TO BE ARGUED BY:
ALAN L. KOVACS

Supreme Court, New York County, Index No. 650607/2012

Supreme Court of the State of New York
Appellate Division: First Department

IN RE EMPIRE STATE REALTY TRUST, INC.
INVESTOR LITIGATION

BRIEF OF OBJECTOR-APPELLANT ALAN L. KOVACS, AS TRUSTEE OF THE HILDA KOVACS FAMILY TRUST OF 2000

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Appellant Alan L. Kovacs as Trustee of the Hilda Kovacs Family Trust of 2000 ("Appellant"), an investor in Empire State Building Associates, L.L.C. ("ESBA"), appeals the orders of the Supreme Court, New York County, Hon. O. Peter Sherwood, J.S.C., as follows:

1. Order dated May 17, 2013 and entered in the Office of the Clerk of the County of New York on May 22, 2013 (the "Settlement Approval Order"). (R. 22). In the Settlement Approval Order, the motion court finally approved the proposed settlement of this action, holding the terms of the settlement to be fair, reasonable and in the best interests of the Class;

2. Order dated May 17, 2013 and entered in the Office of the Clerk of the County of New York on May 17, 2013 (the "Final Order and Judgment"). (R. 9). In the Final Order and Judgment, the motion court granted Respondents' motion, pursuant to Article 9 of the CPLR, for an order: (a) holding that the action was properly maintainable as a class action; (b) finally certifying the Class for purposes of Settlement; (c) finally approving in its entirety the September 28, 2012 Stipulation of Settlement among counsel for Respondents[1], holding its terms to be fair, reasonable and adequate and in the best interests of the Class; (d) awarding Class Counsel attorneys' fees in the amount of $11,599,629.13 and expenses in the amount of $265,282.00; and (e) dismissing the action with prejudice; and

3. Order dated May 17, 2013 and entered in the Office of the Clerk of the County of New York on May 17, 2013 (the "Fee Award Order"). (R. 95). In the Fee Award Order, the motion court granted Class Counsel's fee application to the extent of awarding Class Counsel attorneys' fees in the amount of $11,599,629.13 and expenses in the amount of $265,282.00.

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[1] Respondents Anthony E. Malkin, Peter L. Malkin, Empire State Realty Trust Inc., Empire State Realty OP, L.P., Malkin Holdings L.L.C., Malkin Properties of New York L.L.C., Malkin Holdings of Connecticut Inc., Malkin Construction Corp. and the Estate of Leona M. Helmsley are collectively referenced herein as "Defendant-Respondents."

QUESTIONS PRESENTED

1. Was the Class, consisting of all investors in ESBA, along with all investors in the two other "Public LLCs" and all the "Private Entities" that were to be consolidated into a real estate investment trust, properly certified pursuant to NY CPLR §901-902, *et seq.*, where the interests of the investors in ESBA conflicted with the interests of the investors in the other entities involved in the proposed Consolidation?

The lower court answered in the affirmative, erroneously holding (i) that there are questions of law and fact common to the Class which predominate over any questions affecting only individual Class Members, (ii) that the claims of the Plaintiffs, and the Class were typical of the claims of the ESBA participants, and (iii) that the Plaintiffs and Class Counsel have fairly and adequately protected the interests of the Class with respect to the Action and the claims asserted therein.

There are questions of law and fact that are unique to the investors in ESBA and that predominate over questions of law and fact that are common to investors in the other private and public entities involved in the consolidation in the ESRT. Indeed, ESBA investors should have been, and could only have been, represented fairly as a separate class or sub-class. Furthermore, the conduct of Plaintiff-Respondents and Class Counsel evidences that they clearly cannot protect, and have not protected, the interests of investors in ESBA whose interests conflict with the interests of the other members of the certified class.

2. Was the settlement of the action, pursuant to the terms as stated in the Stipulation of Settlement dated September 28, 2012, fair, reasonable, adequate and in the best interests of the Class?

In answering in the affirmative, the lower court erroneously found (i) that payment of Fifty-five Million Dollars to the Class constituted between 34% and 76% of the total recoverable damages, that (ii) the Settlement resulted in an additional benefit to the class in the form of favorable tax treatment having a value in excess of One Hundred Million Dollars, and (iii) that the Settlement provided additional significant benefits to the class by requiring amendment of the Prospectus to include additional material disclosures. Moreover, though the settlement may have been reasonable to the investors in the other public and private entities, it was nevertheless highly unfavorable to investors in ESBA.

3. Was the award of attorney's fees in the amount of $11,599,629.13 to Class Counsel reasonable in relation to the services rendered?

The lower court erroneously held it was, based on its findings that an average hourly attorney rate of $2,475.56 resulting in a fee of 21% of the common fund was reasonable. The Court reached this result by lowering by 22.6% the hourly rate requested by Class Counsel, $3,201.26, because they had failed to properly document their time expended on the case. However, apart from the fact that the Settlement agreed to by Class Counsel was not reasonable, the Court should have lowered the fee further based on the fact that Class Counsel had improperly discounted the value of certain claims of the Class, the fact that Class Counsel had misrepresented that they were responsible for the tax benefit to the Class, and because the settlement was reached in a case where there was little risk to Class Counsel, as they themselves admitted.

STATEMENT OF FACTS

A. Introduction

"The per unit value to (ESBA) Participants of the Consolidation transaction is estimated to be between $328,800 and $358,670." *Settlement Approval Order, p.2 fn.3.* (R. 27). So believed the lower court, in certifying the Class and approving the Settlement, relying on the representations of Defendant-Respondents, Defendant-Respondents' counsel, and Class Counsel.

Yet, the per unit value that ESBA investors actually received upon consummation of the Consolidation was only "$223,674" or "$247,416"[2].

In short order, each owner of a $10,000 ESBA Participation ended up

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[2] These amounts were provided to ESBA Participants in a letter from the REIT dated October 30, 2013. The lower values were estimated to be received and were received, respectively, by ESBA participants who were subject to the Voluntary Override (see *infra, Argument, Point II(B),* while the higher values were estimated to be received and were received, respectively, by ESBA participant who were not subject to that override. "Later events" may be considered by this Court in determining whether an order granting class action status should be reversed, altered or amended. Colt Industries Shareholder Litigation, 77 NY2d 186, 196 (1991).

receiving over $100,000, or close to 1/3, less than they, like the Court below, reasonably anticipated.

B. <u>Historical Background</u>

ESBA was formed on July 11, 1961 to purchase a long term ground lease of the Empire State Building (hereinafter sometimes "ESB" or the "Building"). It was originally organized as a New York general partnership under a written Partnership Agreement by and among three equal partners, Laurence Wien, Henry W. Klein and defendant-respondent Peter L. Malkin, then each a partner in the law firm of Wien, Lane & Klein. (R. 336, 344-345). These non-investing partners called themselves Agents because they held their respective one-third partnership interest strictly as fiduciary nominees on behalf of the numerous purchasers of "Participations," fractional interests in the ESBA partnership interests formerly held by the Agents. (R. 345-348). In 1961, 3,300 such Participations were sold for $10,000 each, pursuant to a prospectus registered with the U.S. Securities and Exchange Commission ("SEC") which described ESBA's acquisition of the Empire State Building and the investments. (R. 334-366). At the same time as ESBA purchased the ground lease, it entered into a lease with a related business entity, Empire State Building Company ("ESBC"), to operate the Building. (R. 376-433).

To memorialize the trust arrangement by which the Agents were to hold nominal title to the ESBA partnership interests on behalf of the public ESBA Participants, in 1962 three substantively identical "Participation Agreements" – setting forth the rights and obligations of the ESBA Participants and the Agents – were executed, one between each Agent and the Participants who collectively purchased the entirety of such Agent's one-third partnership interest. (R. 367-375).

