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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ALL OF THE CLASS MEMBERS WERE NOT SIMILARLY IMPACTED BY THE PROPOSED TRANSACTION AND THEREFORE IT WAS IMPROPER TO CERTIFY A CLASS CONSISTING OF ALL OWNERS OF INTERESTS IN ALL OF THE PROPERTIES INVOLVED IN THE PROPOSED TRANSACTION 1

II. THE COURT BELOW IMPROPERLY FOUND THAT THE SETTLEMENT WAS FAIR, REASONABLE AND ADEQUATE 9

A. The Court Below Did Not Engage In An "Exhaustive" Review 9

B. The Settlement Was Not As Well Received as Suggested by the Court Below 13

C. Notwithstanding Class Counsel's Claim to the Contrary, There Was No Evidence That The Modification of the Proposed Transaction to Include a Tax Free Exchange for ESBA Participants Was a Result of the Settlement 14

D. Notwithstanding Respondents' Claims that Settlement Negotiations Resulted in Supplemental Disclosures, There is Evidence Suggesting That Many Were Required by the SEC 15

III. CLASS COUNSEL FAILDED TO PURSUE THE CLASS'S CLAIMS AGRESSIVELY 17

CONCLUSION 19

TABLE OF AUTHORITIES

Federal Cases

Page(s)

D'Amato v. Deutsche Bank
236 F.3d 78, 85(2nd Cir. 1974)....................9

Maywalt v. Parker & Parsley Petroleum Co.,
67 F.3d 1072 (2nd Cir. 1995)....................10, 12

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2nd Cir. 2005)....................10, 13

Weinberger v. Kendrick,
698 F.2d 61(2d Cir 1982) 10

New York State Cases

196 Owners Corp. v. Hampton Mgmt. Co.,
227 A.D.2d 296(1st Dep't 1996)....................11

67 Wall St. Co. v. Franklin Nat'l Bank,
37 N.Y.2d 245(1975)....................11

City of New York v. Maul,
14 N.Y.3d 500 (2010)....................6, 8

Friar v. Vanguard Holding Corp.,
78 A.D.2d 83(2d Dep't 1980)....................7

Pruitt v. Rockefeller Ctr. Props., Inc.,
167 A.D.2d 14(1st Dep't 1991) 7

Weinberg v. Hertz, Corp.,
116 A.D.2d 1(1st Dep't 1986)....................7

I. ALL OF THE CLASS MEMBERS WERE NOT SIMILARLY IMPACTED BY THE PROPOSED TRANSACTION AND THEREFORE IT WAS IMPROPER TO CERTIFY A CLASS CONSISTING OF ALL OWNERS OF INTERESTS IN ALL OF THE PROPERTIES INVOLVED IN THE PROPOSED TRANSACTION[1].

Counsel for Plaintiffs-Respondents, the named class representatives (hereinafter "Class Counsel"), state that the question on appeal regarding class certification is whether the lower court properly certified the class where "all the Class members would be similarly impacted by the proposed Transaction." Brief For Plaintiffs-Respondents, p.2 (hereinafter "Pl. Br. __"). The "Class" consists of the Participants (excluding the defendants and related individuals or business entities) in 26 separate entities that owned, or had interests as lessees in, the 20 properties that were to be consolidated into the Empire State Realty Trust (the "REIT"), a real estate investment trust. (R. 163.) *See also* final Prospectus/Consent Solicitation Statement, *http://www.sec.gov/Archives/edgar/data/1541401/ 000119312513018290/d283359d424b3.htm,* at *34-35.* Applying Class Counsel's framework, it could not be clearer that class certification was inappropriate, because all the Class members were not going to be similarly impacted by the Transaction.

[1] While the determination of whether a lawsuit should be certified as a class action ordinarily rests within the sound discretion of the trail court, the Appellate Division "is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the *nisi prius court*." *Maul v. Mattingly,* 14 N.Y. 3d 366, 372 (2010).

