To be Argued by:
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New York County Clerk's Index No. 650607/12

New York Supreme Court

Appellate Division—First Department

IN RE EMPIRE STATE REALTY TRUST, INC.
INVESTOR LITIGATION

BRIEF FOR PLAINTIFFS-RESPONDENTS

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Plaintiffs-Respondents Leon Meyers, Laurence Reinlieb, Susan Bandler, Joseph Weiss, and Steven Keenholtz (collectively, "Plaintiffs-Respondents" or "Plaintiffs"), all Participants[1] in one or more of the Public LLCs and Private Entities and the certified class representatives in this action, hereby respond to the appeal of Objector-Appellant Alan L. Kovacs ("Appellant") of: (i) the Order of the Supreme Court, New York County, Hon. O. Peter Sherwood, J.S.C., dated May 17, 2013, and entered in the New York County Clerk's Office on May 17, 2013 approving the Settlement of this action (the "Settlement Approval Order"); (ii) the Final Order and Judgment dated May 17, 2013 and entered in the New York County Clerk's Office on May 17, 2013 (the "Final Order and Judgment"); and (iii) the Order dated May 17, 2013 and entered in the New York County Clerk's Office on May 17, 2013 awarding fees and expenses to Class Counsel (the "Fee Award Order"). In these Orders, Justice Sherwood properly approved the Settlement of this action, which provides for over $155 million in cash, securities, and tax benefits to the Class, as well as other relief. The lower court also awarded Class Counsel $11,599,629.13 in attorneys' fees and $265,282.00 in expenses, a fee award comprising only 7.5% of the $155 million monetary value of the Settlement.

[1] Unless otherwise noted, all capitalized terms not defined herein shall have the same meaning and/or definitions as set forth in the Stipulation of Settlement (the "Settlement"), filed in the court below on January 18, 2013, and also included in the Record on Appeal ("R.") at R. 220-53.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court properly certify a Class consisting of Participants in both the Public LLCs (including ESBA) and the Private Entities pursuant to CPLR §§ 901 *et seq.* when the Class representatives included ESBA Participants as well as Participants in both the Public LLCs and the Private Entities, and all the Class members would be similarly impacted by the proposed Transaction?

The lower court properly certified a class consisting of Participants in ESBA, as well as Participants in the other Public LLCs and Private Entities, because common questions of fact and law relating to the proposed Transaction predominated over any questions affecting only individual Class members. Moreover, the claims of the Class representatives, which include participants in ESBA, were typical of those of the other Class members, and the named Class representatives were adequate representatives of the Class. There was no conflict requiring separate representation of ESBA Participants.

2. Did the lower court correctly conclude that the Settlement, as set forth in the Stipulation of Settlement dated September 28, 2012, was fair, reasonable, adequate and in the best interests of the Class when the Settlement would provide Class members with a Settlement Fund of $55 million and tax benefits valued at approximately $100 million, in addition to other relief?

The lower court correctly approved the Settlement of this action after considering the objections of a handful of investors. The court concluded that the Settlement was in the best interests of the Class and conducted at arm's length by experienced, competent counsel. The lower court correctly concluded that the Settlement, which provides (i) a $55 million Settlement Fund; (ii) tax benefits valued at over $100 million; (iii) Participant protections in connection with the initial public offering (IPO); and (iv) supplemental disclosures, was "fair, reasonable, and adequate." The allocation to ESBA Participants of approximately 74.6% of the Settlement Fund is particularly fair and more than adequate.

3. Did the lower court properly award attorney's fees in an amount that represented only 7.5% of the $155 million in total cash/securities and tax benefits achieved by Class Counsel for the Class, when Class Counsel aggressively prosecuted the Class' claims for over a year and a half?

The lower court properly awarded attorney's fees in the amount of $11,599,629.13, and expenses in the amount of $265,282.00. This fee award represents only 7.5% of the $155 million in total cash/securities and tax benefits provided to the Class under the terms of the Settlement, and is highly reasonable given the benefits the Settlement will provide to the Class. The court repeatedly commended Class Counsel for the quality of the services they performed for the Class.