Section 4 of the 1962 Participation Agreements explicitly prohibits consolidating ESBA into a REIT without the consent of 100 percent of each Agent's Participants:

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

(R. 368-369)(emphasis supplied). Similarly, Section 5 of the Participation Agreements provides that they may only be amended "with the consent of all the Participants." (R. 369). Section 7 of the Participation Agreements purports to permit the Agents to buy out the Participations owned by non-consenting Participants where 80 percent or more of the Participants (within any one Agent's group) vote in favor of a proposed transaction. (R. 369-370). The buyout price – equal to book value, but in no event less than $100 –was $100 per Participation in

January, 2013 (the “$100 Forced Buyout”). (R. 529).

By letter dated September 13, 1991, Defendant-Respondents informed the Participants that Prudential was considering a sale of fee title to the Empire State Building and sought authorization from the Participants to purchase the Property. (R. 434-503). In recommending the acquisition, Defendant-Respondents represented that it “should result in significant benefits to the Participants in connection with any financing and any ultimate sale of the ESB.” (R. 435).In the letter, Defendant-Respondent Peter Malkin also requested that the Participants “<u>*individually and voluntarily*</u> agree” to a “Voluntary Compensation Program” in which the Agents, who expressly agreed in the Participation Agreements to serve “without compensation,” would nonetheless receive a portion of the cash proceeds otherwise distributable solely to the Participants, as follows:

> [I]n the event of a sale or financing of any interest of [ESBA] in the Master Lease or in the Empire State Building or the land thereunder, the net proceeds be distributed (a) to each Participant, an amount cumulatively equal to the Participant's original, or his predecessor in interest's original, capital contribution in Associates and (b) any excess, 90% to the Participants and 10% to WM&B.

(R. 435) (Emphasis in original). In soliciting the Participants’ consents to the so-called “voluntary override,” Defendant-Respondents expressly represented that unlike the proposed purchase of fee title from Prudential, the Forced Buyout would not apply and that “[o]nly authorizing Participants will be bound to [the voluntary override].” (R. _436-437).

As reflected in Defendant-Respondents'"Statement…In Connection With the Solcitation of Consent," attached to the September 13, 1991 letter (R. 441-502), "the voluntary override was expressly limited to cash-out transactions. In pitching Participants for their consent, Defendant-Respondents explained that the 6 percent additional compensation did not extend to the net proceeds of a sale or financing transaction:

> "WM&B is entitled to receive certain supervisory fees and additional compensation, *but not to share in net proceeds from any sale* by Associates of an interest in the Empire State Building or from any *mortgage financing* or similar capital transaction, e.g., condemnation (collectively, "Capital Transactions")…

(R. 461). Approximately 81 percent of the Participants consented to the Agents' so-called "voluntary override" in response to the 1991 solicitation. (R. 526).

ESBA did not end up purchasing fee title to the Building in 1991, but title once again was offered for sale in 2001. Consequently, by letter dated September 14, 2001, Defendant-Respondents again solicited the Participants' consent to purchase fee title to the ESB. (R. 505-520). In seeking the Participants' consents, Defendant-Respondents represented that the acquisition offered numerous benefits to the Participants, and "would be an intelligent decision for [ESBA], one which will substantially increase the value of your investment…." (R. 505).

As they did in 1991, Defendant-Respondents took the opportunity to simultaneously solicit consents to the "same" voluntary override from the ESBA

Participants who had not consented in 1991. (R. 514-517). An additional 13 percent of the Participants consented to Defendant-Respondents' capital override in response to the 2001 solicitation.

On or about September 30, 2001, Defendant-Respondents unilaterally converted ESBA into a New York limited liability company called Empire State Building Associates, L.L.C. , in order to insulate the Agents (who up until then were partners in a general partnership) from liability to third parties. (R. 504). The LLC's Operating Agreement made no substantive changes to either the 1961 Partnership Agreement or the 1962 Participation Agreements.

On or about April 17, 2002, ESBA through a wholly owned subsidiary called Empire State Land Associates L.L.C., acquired fee title to the Property for $57.5 million cash over a $60.5 million first mortgage. ESBC continued to operate the the Empire State Building pursuant to its Sublease.

C. <u>The Proposed REIT Consolidation</u>

On November 29, 2011, Defendant-Respondents filed a Form 8-K with the SEC stating that Defendant-Respondents had "embarked on a course of action that could result in [ESBA] becoming part of a newly formed public REIT." (R. 521-523).

On February 13, 2012, Defendant-Respondents then filed with the SEC the first of several iterations of a Form S-4 Prospectus/Consent Solicitation Statement (the term "Registration Statement" refers to the Form S-4 on February 13, 2012) which proposed a Five Billion Dollar transaction under which 21 disparate properties would be rolled-up and consolidated into the Empire State Realty Trust, Inc., a real estate investment trust (REIT) (the "Consolidation"), with a simultaneous offering of stock to the public in an IPO.[3] The flagship property in this massive roll-up was the Empire State Building owned by ESBA. The other properties were owned by two other Public Companies and 19 private real estate companies ("Private Companies")[4], all supervised by Defendant-Respondents, and related management businesses. Registration Statement, cover page and 19-20

Upon consummation of the Consolidation, the REIT would issue (a) Class A common stock to the ESBA Participants (and the owners of the other Public Companies), subject to a right to elect to receive cash for up to 12-15% of the Class A common stock issuable to them, and (b) Operating Partnership Units (OPU's) to the owners of the Private Companies and Defendant-Respondents.

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3 http://www.sec.gov/Archives/edgar/data/1541401/000119312512512349/d283359ds4a.htm. As Defendant-Respondents have conceded, this Court may take judicial notice of the content of indisputably authentic documents required by law to be filed with the SEC. See, e.g., Kramer v. Time Warner, Inc., 937 F.2d 767, 774 (2d Cir. 1991); see also In re UBS Auction Rate Sec. Litig., 2010 WL 2541166, at *7, n. 6 (S.D.N.Y. Jun. 10, 2010) (prospectus filed with the SEC "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be disputed," and thus is the proper subject of judicial notice); Siwek v. Mahoney, 39 N.Y.2d 159, 163 n. 2 (1976) ("Data culled from public records is, of course, a proper subject of judicial notice.").

4 Between November 2011 and January 2012, Defendant-Respondents solicited and successfully obtained the consents of the participants in the Private Entities to the proposed consolidation. (Registration Statement, p. 3).

Whether OPU's or Class A stock, the owners of the rolled-up Public and Private Companies are allocated REIT securities based on the relative "Exchange Values" of their respective underlying real properties as determined by the so-called "independent valuer" selected by Defendant-Respondents. The net proceeds from the sale of shares in the IPO would be contributed to the REIT. (Registration Statement, pp. 5, 8, 41-42.

The Registration Statement also included a buy-out provision, based on the Participation Agreements, that threatened to punish ESBA Participants, and participants in one of the other Public Companies, who voted against the Consolidation:

> If holders of 80% of the participation interests in any of the three participating groups in Empire State Building Associates L.L.C. or holders of 90% of the participation interests in any of the seven participating groups in 60 East 42nd St. Associates L.L.C. approve theconsolidation, the agent of any such participating group will purchase on behalf of the subject LLC the participation interest of any participant in such participating group that voted "AGAINST" the consolidation or that did not submit a consent form, at a price that would be substantially lower than the exchange value.

(Registration Statement, p.53).

Additionally, the Helmsley Estate, which owns a majority interest in holder of the Building's operating sublease, ESBC, and various interests in the Private Companies, was to get cashed out

After February 13, 2012, Defendant-Respondents began addressing the substantive and disclosure-related concerns of the SEC raised by the Registration Statement[5]. On January 21, 2013, the Prospectus/Consent Solicitation Statement that was finally approved by the SEC was issued (the "Prospectus").