In fact, the only "impact" of the proposed Transaction that was "similar" for all Class Members was that each received a specific number of shares of the new REIT[2] in exchange for, and in proportion to, their interest in one or more of the entities that was transferring one of the 20 properties to the REIT[3]. Otherwise, the owners of the Empire State Building in particular, as well as the owners of three other properties, 60 E. 42nd Street, 250 West 57th Street and 501 Seventh Avenue (R.846, ¶ 22)[4], were impacted differently, due to infirmities in the valuations of their ownership interests; in the case of ESBA and 60 East 42nd Street, due to the threat to buy-out dissenters for $100; in the case of ESBA and 60 East 42nd Street, due to confiscation of a portion of their equity interests based upon alleged "override" rights of defendant-respondent Malkin Holdings, LLC ("Malkin Holdings"); and in the case of ESBA alone, because the proposed Transaction would not have been consummated absent inclusion of the Empire State Building.

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[2] Unaccredited investors instead received cash equal to the value of those shares.

[3] 18 of the properties were being transferred to the REIT concurrently with the IPO. The REIT had an option to acquire the other two, which it has exercised.

[4] The actual owners of those properties were Empire State Building Associates L.L.C.("ESBA"), 60 East 42nd Street Associates L.L.C. and 250 West 57th Street Associates L.L.C and Seventh and 37th Building Associates L.L.C. respectively, and the "owners" were the Participants, or investors, in each of those entities. The first three were commonly referred to as "the Public Entities, because they were registered with the SEC and subject to the Prospectus/Consent Solicitation. Seventh and 37th Building Associates, L.L.C. was a private company, as were the additional 22 entities (making for the total of 26), involved in the proposed Transaction.

Indeed, in granting class certification, the Court below referenced only one broad common question "the proprietary of the consolidation", but then also identified the claims that were unique to the Empire State Building and 60 E. 42nd Street:

> The commonality of the requirement has been met. There are common question, including the proprietary [*sic*] of the consolidation, whether there are appraisal rights, participants under the LLC, which I've written on already. Questioned [*sic*] as to the proper valuation of the transaction and the propriety of payments to the defendants for so-called override interests and many more which I'm not going to need to go through.

(R. 45-46.)

The argument of Appellant quite simply is that claims of ESBA in particular, (but also the owners of 60 E. 42nd Street, 250 West 57th Street and 501 Seventh Avenue) were distinct, and should have been pursued separately, rather than as part of a larger class which included members who not only had no interest in those distinct claims, but whose interests were in direct conflict with those of ESBA. Those other class members clearly stood to gain in the proposed Transaction, namely obtaining an ownership interest in the Empire State Building. ESBA owners may not have been so interested in giving up a portion of their equity in return for very different, and very less valuable properties.

The importance of the Empire State Building to the proposed transaction was evident, *ab initio*, in the original draft of the prospectus, dated February 13,

2012, which stated that the IPO was conditioned on inclusion of the Empire Statement Building in the transaction, but not on any other property. *See* *http://www.sec.gov/Archives/edgar/data/1541401/000119312512054391/d283359 ds4.htm,* at p. 4. The final Prospectus, issued to the Public Entity participants, stated likewise. *See* *http://www.sec.gov/Archives/edgar/data/1541401/000119312 513018290/d283359d424b3.htm, at p. 13*.

The first Class Action complaint, filed herein on March, 1, 2012 (the "Meyers Complaint"), further evidences that the harms alleged were unique only to ESBA Participants. The Meyers Complaint was brought only on behalf of the Participants in seven (7) entities, 60 East 42nd St. Associates L.L.C, 250 West 5th St. Associates L.L.C., Marlboro Building Associates, L.L.C., 1350 Broadway Associates L.L.C., 112 West 34th Street Associates L.L.C. and 1400 Broadway Associates L.L.C. (R.128, Compl. ¶ 1.) It alleged that the proposed Transaction was unfair to those Participants because:

> (1) it provides excessive and unfair "override" interests to the Malkin Defendants; (2) the "fifty/fifty" allocation of value between the Public LLCs (as the property owners) and the property manager entities is the result of an undisclosed and self-serving valuation process, performed by the Malkin Defendants, that does not accurately value the Public LLCs Participants' interests in the Proposed Transaction; and (3) it provides for an improper allocation of almost $16 million to the Supervisor and Management Companies, all of which are controlled by the Malkin Defendants.