COUNTER-STATEMENT OF FACTS

A. Background of this Litigation

This consolidated action arises out of the Malkin Defendants-Respondents'[2] plan, first announced in a November 2011, to combine the Public LLCs (including ESBA) and the Private Entities into a real estate investment trust titled Empire State Realty Trust, Inc. (the "REIT") and then issue shares of the REIT on the New York Stock Exchange (collectively, the "Transaction"). Plaintiffs-Respondents and the other Class members are investors (also called Participants) owning interests ("Participation Interests") in one or more of the Public LLCs and/or the Private Entities.

On or about February 13, 2012, Defendants caused to be filed with the SEC a Form S-4 (the "S-4") including the preliminary Prospectus/Consent Solicitation Statement seeking the Public LLC Participants' consent to, among other things, the proposed Transaction. R. 222. The proposed Transaction was conditioned on an initial public offering of the REIT's shares to the public and the listing of the REIT's shares on the New York Stock Exchange. *Id.* As part of the Transaction, as originally proposed, each Participation Interest in the Public LLCs would be exchanged for shares of taxable Class A Common Stock of the REIT or a combination of cash and shares of Class A Common Stock of the REIT in a ratio to

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[2] The Malkin Defendants/Respondents consist of Defendants/Respondents Malkin Holdings LLC, Anthony E. Malkin, and Peter L. Malkin.

be determined. *Id.* Participants would not have the option of receiving similarly valued tax-deferred REIT Operating Partnership units ("OP Units") instead of common stock. *Id.* By contrast, Defendants-Respondents (who are also investors in the Public LLCs and Private Entities, although they are excluded from the Class), as well as most of the Private Entity Participants, had the option of receiving OP Units, which would enable them to defer taxation on the substantial gain resulting from the exchange between Participation Interests and OP Units. *Id.*

Under the terms of the Participation Agreements setting forth the rights and obligations of the Participants and the original partners of ESBA, 80% or more of the Participants must vote in favor of any major transaction (such as the proposed Transaction) in order for the transaction to go forward. R. 369. If that supermajority vote is obtained, the dissenting Participants are given the choice of changing their votes and receiving the exact same consideration as those in the supermajority, or being bought out for a predetermined amount.

The Plaintiffs-Respondents believed that the terms of the proposed Transaction, as set forth in the original S-4, were inequitable to the Participants and benefited the Defendants-Respondents at the expense of the Plaintiffs-Respondents. Thus, beginning on or about March 1, 2012, Plaintiffs-Respondents brought five class actions on behalf of Participants in the Public LLCs and the Private Entities, all in the Supreme Court of New York, County of New York:

Leon Meyers, et al. v. Empire State Realty Trust, Inc., et al., Index No. 650607/2012; *Laurence Reinlieb v. Empire State Realty Trust, Inc., et al.*, Index No. 650691/2012; *Susan Bandler v. Empire State Realty Trust, Inc., et al.*, Index No. 650754/2012; *Joseph Weiss v. Empire State Realty Trust, Inc., et al.*, Index No. 650798/2012; and *Steven Keenholtz, M.D. v. Anthony E. Malkin, et al.*, Index No. 650851/2012 (collectively referred to herein as the "Complaints"). R. 223.

These Complaints all alleged, *inter alia*, that the Defendants-Respondents had breached their fiduciary duties to the Plaintiffs-Respondents by pursuing and structuring the proposed Transaction in a way that did not fully compensate Participants for the value of their interests in the Public LLCs and Private Entities. R. 1004. Specifically, the Complaints alleged that Defendants-Respondents: (i) utilized an unfair, unclear, and one-sided process and valuation method to conduct the Transaction and determine the value of Participants' interest in the REIT (R. 143-46, Complaint ("Cmpl.") ¶¶ 57-71); (ii) allocated excessive "override" interests to themselves (R. 147-48, Cmpl. ¶¶ 72-78); and (iii) allocated to themselves an excessive $16 million for their asset management entities (R. 148-49, Cmpl. ¶¶ 79-84). Defendants-Respondents categorically denied Plaintiffs' claims. R. 223.