D. The Class Actions[6]

Between March 1, 2012 and March 19, 2012, five class action complaints were filed on behalf of investors in one or more of the properties sought to be consolidated into defendant-respondent Empire State Reality Trust, Inc (R. 127-154; 702-727; 728-759; 760-791; 792-819.) The class action complaints were virtually identical and alleged claims against some or all of Defendant-Respondents for breaches of fiduciary duty arising out of the proposed consolidation. (R. 127-154, 702-879).

Among other things, the Complaints alleged that, in proposing the Consolidation, the defendants breached their fiduciary duties to the named plaintiffs and the proposed class, because the Consolidation improperly allowed the Defendant-Respondents to exercise certain override interests; it improperly

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5 See generally http://www.sec.gov/cgi-bin/browse-edgar?action= getcompany&CIK=0001541401&type=&dateb=&owner=exclude&start=0&count=40).

6 The five actions, *Meyers et al. v. Empire State Realty Trust, Inc., et al.*, Sup. Ct., N.Y. Cnty Index No. 650607/2012*; Reinlieb v. Empire State Realty Trust, Inc., et al.*, Sup. Ct., N.Y. Cnty Index No. 650691/2012; *Weiss v. Empire State Realty Trust, Inc., et al.*, Sup. Ct., N.Y. Cnty Index No. 650798/2012; *Keenholtz v. Anthony E. Malkin, et al.*, Sup. Ct., N.Y. Cnty Index No. 650851/2012; and *Bandler v. Empire State Realty Trust, Inc., et al.*, Sup. Ct., N.Y. Cnty Index No. 650754/2012, were consolidated under Index Number 650607/2012, bearing consolidated caption "*In re Empire State Realty Trust, Inc. Investor Litigation*."

allocated the value of the properties between the fee owner and the operating lessee; it improperly allowed Defendant-Respondents to convert the expectation of future management fees into equity in the new REIT; and, it failed to provide the participants in the Public and Private entities with sufficient information to enable them to make an informed decision as to whether to consent to the Consolidation. (R. 127-154, 702-819.)

Approximately two weeks after the filing of the last of the class action complaints, on April 3, 2012, counsel for Plaintiff-Respondents jointly moved to consolidate the actions and for appointment counsel to represent the plaintiff class ("Class Counsel"). By Order dated June 25, 2012, the lower court consolidated the actions under one Index Number, appointed Class Counsel and ordered them to serve a consolidated complaint within 120 days. (R. 155-161). However, Class Counsel never filed a consolidated complaint and thus, Defendant-Respondents never filed a pleading responsive to the claims asserted in the class action complaints.

The next filing in the case occurred on January 18, 2013, when Class Counsel filed their Motion for Order of Preliminary Approval of Class Action Settlement and Scheduling of Settlement Hearing (the "Preliminary Approval Motion"). (R. 201-202.)

E. Counsel for Respondents Engage in Informal Discovery

In the interim, Defendant-Respondents having been relieved of any obligation to respond to the claims asserted in the class action complaints, their counsel and Class Counsel swiftly agreed to engage in "informal" discovery. As articulated by Class Counsel:

> MR. KOLKER: Shortly after we filed these actions we started pushing, we started prosecuting. And the defendants needed time to respond to the complaint.
>
> We served document requests right away. We served a subpoena on the independent valuation firm, Duff & Phelps. And we started pushing right away.
>
> Shortly after that the defendants came to us and said, we want to engage in a process by which we give you all of the information that you want and that we have serious discussions about the strengths and weaknesses of this claims and try to resolve it.

(R. 1311, at 38:15-25.) According to Class Counsel, all of this vigorous "prosecution" took place during the twelve-day period between the filing of the last of the Class Action Complaints and the end of March 2012. (R._209-209, ¶16.) As further described by Class Counsel:

> MR. KOLKER: Our thinking about it was, strategically, this was a good time to get into settlement negotiations, because they needed or at least wanted these claims resolved by the time they got to vote. Because, they wanted to be able, I think they needed to be able to tell their people that they had resolved these claims and sweetened the transaction a bit. So, it was a good time to negotiate.
>
> An experienced attorney in a class action would know that this was the right time to negotiate with them.

> Now, we provided them with streamlined document requests. Because, usually if it is going to be an adversarial process you have to ask for three times as much as you really need in order to prevent them giving stuff that you really do need.
>
> We didn't have to do that because they were operating in good faith.
>
> So, we had a very specific although comprehensive and streamlined document request. And they gave us everything, subject to a confidentiality agreement, of course. But, we ended up getting within a month with all of the documents that in a litigation that was not proceeding in this way that would take years to get.

(R. 1312, at 39:4-39:25).

Class Counsel's recollection of the brief adversarial process was confirmed by counsel for the Defendant-Respondents:

> MR. DEWEY: Because, our clients feel so strongly that the transaction is a good one and that the criticisms that have been made are meritless, we deliberately engaged with class counsel immediately after the complaints were filed. We produced extensive documents to them. We made our principals available for interviews. We made third-parties available for interviews.

(R. 1316, at 42:26-43:7).

Over the ensuing nine-month period, aside from the court's consolidation of the action on Class Counsel's unopposed motion, the motion court's docket remained entirely dormant. The Statewide and Commercial Division Rules governing discovery with an eye toward transparency had, by all accounts, been entirely ignored.[7] As a result, prior to the filing of the Preliminary Approval Motion, and indeed through the filing of Class Counsel's Motion for Final Approval of the Settlement, the Participants did not see a single document obtained through Class Counsel's informal investigation unless it was independently disclosed in Defendant-Respondents' correspondence or through their SEC filings, a process controlled entirely by Defendant-Respondents. Not a single sentence of sworn testimony was either sought by Class Counsel or obtained from any of Defendant-Respondents. All information and data allegedly imparted to Class Counsel and upon which its analysis and that of its experts were based was concededly subject to a confidentiality agreement and withheld from the Participants. Much of the information that was disclosed was either buried in an impenetrable thicket of SEC filings or so fraught with disclaimers, carve outs and legalese that it was of little (if any) use to the vast majority of the Participants.

F. Class Counsel's Prematurely Settles the Participants' Claims for Grossly Inadequate Consideration

Unbeknownst to the Participants, on or about September 28, 2012, Class Counsel had entered into a Stipulation of Settlement (the "Settlement Stipulation")

[7] See, e.g., Comm. Div., Rule 7 ("A preliminary conference *shall* be held within 45 days of assignment of the case to a Commercial Division Justice"); Rule 13(a) ("Parties *shall* comply with discovery obligations by the dates set forth in all scheduling orders."). While Appellant respects the motion court's ability to control its own docket and while they acknowledge the value of informal discovery under certain circumstances, clandestine fact-finding, back-door negotiations and off-the record testimony seem particularly ineffective to redress the claims of investors whose overarching complaints are that they were not given a seat at the bargaining table or provided with sufficient data to make an informed decision.

with counsel for Defendant-Respondents settling the claims asserted in the class action complaints (R. 220-253), even though Defendant-Respondents were then still actively negotiating the content of the Registration Statement with the SEC. Indeed, during those negotiations, and after the Settlement, the SEC's repeatedly attempted to compel Defendant-Respondents to include additional disclosures and supplement existing disclosures in the Registration Statement. [8]

Pursuant to the Settlement Stipulation, Defendants-Respondents agreed:

> (i) to establish a cash Settlement Fund in the amount of $55 million, a minimum of 80% of which will be cash and a maximum of 20% of which will be freely tradable REIT securities (OP Units and/or Class A Common Stock only) to be funded in accordance with the Stipulation and distributed to the members of the Class in accordance with the Plan of Allocation; and
>
> (ii) that: (a) the IPO will be on the basis of a firm commitment underwriting; (b) if, during the solicitation period, any of the three Public LLC's percentage of total exchange value is lower than what is presented in the final Form S-4 by a factor of ten percent (10%) or more, such decrease will be promptly disclosed by Defendants to investors in any such Public LLC with the following language immediately following such disclosure: "YOU HAVE THE RIGHT TO CHANGE YOUR VOTE WHILE THIS CONSENT SOLICITATION REMAINS OPEN BY [INSERT INSTRUCTION]"; and (c) unless total gross cash proceeds of six hundred million dollars ($600,000,000.00) is committed in the IPO, Defendants will not proceed with the IPO without first obtaining further approval from the

[8] See, e.g., http://www.sec.gov/Archives/edgar/data/1541401/000000000012065549/filename1.pdf (letter from SEC dated December 4, 2012) and http://www.sec.gov/Archives/edgar/data/1541401/000000000012047803/filename1.pdf (letter from SEC dated August 31, 2012). While most of the materials pre-date the proceedings before the lower court, none of the materials were released by the SEC until 30 days after Defendant-Respondents' IPO on October 2, 2013.