(R.131-132, Compl. ¶ 9.)

The first alleged infirmity, related to the unfair "override," in fact applied only to Participants in ESBA and 60 East 42nd St. (Pl. Br. 26.) The second alleged infirmity, related to the improper "fifty/fifty" allocation of value, related only to the participants in the seven (7) identified entities. Only the third alleged infirmity, relating to allocation of a mere "$16 million" (out of a total of over $4 Billion) to "Supervisor and Management Companies," related to all the Class Members in the Class ultimately certified.

Finally, the Meyers Complaint also complained about the impropriety of the coercive buy-out provisions, involved with only five (5) of the entities, and thus covering only a small segment of the broad Class certified. (R.141-142, Compl. ¶¶ 49-51.)

That the claims, but for the one relating to the comparatively meager $16 Million allocated to supervisor and management companies, belonged only to a select group of the class members, was confirmed by Class Counsel's Damage Report, submitted in support of the proposed Settlement. (R. 838 – 866; *see in particular, ¶31,* R. 850.) In that report, Class Counsel's expert, James M. Vodola, reached his conclusion that the settlement was fair based almost entirely on analysis of possible damages flowing from misallocation of value between the owner and the lessee of the four properties subject to ground leases, *to wit*, the Empire State Building, 60 East 42nd Street, 250 West 57th Street and 501 Seventh

Avenue (R. 846, ¶22; R. 850-854, ¶¶32 – 37), which he estimated amounted to between $72 Million and $162 Million[5]; and from the over-allocation of $2.8 Million of value to the supervisor and management companies and therefore allocable among the entire Class as certified. (R. 856-858, ¶¶41-43 Mr. Vodola did not even include his estimate of the damages attributable to the override claims of ESBA Participants and 60 East 42nd Street Participants (R. 854-856, ¶¶38-40), because he *and* Class Counsel, had reached the legal conclusion that recovery on claims predicated on the overrides in general, and the overrides applicable to the Empire State Building and 60 East 42nd Street in particular, was "unlikely." (R. 856, ¶ 40.) Interestingly, no claims had been asserted that the overrides applicable to any of the properties other than the Empire State Building and 60 East 42nd Street were invalid.

Class Counsel and Defendants-Respondents (hereinafter "Defendants") inappropriately rely on several cases for the proposition that class certification was appropriate here, even though some class members have unique claims that were the basis for virtually all of the potential damages. *See Defendants' Brief,* pp. 25-26 (hereinafter "Def. Br. ___"); Pl. Br. 19-20. In *City of New York v. Maul,* 14 N.Y.3d 500, 512 (2010), the Court's holding that class certification was proper was

[5] In assessing these damages, neither Class Counsel nor their expert apparently even considered the validity of defendants' claim that the Empire State Building lease extended through 2076. Were it not, the lessee's value, as allocated by the expert, would have been even lower.

based on the fact that the lower court had "identified four common allegations that transcend and predominate over any individual matters." In *Weinberg v. Hertz, Corp.*, 116 A.D.2d 1, 6 (1st Dep't 1986), the Court stated that class certification was appropriate even where there are "*subsidiary* questions of law or fact not common to the class" (emphasis supplied). However, in contrast to that case, here the most important questions of law or fact were only common to an identifiable segment of the Class; the only common question here, related to the transfer of equity to the supervisor and management fees was the only "subsidiary" question. In *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 97 (2d Dep't 1980), the Court ruled that certification was appropriate because there was a common predominant issue, namely whether the defendant had wrongfully imposed upon sellers of real estate additional mortgage recording taxes despite legislation requiring the defendant to pay the taxes, notwithstanding that different members of the class suffered different amounts of damage. And, in *Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 22 (1st Dep't 1991), in affirming certification, the Court found that the "plaintiff's claims are identical to those of the other members of the class since he alleges, as would they, they he purchased the stock on the basis of a false and misleading prospectus." Here, there was simply no such common and predominate claim asserted, nor could one have been asserted by the Class Representatives on behalf of all Class members.