On June 25, 2012, the Complaints were consolidated by Justice O. Peter Sherwood, with the caption *In re Empire State Realty Trust, Inc. Investor*

Litigation, under Index No. 650607/2012. R. 223. Justice Sherwood also appointed Wolf Haldenstein Adler Freeman & Herz LLP ("Wolf Haldenstein"), Labaton Sucharow LLP ("Labaton"), Chimicles & Tikellis LLP ("Chimicles"), and Pomerantz LLP ("Pomerantz") as Class Counsel. R. 160.

B. The Discovery and Negotiation Process

Beginning in March 2012, the parties engaged in an extensive informal discovery process. R. 223-24. Plaintiffs-Respondents requested, and Defendants-Respondents produced, tens of thousands of pages of documents, including:

- Operating agreements, partnership agreements, participation agreements, lease agreements, management agreements, subleases, assignments, prospectuses, and other foundational documents relating to each of the public and private entities, as well as amendments and modifications thereto;

- Complete financial and operating statements for each of the public and private entities;

- Valuation analyses provided by Duff & Phelps ("D&P") the independent valuation expert retained to provide the valuation upon which the allocation of Transaction proceeds would be based;

- Consents to increases in supervisory fees and "override" fees;

- Documents, including letters from Peter Malkin, regarding the conversion of the partnerships to limited liability companies;

- Private placement memoranda; and

- Documents relating to title insurance for the various properties.

R. 1005-06.

Class Counsel, in conjunction with experts retained by them, including a forensic accountant, James Vodola, and a real estate valuation consultant, reviewed every document produced by Defendants-Respondents, searching for information about the appraisal process and methodology, the background of the Transaction, and any other pertinent information. R. 1005. To the extent that Defendants-Respondents' initial production of documents did not fully satisfy all of Class Counsel's requests, Class Counsel described those deficiencies to Defendants and Defendants produced additional documents in response to those requests. In total, Defendants made at least seven separate productions of documents to Class Counsel between April 2012 and June 2012. *Id.*

Furthermore, Class Counsel, often along with Mr. Vodola, met with Defendants-Respondents' counsel regularly during this time frame, asking for clarification and further information regarding the documents produced. Defendants-Respondents' counsel provided this information. *Id.* Defendants-Respondents made several principals and fact witnesses available for interviews with Class Counsel. R. 1006.

In sum, in connection with this extensive discovery process, Class Counsel conducted the following:

- A review of Defendants' filings with the SEC and documents produced by Defendants relating to the proposed Transaction and REIT;

- A review and analysis of the appraisals and exchange values of the properties that would be rolled into the REIT, and the interests of the Participants in the Public LLCs and the Private Entities;

- Interviews with Anthony Malkin (President of Malkin Holdings LLC, and the proposed Chairman, Chief Executive Officer and President of the REIT) and John Hogg (Senior VP of Finance of Malkin Properties and the proposed Senior VP of Finance of the REIT);

- Along with their forensic consultants, examinations of the valuations and analyses performed by Duff & Phelps in arriving at the operative valuations and exchange ratios;

- Interviews with representatives of the investment bankers and underwriters engaged in the proposed Transaction and IPO, including Stephen Pierce, Global Head of Equity Capital Markets at Goldman, Sachs & Co.;

- Interview with counsel for the executors of the Estate of Leona M. Helmsley outside the presence of counsel for the Malkin Defendants;

- Interviews with representatives of Clifford Chance LLP, counsel for the REIT; and

- Extensive conferences with their own experts and consultants.