Public LLCs; and

> (iii) to make additional disclosures in or changes to the Registration Statement, that were identified by Plaintiffs, regarding various matters, as described above.

The Settlement Stipulation also claimed that the Action was a material factor in Defendants-Respondents establishing a tax deferral benefit to Class Members who were participants in the Public LLCs, estimated to be worth in excess of $100 million, by permitting them to have the choice of receiving Class A Common Stock or, as to a portion of their participation units, OP Units and Class B Common Stock. (R. 220-253).

It was not until six weeks later, in correspondence dated November 12, 2012 that Defendant-Respondents announced the Settlement. (R. 617-619). In that letter, Defendant-Respondents vaguely referenced a $55 million Settlement Fund "to be funded by the Helmsley Estate, affiliates of the Malkin Family and certain other investors in [ESBC,]" an undisclosed portion of which would be distributed to the recipient, emphasizing that "[t]here will be no settlement or payment except upon completion of the proposed consolidation/IPO or third-party proposal." Neither the Settlement Stipulation itself nor a more complete recitation of its terms was included in Defendant-Respondents' letter, nor did Defendant-Respondents disclose where the Participants could obtain a copy or even if they had a right to do so.

G. The Consolidation

Approximately three months after Class Counsel executed the Settlement Stipulation, and weeks before they filed their Preliminary Approval Motiion, Defendant-Respondents finalized the Registration Statement. On December 21, 2012, the SEC declared the Registration Statement effective.

On January 23, 2013, Defendant-Respondents transmitted the finalized Prospectus/Consent Solicitation Statement (the "Prospectus")[9] to the Participants and began aggressively soliciting their consents to the proposed consolidation.

The Consolidation, pursuant to the terms of the Prospectus, was completed on October 7, 2013.

ARGUMENT

POINT I

THE ESBA PARTICIPANTS WERE NOT ADEQUATELY REPRESENTED BY THE NAMED PLAINTIFFS OR CLASS COUNSEL AND THEREFORE THE COURT BELOW ERRED IN CERTIFYING THE SETTLEMENT CLASS

As clearly evident from below (*supra, Point II),* the interests of the named Plaintiffs, and the putative members of the proposed class other than the ESBA Participants, were adverse to the interests of the ESBA Participants, and the named

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[9] The Prospectus, which spans in excess of 1,200 pages, was filed by Defendant-Respondents pursuant to Rule 424(b) of the Securities Act of 1933. The Registration Statement is publicly available in its entirety at: http://www.sec.gov/Archives/edgar/data/1541401/000119312513018290/d283359d424b3.htm.

Plaintiffs and Class Counsel could not fairly and adequately protect the interests of the ESBA Participants, or the interests of the participants in the other few entities that were subject to the alleged Buyout Right, the voluntary Capital Overrides, or the misallocation of the value of the underlying properties between the fee owners, on the one hand, and the operating lessees, on the other. See CPLR 901(a)(4)[10].

The CPLR demands that the claims of the class representative be typical of the claims of the proposed class. Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 53, 698 N.Y.S.2d 615, 619 (1999). The typicality requirement is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to both the claims of the named plaintiffs and those of the absentees. Neal v. Casey, 43 F.3d 47, 57 (3d Cir. 1994). As succinctly explained by the Third Circuit Court of Appeals, "[t]he inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that the absentees' interests will be fairly represented." Georgine v. Amchen Products, Inc., 83 F.3d 610, 631 (3d Cir. 1996). Here, Appellant's, and other ESBA Participants', claims are not typical of the Class proposed by the Plaintiffs-Respondents. In fact, as shown below, their claims are demonstrably

[10] Indeed, for these same reasons, the lower court should not even have preliminarily certified the class or approved the settlement, as urged by Appellant and six other ESBA participants. (R. 297-653).

atypical fromthose of the rest of the Class, because of the many substantial wrongs solely perpetrated against the ESBA Participants. Indeed, it is clear that the interests of the Plaintiffs-Respondents were adverse to the interests of ESBA Participants, and that Plaintiffs-Respondents, and their counsel, could not fairly and adequately protect the interests of Appellant or the ESBA Participant. See CPLR 901(a)(4).

"The adequacy inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent" and a class representative "must possess the same interest and suffer the same injury as the class members." Georgine, 521 U.S. at 625-626. Furthermore, class counsel must be qualified, experienced and generally able to conduct the litigation. Savino v. Computer Credit, Inc., 173 F.R.D. 346, 353 (E.D.N.Y. 1997) ("Competence of class counsel includes not only reputation built upon past practice, but also past performance in the present litigation.").

The Plaintiffs-Respondents ought to settle voluntary override claims unique to ESBA Participants and participants in 60 East 42nd St. Associates, LLC[11] for the benefit of individuals who do not own any interest in those entities and who therefore had no interest in those claims and did not suffer any injury resulting

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[11] Even thought Appellant did not own an interest in to 60 East 42nd Street Associates, the Court below also improperly held that Appellant "lacks standing to object to the override applicable" to that entity. Appellant was entitled to raise any claim related to the unreasonableness of the settlement.

from the wrongs forming the basis of those claims. It could not be more evident that in trying to settle this case in that fashion, the interests of the Plaintiffs-Respondents are adverse to and directly in conflict with those of ESBA Participants and 60 East 42nd St. Participants.

Furthermore, while there is no doubt that Plaintiffs-Respondents' counsel is experienced class counsel, there exists an inherent conflict of interest in permitting them to represent ESBA Participants in connection with the Settlement, which the Court below completely ignored. As set forth below, ESBA Participants, and 60 East 42nd St. Participants, have unique claims against the defendants that dwarf the known claims of theother members of the Class. While the Proposed Settlement may (or may not) fairly and adequately protect the interests of the Plaintiffs-Respondents, it does not come close to adequately protecting theESBA Participants.

Moreover, also as demonstrated below, Class Counsel's performance evidenced their inability to protect the interests of participants in ESBA and the other Public Entities. They tossed aside significant damage claims in reaching a settlement. They misrepresented their role as to the change in the Proposed Consolidation that provided for a likely, though not definite, tax free exchange. They not only failed to contest the onerous Buyout Right, they even opposed the effort of putative class members to contest it. And, by seeking an award of absurdly high attorneys' fees, they sought to significantly dilute the benefit a Settlement that is manifestly unfair, for their own benefit.

For these reasons alone, certification of the Settlement class should have been denied and the lower court should have eaerlier allowed the proposed intervenors to proceed as representatives of a putative ESBA Sub-Class as requested in oppositions to preliminary certification of the class and preliminary approval of the settlement (R. 297-653).

