in a 50/50 joint venture as far into the future as capital improvements were ongoing. (R.1085-86). This cost sharing also occurred during the recent building improvement program at ESB. (R.1086).

Thus, the arrangement between the lessee and fee owner has the economic attributes of long term sharing, as in a joint venture, and the allocation of ESB's value by Duff & Phelps (the independent valuation firm) was entirely proper.

C. Appellant's Argument Concerning the Tax-Deferred Option Is Without Merit

Appellant alleges that Justice Sherwood should not have considered the tax benefits of the Transaction in assessing the fairness of the proposed settlement, outrageously asserting—without evidence (because there is none)—that Class Counsel and Defendants "agreed to lie and say that the tax restructuring was part of the Settlement" (Br. 34). Appellant is wrong.

Justice Sherwood explicitly rejected Appellant's tax-deferred option argument as a factual matter, noting that the parties addressed the issue during their negotiations and reached an agreement that substantially benefited the Participants in the amount of more than $100 million. (R.92). Justice Sherwood directly addressed and dismissed the assertion that the $100 million assessment was wrong or that the parties colluded:

> I am completely satisfied that this settlement is the result of arm's length and intense negotiation between parties who had very different perspectives and very different interests with the plaintiffs' interests being fully aligned with all members of the class and the defendants' interests being associated with that of the proponents of the consolidations.

> So, I am fully satisfied that there is no evidence of collusion here.

(R.93).

Further, in his Decision and Order, Justice Sherwood stated, “Additionally, as a result of implementation of an amendment of the originally proposed terms of the Consolidation transaction, class members will be able to take advantage of a tax deferral benefit which defendants state has a value exceeding $100 million.” (R.27).

D. Appellant’s Additional Objections Are Meritless

Appellant also complains that the “Prospectus should have provided Participants with an explanation as how the projections contained in Appendix C-1 and Exhibit 99.59 could be used to perform the cash flow analysis for ESBA on a stand-alone basis”. (Br. 37). Yet, Appellant admits that the disclosures “satisfy Defendants’ disclosure obligations under the SEC regulations” (Br. 38) and therefore alleges no harm. Indeed, Defendants complied with the SEC’s disclosure requirements and established REIT IPO practice. Item 902(b)(6), which applies to disclosures relating to the Transaction, requires disclosures of historical distributions for a five year period. Additionally, it is standard practice in a REIT IPO to include a so-called “magic page”, which provides an estimate of the first year of distributions for the REIT. (R.1337, ¶ 20). *See also* Fass, Shaff and Zief, *Real Estate Investment Trusts Handbook* § 2:266 (2012-13 ed.). Based on

longstanding SEC practice, long-term projections are not provided in a prospectus. (*Id.*).

Here, projections for individual properties (assuming they continue in their existing operational format) were provided not so that investors could determine what ESBA's standalone income is expected to be, or what future distributions might be, but because they formed the basis for Duff & Phelps' valuations. (R.1338, ¶ 21). Because of the inherent uncertainty of these projections, Malkin Holdings made appropriately strong disclaimers about the use of the projections. (R.1376-77). Accordingly, there was nothing improper about Malkin Holdings' disclosures regarding projections, and any objection to the Settlement on that ground was baseless, as Justice Sherwood necessarily found. (R.82-83) ("It strikes me that you just have a difference of opinion with them. . . . But class counsel considered the argument and made some judgments about it, didn't they? . . .You just don't like the judgment they made.").

Justice Sherwood's findings are entitled to deference here. *See Weinberger*, 698 F.2d at 73 (trial court's disposition of proposed class action settlement "should be accorded considerable deference"; trial court is "on the firing line and can evaluate the action accordingly" (internal quotation marks omitted)); *Wal-Mart Stores, Inc.*, 396 F.3d at 117 (when reviewing trial court approval of settlement, "trial judge's views are accorded great weight . . . because trial court is exposed to

litigants, their strategies, positions and proofs" (internal quotation marks omitted)). *See also Fiala v. Met. Life Ins. Co.*, 27 Misc. 3d 599, 606 (Sup. Ct. N.Y. Cnty. 2010) (New York courts recognize that "its class action statute is similar to the federal statute"; "court approval is determined by the fairness of the settlement, its adequacy, its reasonableness and its best interests of the class members"); *Hallock*, 64 N.Y.2d at 230 ("Neither court below found fraud, collusion, mistake or accident; nor can we conclude as a matter of law that such a showing was made.").[6]

Appellant also makes the unsubstantiated allegation that Defendants claimed that the exchange value would represent the value Participants would receive in the transaction (Br. 4-5). To the contrary, Defendants' disclosures made clear that the value of what Participants would receive could be less than the exchange value (*e.g.*, R.671 ("The market's view of the company's net asset value determined in connection with the IPO could be less than the exchange values determined based on the Appraisal."). ESRT, which went public at $13 per share, is currently trading at $14.84 (as of April 15, 2014).

[6] Defendants take no position on the award of attorneys' fees.

CONCLUSION

For all the above reasons, the Court should affirm the judgment.

Dated: New York, New York
April 16, 2014

Respectfully Submitted,

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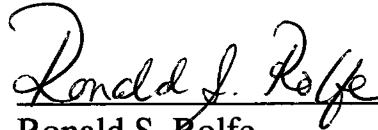

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I, Thomas E. L. Dewey, attorney for the Defendants-Respondents, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using proportionally spaced typeface. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 9,139 words counted by the word-processing program.

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