R. 1006.

After the initiation of the discovery process, the parties began to engage in arm's-length settlement negotiations which took place over the course of several months. R. 224-25. Class Counsel met with Defendants-Respondents' counsel multiple times, engaged in numerous phone calls, and exchanged position papers throughout the settlement process to discuss the effect of the Transaction on the

Participants. *Id.* Counsel for the parties discussed numerous issues raised by the Transaction and the Complaints, including ways to improve the proposed Transaction for the Participants in the Public LLCs and the Private Entities, the potential to avoid the adverse tax consequences to the Participants in the Public LLCs; and supplementation of and improving upon the disclosures contained in the S-4 and Preliminary Consent Solicitation Statement. *Id.*

Finally, after the review and production of tens of thousands of pages of documents, ongoing consultation with valuation and real estate experts, and months of hard-fought negotiation and drafting, the parties entered into the Stipulation of Settlement on September 28, 2012. R. 220-49.[3]

C. **The Terms and Benefits of the Settlement**

The Settlement consists of four primary components, all of which provide substantial benefits to the Class Members.

[3] Appellant makes much of the fact that the parties did not hold a formal preliminary conference while simultaneously conducting extensive informal discovery and negotiating the Settlement. Appellant's Brief ("App. Br.") at 15-16. However, as Appellant acknowledges (App. Br. at 16 n.7), the lower court ultimately has the ability to manage its own docket, and informal discovery is viewed favorably by courts insofar as it can lead to a swift and equitable resolution of an action. Given the time-sensitive nature of the proposed Transaction and thus the pressure on Defendants-Respondents to resolve the actions, Class Counsel knew that they had to begin discovery immediately in order to achieve the most favorable resolution possible. R. 1312 (Transcript of Feb. 21, 2013 Hearing at 39:4-39:25). As set forth in detail below, the lower court was pleased with both the Settlement and negotiation process, and did not require the parties to participate in a preliminary conference or adhere to a formal discovery timeline; or engage in unnecessary litigation. R. 30.

The first component is the establishment of the Settlement Fund, funded by Defendants, in the amount of $55,000,000.00 in cash and OP Units and/or Class A common stock. The cash component will constitute at least 80% of the Fund, and the contents of the Fund will be distributed (net of fees and expenses as awarded by Justice Sherwood) to the members of the Class in accordance with the Plan of Allocation. The Plan of Allocation, which was provided to Class Members along with the Notice of Settlement, informed each Class member of his or her estimated net recovery per unit of investment. R. 232-33.

The second component is a tax deferral benefit permitting Participants in the Public LLCs to have the choice of receiving OP Units, in order to defer taxation indefinitely, rather than being forced to receive taxable Class A common stock. R. 233-34. The S-4 issued by Defendants-Respondents in February 2012 initially provided that, while Defendants-Respondents and Participants in the Private Entities would have the option of receiving tax-deferred OP Units instead of taxable Class A common stock, the Class member Participants in the Public LLCs would only be eligible to receive taxable Class A common stock. R. 222. This arrangement would result in substantial negative consequences to non-Defendant Participants in the Public LLCs. Thus, the Settlement provides that all Participants in the Public LLCs will have the option of receiving tax-deferred OP Units. R. 233-34. Defendants-Respondents estimated the value of this tax benefit to be

approximately $100 million. R. 233. This valuation estimate was confirmed by Plaintiffs-Respondents' expert, Mr. Vodola. R. 849.

The third component of the Settlement consists of Participant protections concerning the IPO underwriting and changes in exchange value. Namely, Defendant-Respondents agreed that (i) the IPO would be on the basis of a firm commitment underwriting; (ii) if, during the consent solicitation period, any of the three Public LLCs' percentage of total exchange value is lower than what is presented in the final Form S-4 by a factor of ten percent or more, the Defendant-Respondents will promptly inform the Participants of the decrease in value and permit them to change their vote; and (iii) if the total gross cash proceeds committed in the IPO was less than $600 million, the Defendants-Respondents would not proceed with the IPO without further approval from the Participants. R. 234.