Nor does allocation of a large percentage of the settlement fund to the Participants in ESBA, 60 East 42nd Street Associates and 250 West 57th Street Associates (R. 864) address the problem, as Class Counsel argues. (Pl. Br. 17.) Rather, certification of Subclasses was appropriate and necessary, so that the investors in those entities could fully pursue their unique and predominate claims, without destroying the ability of the litigation to proceed as a class action. *See Maul, supra,* 14 N.Y.3d at 513-14; *Weinberg, supra,* 116 A.D.2d at 6. In fact, proposed intervenors and Appellant had argued that subclasses were necessary. (R. 297-653.)

Thus, questions unique to the Empire State Building, 60 East 42nd Street, 150 W. 57th Street and 501 Seventh Avenue predominated over any question common to all the properties to be consolidated in the proposed Transaction. Equally as important in connection with Class Certification, the interest of Class Members who owned properties other than the Empire State Building conflicted with the interests of the owners of the Empire State Building. The owners of interests in the other properties clearly stood to benefit from acquiring an interest in the Empire State Building under the terms proposed. In contrast, the owners of the Empire State Building were to have the value of their interests diluted when they acquired interests in the other buildings. Thus, the ESBA Participants had claims that the terms were uniquely unfair to them.

Class Counsel simply have no basis for their claim that the impact on all the Class members was similar.

II. THE COURT BELOW IMPROPERLY FOUND THAT THE SETTLEMENT WAS FAIR, REASONABLE AND ADEQUATE.

A. The Court Below Did Not Engage In An "Exhaustive" Review.

The Settlement, and the underlying claims, were not subjected to "exhaustive" review as claimed by Defendants (Def. Br. 1), and there was no basis for the Court below to be satisfied, let alone "completely satisfied," that the settlement here was the result of arm's length and intense negotiations, as claimed by Class Counsel (Pl. Br. 25).

Prior to the February 21, 2013 oral argument on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (R. 201-202), Class Counsel and Defendants' Counsel had not even appeared before the Court. No Consolidated Complaint had been filed as required by the Order of Consolidation entered on June 25, 2012. (R. 155-161.) The Court had not entertained, heard and decided any motions to dismiss. The Court had not entertained, heard and decided any discovery motions. Nor did any independent third party attest to the bona-fides of the negotiation process, as was the case in *D'Amato v. Deutsche Bank,* 236 F.3d 78, 85(2nd Cir. 1974).

Indeed, through its final approval of the Settlement, all the Court had before it in support of the Settlement substantively, were the sworn affirmations of Class

Counsel, Class Counsel's and Defendants' Counsel's Memoranda of Law, and the affidavit of a single expert. There was no affidavit from any defendant, and there no affidavit from any of the Class Representatives. Other than the affidavit of plaintiffs' expert, the "proof" that the Court below claimed it had reviewed (R. 29), and referred to by Class Counsel (Pl. Br. 30), was non-existent.

The court below did not have benefit of hard fought litigation between plaintiffs and defendants that would have provided it with complete knowledge of the parties' "strategies, positions and proof," as was the case in the cases relied upon by Defendants. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 102 (2nd Cir. 2005) ("Plaintiffs originally filed their complaint on October 26, 1996. The district court certified plaintiffs as a class in February 2000....Plaintiffs' discovery included 'a review of approximately five million pages of documents, almost 400 depositions, discovery from roughly 200 non parties, 54 expert reports, and 21 expert depositions.' On April 30, 2003, 'after complete and exhaustive discovery, summary judgment proceedings, and substantial mediation,' Visa and MasterCard each signed a memorandum of understanding setting forth a preliminary settlement agreement with plaintiffs..."); *Weinberger v. Kendrick,* 698 F.2d 61,66-68 (2d Cir 1982) (Bankruptcy proceeding prior to fling of class action and then four (4) years of discovery, including depositions); *Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072 (2nd Cir. 1995)(settlement after two

years of discovery and decision on Motion for Class Certification). In fact, the legal challenge of the proposed intervenors, to the validity of the $100 buy-out provision applicable in the case of ESBA and 60 East 42nd Street Participants, was the only legal issue fully considered by the Court below; yet that challenge was opposed by Class Counsel, who purportedly represented the very class members subject to the allegedly invalid provision.