POINT II

THE LOWER COURT ERRED IN APPROVING THE UNFAIR, UNREASONABLE AND INADEQUATE SETTLEMENT

A. The Legal Standard for Final Approval of a Class Action Settlement

CPLR 908 provides that a class action "shall not be dismissed, discontinued or compromised without approval of the Court." See CPLR 908. Accordingly, courts condition their approval of a proposed class action settlement on "the fairness of the settlement, its adequacy, its reasonableness" with an eye towards "the best interests of the class members." Fiala v. Metropolitan Life Ins. Co., Inc., 27 Misc. 3d 599, 606, 899 N.Y.S.2d 531, 537 (Sup. Ct. N.Y. Cnty Mar. 3, 2010).

Unlike its role as fact-finder or law determiner, a court, in reviewing a proposed class action settlement, is charged with "a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." Maywalt v. Parker & Parsley

Petroleum Co., 67 F.3d 1072, 1078 (2d. Cir. 1995) (quoting Grant v. Bethlehem Steel Corp., 823 F.2d 20, 22 (2d Cir. 1987)). This requirement serves the important function of "protect[ing] the rights of those whose interests may not have been given due regard by the negotiating parties." In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740, 758 (E.D.N.Y. 1984) aff'd, 818 F.2d 145 (2d Cir. 1987). As such, the burden of proof as to the fairness, reasonableness and adequacy of a proposed settlement falls squarely on its proponents, and the burden of protecting the class falls upon the court as a fiduciary for the class in assessing the fairness of the proposed settlement. Id.

Where, as here, approval of a settlement is sought prior to certification of the class, the court is charged with the additional responsibility of examining the negotiations among counsel to ensure that "the compromise is the result of arm's-length negotiations and that plaintiff's counsel has engaged in the discovery necessary to effective representation of the class's interests." Polar Intl. Brokerage Corp. v. Reeve, 187 F.R.D. 108, 112 (S.D.N.Y. 1999). As part of this inquiry, the court must examine "the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations." Id.

As recognized by the district court in Polar Intl.:

> The use of [the settlement certification] device may also raise questions about collusion and the ability of plaintiffs' counsel to represent the interests of the entire class. In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 787 (3d Cir. 1995) (hereinafter "In re General Motors") ("the court performs its role as supervisor/protector without the benefit of a full adversarial briefing on the certification issues. With less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs…and other abuses."); see also Mars Steel Corp. v. Continental Illinois National Bank and Trust. Co., 834 F.2d 677, 680 (7th Cir. 1987) ("the danger of a premature, even a collusive settlement is increased when … the status of the action as a class action is not determined until a settlement agreement generates.") In addition, courts have pointed out that where, as here, notice of the class action is sent to class members at the same time as notice of the settlement, "class members are presented with what looks like a fait accompli," Mars, 834 F.2d at 680-81.

Polar Intl., 187 F.R.D. at 113.

Accordingly, in light of the absence of the inherent checks imposed by the adversarial discovery process on class counsel's conduct, when class certification is sought *after* the settlement terms are finalized, "courts must require 'a clearer showing of a settlement's fairness, its reasonableness and adequacy and the propriety of the negotiations leading to it.'" Polar Intl., 187 F.R.D. at 113 (citing Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982)). Indeed, courts have recently recognized that there exists a "judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class." Carroll v. Sanford, Index No. 600645/2006, 2007 WL 2175568, p. 17 fn. 9 (Sup. Ct. New York County, May 15, 2007) (Ramos, J.) (citing Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 285 (7th Cir. 2002)); see also Polar Intl. Brokerage Corp., 187 F.R.D. at 119 ("Often the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs. At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees.")

The lower court failed to properly discharge its "fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately" when it approved the Settlement. Maywalt, 67 F.3d at 1078.

B. The Settlement Fails to Adequately Compensate the ESBA Participants and 60 East 42nd Street Participants for Defendant-Respondents' Wrongful Application of the 10 Percent "Voluntary" Override to the REIT Transaction

According to the Registration Statement and the Prospectus, Defendant-Respondents claimed they were entitled to $108 Million, or "9.14%, of the over One Billion Dollars of Empire State Building value otherwise allocable to ESBA Participants, based upon the so-called "voluntary override." (R. 1076). Thus, for 94% of the ESBA Participants, the more than $108 million in "exchange value" Defendant-Respondents attributed to themselves resulted in: (i) a loss of $34,870 in exchange value for each ESBA Participation; (ii) a 10% truncation of equity ownership interest for each ESBA Participation; (iii) a loss of future allocable distributions and appurtenant voting rights to the severed interests for each ESBA Participation; and (iv) a reallocation of those rights to Defendant-Respondents in the form of fixed equities. Indeed, the diminution of value is plainly echoed in theProspectus:

> You will receive a portion of the operating partnership units and common stock allocated to your subject LLC in accordance with your election and with your percentage interest in the subject LLC and the subject LLC's organizational documents, after taking into account the allocations in respect of the supervisor's override interests.

(R. 1369).

As set forth, in the Plan of Allocation proposed by Class Counsel (R. 186-190), each affected ESBA Participant will receive only $1,486 per ESBA Participation for this enormous diminution of value. This deficiency is attributable to Class Counsel's drastic undervaluation of the ESBA Participants' claims with regard to the so-called "voluntary" overrides. Defendant-Respondents' claim to over $108 million of REIT securities in respect of the voluntary override is contradicted by the plain language of the governing documents. Under the principle of *expressio unius est exclusive alterius*, "the expression in the contract of one or more things of a class implies exclusion of all not expressed." Eden Music Corp. v. Times Square Music Publications Co., 127 A.D.2d 161, 164, 514 N.Y.S.2d 3, 5 (1987). Thus, where "certain persons or categories are specified in a contract, an intention to exclude all others may be inferred." Assured Guar. Mun. Corp. v. UBS Real Estate Securities, Inc., 2012 WL 3525613, at * 3 (S.D.N.Y. Aug. 15, 2012) (quoting IBM Poughkeepsie Employees Fed. Credit Union v. Cumis Ins. Society, Inc., 590 F. Supp. 769, 773 n. 19 (S.D.N.Y. 1984)).

When the Agents syndicated their interests in ESBA in 1962, they undertook not to perform certain, clearly delineated actions without the unanimous consent of 100 percent of the Participants (subject of course to the buy-out provision if 80 percent or more of the Participants consent). Section 4 of the Participation Agreement provides:

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

(R. 368-369). That is, the Participation Agreement clearly itemized certain actions that could not be done absent unanimous (or at least 80 percent) consent. Included among those actions were selling theEmpire State Buiding, mortgaging it or converting ESBA into a REIT.

In a letter dated September 13, 1991 (the "1991 Solicitation"), Defendant-Respondents, in connection with a solicitation aimed at getting Participants to consent to buying fee title to the Empire State Building, requested that the ESBA Participants consent to the voluntary override:

> "in the event of a *sale or financing* of any interest of [ESBA] in the Master Lease or in the Empire State Building or the land thereunder, *the net proceeds be distributed* (a) to each Participant, an amount cumulatively equal to the Participant's original, or his predecessor in interest's original, capital contribution in Associates and (b) any excess, 90% to the Participants and 10% to WM&B"

(R. 435) (emphasis supplied). Thus, while Defendant-Respondents' wererequired to obtain the consent of the ESBA Participants to *sell* the Property, *finance* the Property, or convert ESBA to a REIT, the 1991 Solicitation provided that the voluntary override only applies to a sale or financing. Under the principle *expressio unius est exclusive alterius,* Defendant-Respondents' omission of a REIT conversion from the transactions to which the voluntary override applies must be interpreted as intentional. Regardless, the Consolidation was neither a sale nor a financing.