Finally, the Settlement provides that Defendant-Respondents would amend the S-4 to reflect extensive additional disclosures, all of which were made prior to the Participants' voting period. R. 234-35. These supplemental disclosures regarded, among other things:

- the property appraisals, fairness opinions, valuation methodologies, including the 50/50 joint venture allocation, and discounted cash flow methodologies, and the derivation of exchange values used in connection with the proposed Transaction;

- the Malkin family's interests, including ownership interests in the Public and Private LLCs, override interests and interests in management and construction companies, and the valuation of those interests;

- the conflicts of interest between the members of the Class and Defendants;

- the Helmsley Estate's impetus to sell its interests and the risks associated with sale alternatives to the proposed Transaction;

- the exchange value allocated to Defendants;

- the definition and explanation of enterprise value;

- the payment to the Class of excess cash held by the Public LLCs and additional distributions accrued prior to the closing and Transaction;

- the transaction expenses of the Transaction and their potential reimbursement;

- the estimated distributions by the REIT as compared to historical distributions to Participants;

- the proposed centralized management structure and makeup of the REIT; and

- the assets being contributed to the REIT and improvements made thereon.

Id.

In addition, the Settlement provided for a mutual release of claims and the payment of attorneys' fees and reimbursement of expenses to Plaintiffs' Counsel. R. 235-36.

D. The Settlement is Approved by the Court and Overwhelmingly Supported by the Class Members

On February 21, 2013, Justice O. Peter Sherwood of the New York Supreme Court preliminarily approved the proposed Settlement, preliminarily certified the Class, and ordered that the Notice be distributed to Class Members. Supplemental Record on Appeal ("S.R.") 2-7. On March 1, 2013, Defendants-Respondents informed Class Counsel that they had mailed Notice of the Settlement to all of the Class members. S.R. 59. The Notice informed Class members that if they chose to opt-out or object to the Settlement, they must do so by April 18, 2013. R. 165. Remarkably, of the approximately 4,500 Class members, only 17 members objected to the Settlement and only 12 requested to be excluded from the Class, meaning that approximately 99.4% of the Class members supported the Settlement.

On May 17, 2013, Justice Sherwood issued three Orders approving the Settlement: the Settlement Approval Order (R. 25-30), the Fee Award (R. 98-104), and the Final Order and Judgment (R. 12-21).

At the May 2, 2013 hearing on the motion for final approval of the Settlement, Justice Sherwood described the history of the litigation before setting forth his reasons for approving the Settlement:

> There has been extensive discovery conducted in this litigation. There has been many thousands of documents reviewed. There has been many conversations and interviews conducted. The plaintiffs hired experts in forensic accounting and in real estate appraisal, the kinds of

> skills necessary to evaluate whether or not this is a fair transaction or not.
>
> …
>
> [W]hile the plaintiffs and their lawyers are very, very good, so are the defendants and their lawyers, and so you would have had a good dog fight on your hands, and the outcome was far from [being] foreordained.
>
> …
>
> [T]he settlement provides for a settlement fund of $55 million which represents a recovery of somewhere between 28 and 70 percent of the monetary value estimated by the plaintiffs.
>
> …
>
> *I am completely satisfied that this settlement is the result of arm's length and intense negotiation between parties who had very different perspectives and very different interests with the plaintiffs' interests being fully aligned with all the members of the class and the defendants' interests being associated with that of the proponents of the consolidation.*

R. 88-93 (Transcript of May 2, 2013 Hearing ("May 2 Tr.") at 58:13-63:8 (emphasis added)). Justice Sherwood further noted in his May 17 Settlement Order that the Settlement "fairly reflects the strengths and risks associated with" the Class claim, and concluded that the "terms of the proposed settlement are fair, reasonable, adequate and in the best interest of the class." R. 30. The trial court likewise approved Class Counsel's request for an award of fees and expenses; after fully analyzing the applicable law and facts, he awarded approximately $3.4 million less than the amount requested. R. 103-04. Justice Sherwood was careful to note that "[t]he motion to approve the settlement does not call on the court or members of the class to approve the underlying Consolidation transaction." R. 27.

On May 31, 2013, Defendants-Respondents announced that over 80% of the Participants had voted in favor of the Transaction, and thus the Transaction had been approved. *See* Empire State Realty Trust, Inc., Form 425 (May 31, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1541401/00011931251324 2290/d546804d425.htm. On October 2, 2013, shares of Empire State Realty Trust, Inc. began trading on the New York Stock Exchange. However, under the terms of the Stipulation, no disbursements of the Settlement Fund may be effected until all appeals have been resolved, and thus, Participants have yet to receive their allocated disbursements from the Settlement Fund.