In the same vein, based on the filings of Appellant and other Objectors (R. 297-653, 1125-1220; Supplemental Record 92-102 (hereinafter "S.R. __"), which included substantial documentary evidence, it should have been more than apparent to the Court below that Defendants would not have been entitled to Summary Judgment on many of the legal issues being raised by the objectors, and relevant only to ESBA, 60 East 42nd Street Associates L.L.C., 250 West 57th Street Associates L.L.C and Seventh and 37th Building Associates L.L.C., namely the override issue[6] and the allocation of value issue.

[6] As to the override issue, on appeal, Malkin Holdings conveniently ignores the description of the override in its letter to ESBA Participants dated September 13, 1991 (R. 434 – 437). Def. Br.. 28-29. The description of the override therein clearly conflicted with the definition of a "capital transaction" as contained in an additional 35 page "Statement" that accompanied the cover letter (R. 441- 475). Thus, at best for Malkin Holdings, there was an ambiguity as to the conditions upon which the override would apply. It is the settled law of New York that any ambiguity in a contract should be construed against the drafter. *See*, *e.g.*, *196 Owners Corp. v. Hampton Mgmt. Co*., 227 A.D.2d 296, 642 N.Y.S.2d 316, 317 (1st Dep't 1996) (*citing 67 Wall St. Co. v. Franklin Nat'l Bank*, 37 N.Y.2d 245, 249, 371 N.Y.S.2d 915, 918 (1975) ("[I]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language.").

The decision in *Maywalt, supra,* cited by Defendants (Def. Br. 24), is instructive in this regard. That case involved a challenge to a merger. In upholding that the settlement was fair, the Court found that a separate claim of particular class members should not impede the settlement where no evidence tending to establish either the merit or the value of that claim had been presented. "The mere proffer of the prospect of a claim that has neither been asserted nor substantiated nor evaluated by the proffering party should not impede the settlement of the class action." Obviously, here, the claims of the owners of Empire State Building, 60 E. 42nd Street, 250 West 57th Street and 501 Seventh Avenue were before the Court below.

Furthermore, the attempt by Class Counsel to take credit for the modification of the proposed Transaction to provide a tax-free exchange to ESBA participants, and for the addition of certain disclosures in the Prospectus, are indicative that the settlement was not the product of arms' length negotiations. Those issues are substantively addressed below.

B. The Settlement Was Not As Well Received as Suggested by the Court Below.

The Court below claimed the Settlement was well received by Class Members since "only Eleven (11) opted out, and only seventeen (17) objected."[7] (R. 26.) It is not that clear.

Besides Appellant and six proposed intervenors, an additional 134 ESBA Participants had objected to Preliminary Approval of the Settlement and preliminary certification of the proposed class consisting of Participants in all of the entities involved in the proposed Transaction. (S.R. 36, ¶6; S.R. 56-57.) It was not so easy for these same ESBA Participants to opt-out or object to final approval. The Class Notice sent to the ESBA Participants regarding the hearing on final approval, which was drafted by Defendants' counsel and Class Counsel, required opt-outs and objections be sent to the Court, with copies to all seven (7) counsel involved, not just lead counsel for Plaintiffs and one counsel for Defendants. (R. 183-184.) Though the procedure was modified for opt-outs such that they were then required only to notify the Court and Lead Plaintiffs' Counsel (R. 191), it was not similarly changed for objectors. Moreover, while service of the original Notice on all Class Members was certified (SR. 59), there is no evidence of which

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[7] While here there were 17 class members objecting out of a total of 4500, in *Wal-Mart Stores, supra,396 F.3d at 118,* there were 18 class members objecting out of a total of over 5 million.