Similarly, the voluntary override was not clearly not applicable in the case of 60 East 42nd Street. The Defendant-Respondents based their right to the override on a letter to Participants in that entity from Wien , Lane, Klein & Malkin, dated February 25, 1968. (R. 1184-1185). The letter stated, in applicable part:

> In view of the success of this investment and so that my firm may be compensated for increasing costs of supervision and disbursement, I believe it fair that the arrangementfor annual payments to Wien, Lane, Klein & Malkin be modified. I recommend that effective January 1, 1968, after the participant have received distributions equal to a return

> at the rate of 14% on their cash investment in any year, all additional amount paid out shall be allocated 90% to participants and 10$ to Wien, Lane, Klein & malkin as additional compensation.

The plain language of that letter spoke about additional "compensation" based on the particular amount of "annual payments,", not proceeds from any consolidation as that proposed in the Registration Statement, let alone any sale or other conveyance of the property. *See also Letter from Robert A. Machleder to Thomas Kluck, et al, dated March 19, 2013.* (R. 1180-1183.)

C. The Settlement Inadequately Compensates the ESBA Participants for Defendant-Respondents' Misallocation of Value and Debt Among ESBA and ESBC

Under the Operating Sublease between ESBA and ESBC, a fixed base rent (as of January 5, 2013) of approximately $5,900,000 was paid to ESBA (not including certain required payments to cover debt service on borrowings for improvements and tenant costs of the building) and, additionally, the two entities split equally the profits of ESBC in excess of $1,000,000. In other words, ESBA received more than one-half of the profits currently generated by the Empire State Building – in excess of 54 percent based upon 2012 calendar year figures. When the Operating Sublease was to come to an end in 2076, all of the profits generated by the Empire State Building belonged to ESBA and none to ESBC. Thus, to determine the appropriate and correct allocation of the $2.3 billion exchange value of the Empire State Building between ESBA and ESBC, a discounted cash flow

("DCF") analysis must have been undertaken taking into account the 100% ownership interest of ESBA in 2076 and the actual sharing percentage ratios between ESBA and ESBC (rather than the arbitrary 50/50 allocation used by Defendant-Respondents in the S-4).

This exact analysis was providedby Plaintffs'-Respondents' expert. Mr. Vodola specifically rejected the 50/50 allocation as it relates to the ESBA and stated "[i]t is my and [Plaintiff-Respondents'] opinion that this [50/50] assumption was inconsistent with the governing documents, including the partnership agreement. It was my opinion that the Lessor and Lessee interests should be individually valued to account for, among other things, the two tier structure, the impact of the capital improvement requirements for the Empire State Building and the fact that at the expiration of the ground lease ownership of real property reverted to the lessors." (R. 846, ¶23). Based upon his extensive analysis, Mr. Vodola concludes that "[u]nder the lessor DCF analysis, a higher Exchange Value, of approximately 87 million, would have been allocated to the Empire State Building Associates, L.L.C. (the Lessor of the Empire State Building) ("ESBA")" … and that "one measure of damages for the ESBA Participants could be this $87 million difference between the lessor DCF analysis and the 50/50 allocation." Excluding the interests of Defendant-Respondents and their affiliates who are also ESBA Participants, "$72 million of the $84 million difference between the ESBA lessor DCF analysis and the 50/50 allocation would be attributable to [the ESBA] Class damages (R. 850-851, ¶32). This improper allocation results in the ESBA Participants being cheated out of approximately $72 million in value.

Further distorting the relative Exchange Values between the ESBA and ESBC was Defendant-Respondents' improper deduction of a portion of the debt for the Empire State Building from the ESBA lessor's interest. This improper treatment was extensively evaluated and discussed by Mr. Vodola and he unequivocally rejected it, concluding that "[b]ased upon my extensive review of the application documents, including the 2008 solicitation letter sent to the ESBA Participants, the debt of the Empire State Building funded the obligation of the lessees, so that the lessee was the primary beneficiary of the debt and the capital improvement loans were the lessee's liability, thereby rendering it appropriate to deduct the entire amount of the debt for the Empire State Building from the lessee's interest in connection with allocating value in the Consolidation. … We view the debt differential to be a measure of damages that could be appropriately considered by the Court and the fact finder in this case." (R. 851-852, ¶34).

In summarizing his analysis of the 50/50 and debt allocation issues, Mr. Vodola concluded that in his professional view, a range of reasonable recoverable damages (weighted to account for his assessment of the strength of the claims) attributable to the ESBA Participants would be approximately $72 million (reflecting the DCF analysis compared to the 50/50 allocation) to approximately $132 million (after taking into account the debt differential). (R._854, ¶37 and Chart A).

D. Class Counsel's Claims that their Efforts Were Material in Creating a Tax-Deferred Option are False

Class Counsel attempted to bolster the apparent value of the meager Proposed Settlement by saying that the restructuring of the Proposed Consolidation so as to result in a tax-deferred exchange was worth $100 million to the Settlement Class, thus tripling the supposed value of the Proposed Settlement. This was disingenuous for two reasons. First, Defendant-Respondents had to work hard to make this (largely) non-cash exchange of securities taxable to begin with. Instead of giving Operating Partnership Units – or like-kind securities – to the Public Company investors, as they did for themselves and the Private Company investors, they gave the Public Company investors REIT class A stock (not a like-kind security compared to the Participations in limited liability companies).

Second, it is clear that Defendant-Respondents had already agreed to swap out the Operating Partnership Units for the Class A stock going to the Public Company investors without regard to any settlement. In the July 2, 2012 letter from Defendant-Respondents to ESBA Participants responding to complaints of numerous ESBA Participants, Defendant-Respondents announced:

> “Since we embarked on a path toward the proposed consolidation of properties and initial public offering (“IPO”), we have heard widespread concern from investors that they could owe taxes and might have to sell a portion of their interests to pay their taxes based on the original structure developed by our experts … We are pleased to inform you that we have developed a new structure that would give you the option to defer any tax that could be triggered by the proposed consolidation….”

(R. 614-616).

Accordingly, the Court below should not have considered the tax benefits in assessing the fairness of the Proposed Settlement except in this respect: the fact that both Defendant-Respondents’ and Class Counsel agreed to lie and say that the tax restructuring was part of the Settlement is strong evidence of the very collusion that ought to move the Court to disapprove it.

E. The Additional Disclosures Made By Defendant-Respondents are Not Attributable to Class Counsel and, in Any Event, Confer Minimal Benefits on the Class

As support for the work it did to purportedly justify its exorbitant demand for $15,000,000 in legal fees for approximately one year of work (the bulk of which it admits was done over a period of only a few months), Class Counsel claims credit for any positive actions Defendant-Respondents took during the time of their informal discovery. Class Counsel makes this claim without providing a scintilla of objective evidence regarding its actual role in Defendant-Respondents’ SEC filings. None of the documents containing the changes Class Counsel claims to have fought so hard reveal the reasons the changes were made. Certainly they do not indicate that changes were made at the behest of Class Counsel.

Moreover, much of the information that was disclosed was either buried in SEC filings or so fraught with disclaimers, carve outs and legalese that it is of little (if any) use to the vast majority of the ESBA Participants. Many of the purported "disclosures" that were sent to the Class Members consisted of 2 page letters largely referring them to the SEC's web site to review documents which are 300-600 pages long.

Indeed, such was the case with respect to financial information that would have better enabled ESBA Participants to reasonably analyze the proposal. Specifically, the Prospectus failed to include any projections, or even just a discussion, as to the cash flow that might be available for distribution to ESBA Participants in future years should the Consolidation not have been approved.

Further, it is obvious that that such an analysis was withheld from ESBA participants by the Respondents-Defendants intentionally. As indicated in the Prospectus, they did not think it material or worthy of consideration by ESBA Participants:

> While the supervisor did not perform a detailed financial analysis of all these alternatives, other than continued operations of the subject LLCs and liquidation of the subject LLCs, the supervisor believes that these alternatives would not be as beneficial to participants as the consolidation.