Each Participant received 16,543 shares in ERST for each $10,000 Participant Interest in ESBA. In the fourth quarter of 2013, the Empire State Realty Trust, Inc. issued dividends to investors in the amount of $0.0795 per share. *See* Empire State Realty Trust, Inc., Form 10-K for the Year Ending Dec. 31, 2013 (March 24, 2014) (the "2013 10-K"), *available at* https://www.sec.gov/Archives/ edgar/data/1541401/000144530514001129/esrt12-31x1310xk.htm. Annualized, this dividend is valued at $0.318 per share, per year. Thus, each former ESBA Participants is receiving dividends of $5,247 (annualized) per $10,000 Participation Interest. By contrast, according the July 3, 2012 S-4 Registration Statement, *available at* https://www.sec.gov/Archives/edgar/data/1541401/ 000119312512293929/d283359ds4a.htm, the average five year distribution to

Participants prior to the Transaction was only $3,110 per $10,000 Participation Interest.

ARGUMENT

I. THE COURT PROPERLY CERTIFIED THE SETTLEMENT CLASS, AND THE NAMED PLAINTIFFS AND THEIR COUNSEL ADEQUATELY REPRESENTED THE CLASS

Justice Sherwood correctly found that this litigation satisfied all of the requisite elements for class action treatment. *See* Section II(A), *infra.* Appellant's *ex post facto* attacks on the adequacy of the representation of the Class are based on his dissatisfaction with the terms of the Settlement rather than any legally relevant factor. Plaintiffs' interests were typical, if not identical, to those of the Class, particularly the ESBA holders whose interests Appellant purports to champion.[4] Indeed, all the Named Plaintiffs owned interests in ESBA. Indicative of their vigorous pursuit of claims for such stakeholders, 74.6% of the Settlement Fund (which, in light of Justice Sherwoods's Fee and Expense Order, amounts to approximately $43 million) has been allocated to ESBA holders, consistent with the greater value of those claims.

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[4] Leon Meyers is a Participant in 60 East 42nd St. Associates L.L.C. Leon M. Meyers, Trustee under the will of Ben Meyers dated 1/24/92, is a Participant in ESBA and a Participant in 60 East 42nd St. Associates LLC. Leon M. Meyers, Trustee under the Trust dated 7/30/81 f/b/o Abraham M. Sacharow, Elvira D. Sacharow, Eli M. Sacharow and Roni C. Sacharow, is a Participant in Marlboro Building Associates L.L.C. R. 132. Steven Keenholtz, M.D. is a holder of a Participation Unit of ESBA. R. 707. Joseph Weiss is a Participant in ESBA. R. 735. Susan Bandler is a Participant in ESBA R. 767. Laurence Reinlieb is a Participant in 60 East 42nd St. Associates L.L.C. and ESBA. R. 798.

Moreover, the adequacy of Named Plaintiffs' representation has been ratified by the Class itself. As the trial court observed, "over ninety percent (90%) of the members of the class support the proposed settlement. Of the approximately 4,500 class members [approximately 2,800 of which are ESBA participants], only eleven (11) opted out and seventeen (17) objected." R. 26.[5] More precisely, based on these numbers, approximately 99.4% of the Class members supported the Settlement.

Nor can Appellant credibly attack the experience and *bona fides* of Class Counsel, which are four of the leading plaintiff securities litigation firms in the country, with considerable experience in REIT transactions such as this. R. 881-930; 935-65; 970-98; 1023-68. In contrast, Appellant, the lone objector pursuing this appeal, is a *pro se* litigant who is a solo practitioner focusing on antitrust litigation.