Appellant is aware similarly certifying service of the Notice of Change in Opt Out Procedure on the members of the Class.

C. Notwithstanding Class Counsel's Claim to the Contrary, There Was No Evidence That The Modification of the Proposed Transaction to Include a Tax Free Exchange for ESBA Participants Was a Result of the Settlement.

There was no "evidence" upon which the Court below could find, as it did, that the Settlement provided a tax benefit of $100 Million to ESBA Participants. In fact, the only evidence upon which the Court could base that conclusion was an implication to that effect in paragraphs 20 and 32 of the Affirmation of Plaintiff's Lead Counsel. The latter simply stated:

> 32. As set forth above, Defendants amended the terms of the originally proposed form S-4 to provide a tax deferral benefit to certain Class members, Stipulation ¶ 1 (3), which Defendants acknowledge provides Participant a substantial benefit that is estimated to be over one hundred million dollars ($100,000, 000.00).

(R. 210, 214.) Notably, the language of paragraph 32 does not say that Defendants acknowledged that Class Counsel were responsible for the change. Nor have they ever.

The Stipulation of Settlement itself (R. 220 – 249), in the fifteenth "Whereas" clause, likewise simply states that during settlement and discovery discussions:

> Defendants' counsel advised Class Counsel that Defendants had taken several steps to address the concerns of Participants …as to how it might be possible to address investor concerns raised by Plaintiffs and

> others within the federal and state securities laws, and discussions with national securities exchanges regarding the potential listing of OP Units, which would allow for a tax deferred option for Participants in the Public LLCs comparable to that previously offered to Participants in the Private Entities, and that Defendants had changed the terms of the Consolidation to ameliorate the adverse tax consequences to the Participants in the Public LLCs by allowing all of them to elect to receive OP Units rather than Class A Common Stock, thereby permitting them to defer any tax that would otherwise be payable upon receipt of the Class A Common Stock.

(R. 224-225.)

Additionally, the letter sent to ESBA Participants in regard to the change, dated July 2, 2012, made absolutely no mention of the role of Class Counsel or the litigation. (R. 614-616.) Similarly, in their Brief on appeal, defendants say simply that the settlement was fair because of the $55 Million settlement fund, the deal protections and supplemental disclosures. They again simply reiterate that they had "acknowledged" the value of the tax benefit, but even now refrain from saying that the change was part of the Settlement. Def. Br. pp. 3-4, 11.

Finally, but most importantly, no affidavit was presented by defendants or their counsel specifically affirming that the tax benefit was the result of settlement negotiations or part of the settlement.

D. Notwithstanding Respondents' Claims that Settlement Negotiations Resulted in Supplemental Disclosures, There is Evidence Suggesting That Many Were Required by the SEC.

Class Counsel claims that "the extensive supplemental disclosures that preceded the Settlement were made after extensive negotiations and at Class

Counsel's request." Pl. Br., p. 39. However, it appears that the amended Registration Statements dated May 8, 2012, July 3, 2012 and August 13, 2012 were issued in response to comments of the SEC, as demonstrated by Malkin Holdings' responses to the SEC on those same dates. *See May 8, 2012 ESRT letter response to SEC comment letter dated March 14, 2012 (before two of the class action complaints was even filed) issued in conjunction with S-4 Amendment No. 1:* *http://www.sec.gov/Archives/edgar/data/1541401/000119312512216509/filename54.htm*; *July 3, 2012 ESRT letter response to SEC comment letter dated June 8, 2012 issued in conjunction with Amendment No. 2*: *http://www.sec.gov/Archives/edgar/data/ 1541401/000119312512293929/filename156.htm*; *August 13, 2012 ESRT letter response to SEC comment letter dated July 31, 2012 issued in connection with Amendment No. 3*: *http://www.sec.gov/Archives/edgar/data/1541401/000119312512351400/filename148.htm*.