*(*R. 1212)[12]. Indeed, the analysis, or at least part of it, was submitted to the SEC but was not distributed directly to Participants as part of the Prospectus. *See Exhibit 99.48 to Amendment No. 3 of the S4 (the proposed Prospectus), dated August 13, 2012(R.640-653), and Exhibit 99.59 to Amendment No. 4 of the S4 dated November 2, 2012*[13]. (R. 1193-1203). Indeed, the projections contained in those Exhibits likely give a clue as to why they were not provided as part of the Prospectus. They showed the amount available for distribution to Participants, before debt service, increasing dramatically over the next 10 years and going forward thereafter.

The Prospectus further complicated the ability of a Participant attempting to make the comparison by using Prospectus Appendix C-1 and, if they found it, Exhibit 99.59. The Prospectus explains that the "discounted cash flow ("DCF") analysis (contained in Appendix c-1) *focuses on the operating cash flows expected from the property* and the anticipated proceeds of a hypothetical sale at the end of an assumed holding period" (emphasis supplied). (R. 1216). Then, the Prospectus explains that "(the) *projections* with respect to the properties were presented by the independent valuer *based on the information provided by management of the supervisor* and analysis performed by the independent valuer and reviewed and

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12 The language used is clearly designed to confuse readers as to what was and was not done, by starting with the phrase "While the supervisor *did not perform*…." (emphasis supplied).

13 Though Exhibit 99.59 updated and superseded Exhibit 99.48, the Prospectus issued to Participants in January, 2013 still referred to the latter rather than the former. (Rec. 1213).

approved by management of the supervisor, and the projections with respect to the management companies were each prepared by the supervisor" (emphasis supplied). (R. 1217). Based on the those statements, a Participant might think he or she could use the projections contained in Appendix C-1 to estimate cash available for distribution going forward if the consolidation was not approved. However, the Prospectus says that can't be done, warning as follows:

> The appraisal process undertaken by the independent valuer was conducted solely to determine the relative value among the subject LLCs, the private entities and the management companies and to establish exchange values to facilitate the consolidation. The projections were prepared solely for this purpose and should not be relied upon for any other purpose, including without limitation, as an indicator of future performance of the company, the properties, the subject LLCs, the private entities or the management companies.

Instead, the Prospectus asked Participants to decide on the Consolidation based on what they have received on average over the years 2007 to 2012 (i.e. past distribution) compared to the projected distribution to them from the REIT in 2013. (R.1210). But that was hardly fair, since ESBA distributions had been drastically reduced as a result of $157.9 Million being spent on the Empire State Building for capital improvements.

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; and, if there were other factors that needed to be considered, than those ought to have been disclosed. Yet, Class Counsel failed to require any such key disclosures.

While the disclosure documents may satisfy Defendant-Respondents' disclosure obligations under the SEC's regulations, the fact that Defendant-Respondents did what they were legally required to do under federal securities law does not translate into any value in the Settlement (and certainly does not justify Class Counsel's$11,599,629 fee award).

POINT III

THE AWARD OF ATTORNEYS' FEES
IN THE AMOUNT OF $11,599,629 WAS EXCESSIVE AND UNJUSTIFIED

A. The Award Was Outrageously High Given the Quality and Quantity of the Services Provided by Class Counsel

Class Counsel sought $15 million in attorneys' fees to be taken from the $55 million settlement fund, which amounted to 27.3%, almost one-third of the settlement fund. In seeking that amount, they claimed they had expended 4,685.65 hours litigating this action (which was settled even before formal discovery or responsive pleadings were served), and that their lodestar figure was $3,314,179.75, which amounted to an average hourly rate of $707.30. However, they asked for a lodestar multiplier of 4.5, resulting in an hourly rate of $3,201.13 per hour, for their services.

Even the Court below recognized that this request was unreasonable, and therefore instead awarded Class Counsel $11,599,629.13 in fees, which amounted to $2.475.56 per hour. This equaled their lodestar of $3,314.179.75 times a multiplier of 3.5. The lower Court based its reduction on the simple conclusion that the multiplier requested was too high. (R. 102).

Pursuant to CPLR 909, “if a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys’ fees to the representatives of the class based on the reasonable value of legal services rendered…” Applying this standard, the court based its award on findings that: Class Counsel undertook significant risks; that after investigation it appeared than many of the claims might not constitute serious breaches of fiduciary duty as claimed in the Complaint; and that nevertheless, they were able to secure monetary benefits for the class valued at more than $155 Million and non-monetary concessions. The Court also found that the requested fee was only 9.7% of the total settlement value, “a percentage will within the range of attorney fees recoveries courts have allowed in class action settlements.” Finally, the Court reasoned that its reduction of the fee request was also reasonable notwithstanding the fact that Class Counsel provided limited detail of the work performed, specifically “only one page summary charts showing the name of attorney/paraprofessional, hours logged, current hourly rate and lodestar amount.”

According to the Court, since it was using the lodestar method only as a cross-check, more detailed records were not required. (R. 95-104).

The lower Court's findings were questionable, and the reduction of the fee did not go far enough. This Court must not permit the award of such an unconscionably high fee.

The award of attorneys' fees pursuant to CPLR 909 is not automatic, but rather, at the court's sole discretion. See Cooper v. Morin, 49 N.Y.2d 69, 84, 424 N.Y.S.2d 168, 177, 399 N.E.2d 1188, 1196 (1979). Courts generally award fees based on the reasonable value of the legal services provided to the class. Klein v. Robert's American Gourmet Food, Inc., 28 A.D.3d 63, 74-75, 808 N.Y.S.2d 766, 775-76 (2d Dept. 2006).[14] The burden of showing the reasonableness of the fee lies with the claimant. Id. (citing Matter of Karp, 145 A.D.2d 208, 216, 537 N.Y.S.2d 510 (1st Dept. 1989)). In determining what constitutes a reasonable fee, courts give extensive consideration to the nature and value of the services rendered by the plaintiffs' attorneys. See Friar v. Vanguard Holding Corp.,125 A.D.2d 444, 447, 509 N.Y.S.2d 374, 377 (2d Dept. 1986).

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[14] Other factors courts consider is assessing the fees are: the risks of the litigation, whether counsel had the benefit of a prior judgment, standing at bar of counsel for the plaintiffs and defendants, the magnitude and complexity of the litigation, responsibility undertaken, the amount recovered, the knowledge the court has of the case's history and the work done by counsel prior to trial. See Fiala v. Metropolitan Life Insur. Co., Inc., 27 Misc.3d 599, 611, 899 N.Y.S.2d 531, 540 (Sup. Ct., N.Y. Co. 2010), citing Sheridan v. Police Pension Fund, Art. 2 of City of N.Y., 76 A.D.2d 800, 801, 429 N.Y.S.2d 204 (1st Dept. 1980).

In exercising its discretion, and whether it uses the lodestar method or the percentage method, a Court must determine what is a "reasonable" fee by considering "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2nd Cir. 2000); In re Visa Check/Mastermoney Antitrust Litigation, 297 F.Supp.2d 503, 520 - 521 (E.D.N.Y. 2003); See Ryan v. Volume Servs. Am., *No 652970/2012*, Final Judgment (Doc. No. 24, Mar. 7, 2013) p. 9, ¶19, 2013 N.Y. Misc. LEXIS 932 (Sup. Ct. N.Y. Cty)(Schweitzer, J) citing Fiala v. Metro. Life. Ins. Co., 899 N.Y.S.2d 531, 610 (Sup. Ct. N.Y. Cty. 2010). in no event may the fees awarded in a common fund case exceed what is "reasonable" under the circumstances. Goldberger, 209 F.3d at 47.

Moreover, whether they be percentages or multipliers, benchmarks must be used with circumspection. As stated in Goldberger, "starting an analysis with a benchmark could easily lead to routine windfalls where the recovered fund runs into the multi-millions. Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case." 209 F.3d at 52. Here, Class Counsel were awarded a huge windfall.