In certifying the class and approving the settlement, Justice Sherwood acknowledged that the Named Plaintiffs and their counsel fulfilled the criteria for

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[5] The Settlement as proposed could not have been consummated unless and until a supermajority of the Participants in each of the Public LLCs have approved the Transaction as proposed, based on the already-enhanced consent solicitations, and with knowledge of the litigation and the proposed Settlement. Under New York law, such strong support for both the proposed Settlement and the proposed Transaction supported the approval of the Settlement. *See, e.g., Hibbs v. Marvel Enters*., 19 A.D.3d 232, 233, 797 N.Y.S.2d 463, 464 (1st Dep't 2005); *Fiala v. Metro. Life Ins. Co.*, 27 Misc. 3d 599, 608, 899 N.Y.S.2d 531, 539 (Sup. Ct. N.Y. Co. 2010) (approving settlement when small fraction of class members objected or opted out); *Michel*s *v. Phoenix Home Life Mut. Ins. Co.*, Index No. 5318-95, 1997 N.Y. Misc. LEXIS 171, at *84-85 (Sup. Ct. Albany Co. Jan. 3, 1997) (same).

CPLR § 901(a)(3) and (4): "Pursuant to NY CPLR § 901, *et seq.*: (a) the Court specifically finds that, in accordance with NY CPLR § 901:…(iii) the claims of the Plaintiffs are typical of the claims of the Class; and (iv) 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…." R. 13-14.

Case law supports these findings. Specifically, Plaintiffs' claims satisfy the "typicality" requirement of CPLR 901(a)(3) because they "derive[] from the same practice or course of conduct that gave rise to the remaining claims of other class members and [are] based upon the same legal theory." *In re Coordinated Title Ins. Cases*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 919 (Sup. Ct. Nassau Co. 2004) (quoting *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 99, 434 N.Y.S.2d 698, 708 (2d Dept' 1980)). In order to satisfy CPLR 901(a)(3), Plaintiffs' claims and those of all other Class members need only be substantially similar, not identical in every respect. *See Michels*, 1997 N.Y. Misc. LEXIS 171, at *30; *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7, 499 N.Y.S.2d 693, 697 (1st Dep't 1986). In this case, Plaintiffs' claims are based on the same legal theories and involve the same set of facts as those of all other Class members. Plaintiffs brought this Action alleging, *inter alia*, that the Defendants-Respondents breached their fiduciary duties because the proposed Transaction was the result of an inadequate process, because certain disclosures contained in the preliminary S-4 were misleading or otherwise

inadequate, and because Defendants failed to adequately consider possible alternatives to the Transaction. Defendants owed the same fiduciary duties to the Plaintiffs as they do to all other Class members. Thus, Plaintiffs' claims are typical of their fellow Class members.

Complete identity of interests is not required as long as Named Plaintiffs have a sufficient interest in the outcome of the litigation and the interests do not conflict with the interests of the class, they can represent the class. *See, e.g., Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 24, 574 N.Y.S.2d 672, 678 (1st Dep't 1991); *Michels*, 1997 N.Y. Misc. LEXIS 171, at *33. Here, the representative Plaintiffs in the Action allege that Defendants breached their fiduciary duties, and thus Plaintiffs have a stake in the outcome of the litigation such that vindicating their own claims advances the interests of the Class as a whole.

The cases to which Appellant cites do not support his argument. Appellant cites *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 53, 698 N.Y.S.2d 615, 618-19 (1999), for the typicality standard on class certification. Factually, *Small* is wholly inapposite. *Small* sought to certify a consumer class action of New York residents who, after June 19, 1980, became or continued to be nicotine-dependent as a result of smoking cigarettes manufactured by the defendants. Typicality was not satisfied because the named plaintiffs' individual claims failed to establish the

elements of reliance and causation. The dangers of smoking were publicly available and foreclosed a presumption of reliance, hence individualized inquiry into whether each class members' awareness of that information was required. *Id*. at 54. In contrast, here there is no issue of individualized reliance (or indeed, any individual issues of fact or law).[6]

With respect to adequacy, as noted in *Michels*, 1997 N.Y. Misc. LEXIS 171, at *31 (citing *Pruitt*, 167 A.D.2d at 24, 574 N.Y.S.2d at 678):

> CPLR § 901(a)(4) [mandates] that the representative parties will fairly and adequately protect the interest[s] of the class [and] has three primary components: (i) the qualifications of counsel, (ii) the ability of the class representatives to assist their counsel, and (iii) the relationship between the interests of the class representatives and the interests of other class members.