The SEC letters had, together, contained 260 extensive comments and questions that resulted in nearly as many modifications to the prospectus. The modifications addressed, among many other things, SEC questions regarding the 50/50 valuation between the owner and lessee, the alleged right of Malkin Holdings to the overrides, and specifically those related to ESBA and 60 East 42nd St., what the participants would be receiving in the proposed Transacation, what the Malkin family and the Helmsley Estate would be receiving, and the

relationship between Malkin Holdings and the Helmsley estate, the very issues to which Class Counsel refer. One can assume that unexplained changes to the S-4 (i.e. not the result of SEC comments) would have opened Malkin Holdings to further SEC inquiries, something Malkin Holdings obviously wished to avoid so that the Prospectus was finally approved sooner, rather than later.

Further, the letters to investors which Class Counsel take credit for (Pl. Br. 38, all essentially indicated they were being sent as a result of inquiries from investors, or because of a disclosure required by the SEC, and did not mention Class Counsel or the litigation. See *http://www.sec.gov/Archives/edgar/date/1541401/ 00011931 2512 255356/d360981d425.htm* (Letter of May 13, 2012); *http://www.sec.gov/ Archives/ edgar/date/1541401/000119312512310470/d383170d425.htm* (Letter of July 23, 2012); *http://www.sec.gov/Archives/edgar/date/1541401/ 000119312512 340845/d390188d425.htm* (Letter of August 7, 2012).

III. CLASS COUNSEL FAILDED TO PURSUE THE CLASS'S CLAIMS AGRESSIVELY.

Finally, Class Counsel's formulation of the issue with respect to the award of attorneys' fees likewise contradicts their argument. They say the issue is whether they were entitled to the fee awarded when they "aggressively prosecuted the Class' claims for over a year and half." Perhaps the fee award would be justified, were that claim accurate. But it is not.

On March 1, 2013, the first of the five class action complaints involved in this matter was filed. (R. 223). Later that month, class counsel commenced "informal" discovery (R. 223) and "after initiation of the discovery process" began to engage in settlement discussions with defense counsel. Pls. Br. p.9. By September 28, 2012, Class Counsel covertly entered into the Settlement Agreement with counsel for Defendants (R. 220-249) only seven months after the filing of the first complaint.

As discussed above, Class Counsel failed to protect the unique interests and claims of the main stakeholders in the proposed Transaction, the owners of the Empire State Building, and they failed to achieve a reasonable in relation to those interests and claims. Defendants and Class Counsel seek to divert the Court's attention from those facts, by implying that the settlement was nevertheless fair to ESBA Participants because they received $8,350-$9,836 per $10,000 investment from the $55 million settlement fund, (Def. Br. 11), and will each now receive estimated dividends of $5,247 (annualized) per $10,000 Participation Interest, in comparison to $3,110 per $10,000 Participation Unit they had been receiving on average over the last five years prior to the transaction. Pl. Br. 16-17.

Malkin Holdings and Class Counsel totally miss the point. As urged by Appellant and others below, had the Empire State Building not been transferred to the REIT, or sold to a third party, ESBA Participants might soon be receiving

double or triple the projected dividends from the REIT, due to the projected increasing revenue stream indicated in the financial analysis of Malkin Holdings. (R. 1218-1220).

However, in fact, not hypothetically, each ESBA Participant ended up actually receiving REIT stock having a value of $223,674 or $247,416, plus the $8,350-$9,836 in cash for the settlement, rather stock having a value of $328,800 or $358,670, as promised by Malkin Holdings. This perhaps speaks most about the unreasonableness of Class Counsel's fee award of $2,475.56 per hour.

CONCLUSION

For the reasons set forth in this Reply Brief, and the reasons set forth in the Brief of Objector-Appellant Alan L. Kovacs, as Trustee of the Hilda Kovacs Family Trust of 2000, Appellant respectfully requests that the Orders by reversed.

Dated: Newton, Massachusetts
April 25, 2014

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CERTIFICATE OF COMPLIANCE

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