First, Class Counsel faced little risk, if any. As stated in Defendant-Respondents' Opposition to Intervenors' Order to Show Cause, "While an appraisal proceeding offers little real benefit to Participants, it *would* facilitate Movants' actual goal of hindering or killing the Transaction: as a practical matter, the pendency of any material litigation makes an IPO difficult to accomplish." (R. Doc. No. 124, p. 25. It could not be any clearer that Defendant-Respondents were likely to settle, and quickly. Indeed, that is precisely what happened.

Second, the Court's finding that Class Counsel concluded that many claims might not be serious was based solely on the representations of Class Counsel, who had failed to even file an consolidated complaint as required by the Court's Order of consolidation and then failed to take the opportunity to test the strength of their main claims. Class Counsel likewise failed to seek timely decision by the Court on the validity of the Capital Event Overrides. Both of those issues could have been determined solely on the basis of documentary evidence and construction thereof, supplemented by affidavit(s) if necessary.

Moreover, the Settlement was reached without any sworn testimony by Defendant-Respondents and principals of Malkin Holdings, Peter Malkin and Anthony Malkin. Indeed, the Settlement was based only on "interviews" of unidentified representatives of Defendant-Respondents. And while Class Counsel interviewed Anthony Malkin, they apparently did not even interview Peter Malkin. (R. 1006, ¶*21).*

Courts frequently reduce fee awards where, as here, the parties settle relatively early in the litigation, prior to engaging in discovery or trial. In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2007 WL 313474, *21 (S.D.N.Y. 2007). In Lasker v. Kansas, No. 0103557/2006, 2007 WL 3142959 (Sup. Ct. N.Y. Cnty Sept. 26, 2007), the court considered a fee request of $5 million (plus interest) by class counsel to be paid out of a settlement fund of $20 million, or 25% of the fund. The court also noted that class counsel had claimed expending 1,791.84 hours in the litigation for a lodestar amount of $976,553.85, and that the $5 million fee request would amount to a fee of $2,887 per hour representing a multiplier of 5.3. Id. In reducing the percentage fee to 15% and the lodestar amount to 3.2, the court in Lasker noted, inter alia, that, just as was the case here, the parties reached an early settlement in that case and that only limited discovery ensued. Id. See also In re Twinlab Corp. Securities Litigation, 187 F. Supp.2d 80 (E.D.N.Y. 2002) (request for 33% of $26,500,000 settlement fund rejected and reduced to 12% where parties did not engage in extensive discovery and case settled shortly after motions to dismiss were decided); Berlinsky v. Alcatel Alsthom Compagnie Generale D'Electicite, 970 F. Supp. 348 (S.D.N.Y. 1997) (Attorneys' fee request of $2.4 million out of settlement fund of $8.8 million (27.5%), which would equal a 2.97 lodestar multiplier, rejected and reduced to $1.14 million (a 1.4 multiplier), where, inter alia, no motions were filed, discovery was informal and case settled in two years); In re Bausch & Lomb, Inc. Securities Litigation, 183 F.R.D. 78 (W.D.N.Y. 1998) (lodestar multiplier of 2 (amounting to a fee of 10.5% of fund) appropriate where common fund amount was $42 million and counsel stated maximum possible loss to be around $250 million, with most likely damage award in the $120-$140 million range); see also Eisenberg & Miller, *"Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008"* (2009) at 25-26 & Table 15 (reporting that the mean lodestar recovery was 1.98 and the median lodestar recovery 1.75 for cases in which class recoveries were between $38.3 million and $69.6 million).

Also, courts have held that the lodestar amount is excessive where it is calculated using partner billing rates for a large percentage of the time worked on the case, where an associate or a paralegal could have performed the work at a much lower rate. See In re Twinlab Securities Litigation, 187 F. Supp. 2d at 87. Here, Class Counsel makes much of the fact that they had to review "tens of thousands of documents" before a settlement was reached. Surely, much of this review could have been undertaken by associates or even paralegals. However, as the affidavits and affirmations submitted by Class Counsel in support of their fee application indicate, this was not the case. For instance, while the total attorney time spent by the Wolf Haldenstein firm is 1,916.30, approximately 80% of that time was spent by partners (attorney Kolker alone billed 1,266.90 hours at an hourly rate of $765). (R. 1067). Similarly, Marc Gross of the Pomerantz Grossman firm billed 189.4 hours at an hourly rate of $935. (R. 933).

The fee decision of the 2nd Circuit in Goldberger is also particularly relevant to the fee request here. In Goldberger, a securities class action, following the settlement for over $54 million, plaintiffs' counsel sought attorneys' fees of 25% of the recovery, amounting to $13.5 million. The Court declined to award that amount, awarding instead $2.1 million, amounting to about 4% of the recovery, based on counsel's "lodestar" of hours actually and reasonably billed. 209 F.3d at 43. The court acknowledged that in similar cases with recoveries of between $50 and $75 million, courts traditionally accounted for these economies of scale by awarding fees in the lower range of about 11% to 19%. 209 F.3d at 52. However, the Court emphasized that a principal "analytical flaw" in the request before it was the "assumption that there is a substantial contingency risk in every common fund case. We harbor some doubt that this assumption is justified in cases such as this. At least one empirical study has concluded that "there appears to be no appreciable risk of non-recovery" in securities class actions, because "virtually all cases are settled." 209 F.3d at 52. Janet Cooper Alexander, *Do the Merits Matter A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991).

B. In Any Event, Class Counsel, Instead of Advocating for the Class Members, Have Advocated Against them and Have Colluded with Defendant-Respondents' Counsel, in a Patent Effort to Line their own Pockets and Therefore Deserve No Fee

Class counsel serves as a fiduciary to a certified class. See e.g., Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) ("class action counsel possess, in a very real sense, fiduciary obligations to those not before the court"); In re LIBOR Based Fin. Instruments Antitrust Litig., No. 11MD 2262, 2011 WL 5007957, at *2 (S.D.N.Y. Oct. 18, 2011); Chana Friedman-Katz v. Lindt & Sprungli (USA), Inc., 270 F.R.D. 150, 160 (S.D.N.Y. 2010). With that fiduciary duty in mind, the court must determine that the negotiating process leading up to a settlement of a class action was conducted at arms-length and whether sufficient discovery of the claims has ensued. Polar Int'l,187 F.R.D. at 118. Courts must look out for signs that class counsel has sacrificed value for the class in exchange for maximizing attorneys' fees. Id. That is because

> the class action device has its downside, or rather downsides. There is first of all a much greater conflict of interest between the members of the class and the class lawyers than there is between an individual client and his lawyer. The class members are interested in relief for the class but the lawyers are interested in their fees, and the class members' stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.

Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 744-45 (7th Cir. 2008) (Posner, J.). As Judge Friendly once put it, "a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage." Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964).

Incredibly, on April 8, 2013, Class Counsel filed a brief opposing the Objectors' LLC Law Motion and refused Objectors' request to extend the Opt-Out Deadline in light of the pendency of that application, both of which were in the Class Members' interest. Class Counsels' actions in this regard are reprehensible, and demonstrate the lengths they would go to settle this case and receive their fee, including taking positions adverse to those whose protection with which they are charged. These reasons alone merit rejection of Class Counsel's Fee Award.

Perhaps most tellingly, like those ESBA Participants who voluntarily consented to the Consolidation, Class Counsel were duped by Defendant-Respondents into believing that most ESBA Participants would be receiving $328,800. Perhaps, had they been more diligent in their efforts to discover the truth about Defendant-Respondents' proposal, those class members would not have instead only received $223,674. Class Counsel failed in their duty to insure that that was not the outcome of the Consolidation.

CONCLUSION

For all of the foregoing reasons, Appellant respectfully request that the Orders be reversed.

Dated: Newton, Massachusetts
March 14, 2014

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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