The representatives in this case have retained experienced counsel and have maintained an interest in prosecuting the Action, and have had regular conversations with counsel regarding the status of the litigation and the Settlement. R. 1009; *see Michels*, 1997 N.Y. Misc. LEXIS 171, at *32. Accordingly, Plaintiffs were able to assist their attorneys in the prosecution of the Action. *See id*. at *33.

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[6] Appellant similarly cites to *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994), for the legal principle that the typicality inquiry assesses whether the named plaintiffs' incentives align with those of absent class members. However, in *Neal* the Third Circuit actually *reversed* the lower court's refusal to certify the class and reaffirmed that "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Id.* at 58.

Competent and zealous counsel representing the class strongly supports a finding of adequate representation. *See Pruitt*, 167 A.D.2d at 24, 574 N.Y.S.2d at 678.

Class Counsel has successfully prosecuted scores of class actions and other complex actions on behalf of injured investors across the country. Based upon Class Counsel's extensive experience and expertise in litigating numerous cases similar to these Actions, there can be no legitimate dispute regarding Plaintiffs' Counsel's ability to prosecute this Action.

Appellant's adequacy challenges essentially state that since Appellant is not satisfied with the results of the Settlement, Plaintiffs-Respondents' representation of the Class was inadequate. *See* App. Br. at 19-23. However, such a retrospective view is irrelevant to CPLR Article 9. Appellant is especially displeased with the valuation of the "override" claims under the Settlement. The Court considered these override claims, and determined that they had limited, if any value:

> Class Counsel thoroughly investigated the claim and concluded that there was a "substantial risk" that on a motion for summary judgment the court would find, based on the documentary evidence, that the Malkin Defendants are entitled to payment of the overrides. In light of that risk, Class Counsel discounted the override claims.

R. 29. The lower court correctly found that "Class Counsel's decision to discount the value of this claim [was] reasonable." *Id.*

In short, Class Counsel considered, analyzed, and made judgments on each of the arguments raised by Appellant. He alone does not like Class Counsel's judgment. Appellant's personal displeasure, however, is a red herring, and not a legal basis to decertify the class.

II. THE LOWER COURT CORRECTLY APPROVED THE SETTLEMENT AS FAIR, REASONABLE, AND ADEQUATE

A. Standard of Review of Approval of Class Action Settlement

Justice Sherwood correctly concluded that the Settlement of this action was "fair, adequate, and reasonable" and granted final approval of the Settlement. R. 30. These findings were well within Justice Sherwood's discretion and therefore should not be disturbed by this Court.

CPLR 908 provides that "[a] class action shall not be dismissed, discontinued or compromised without the approval of the Court." New York courts focus on whether the settlement is "fair, adequate, reasonable, and in the best interest of the class members." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73, 808 N.Y.S.2d 766, 774 (2d Dep't 2006); *see Rosenfeld v. Bear Stearns & Co., Inc.*, 237 A.D.2d 199, 199, 655 N.Y.S.2d 473 (1st Dep't 1997). New York has a well-established public policy favoring settlements, particularly in the context of complex class action litigations such as this one. *Hallock v. State of N. Y.*, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, 512 (1984).

In determining whether this class action settlement is "fair, reasonable, and adequate," Justice Sherwood considered the following factors: (1) the likelihood that the plaintiffs will succeed on the merits of their claim; (2) the extent to which the parties support the proposed settlement; (3) the judgment of counsel; (4) whether the parties bargained for the settlement in good faith; and (5) the complexity and nature of the issues of law and fact. *See In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160, 533 N.Y.S.2d 138, 141 (1st Dep't 1990); R. 26-94. Justice Sherwood determined that all of these factors weigh in favor of approval of this settlement. R. 26-94. Moreover, the lower court noted that "over 90%" of the Class members supported the Settlement,[7] and of approximately 4,500 class members, only eleven opted out and only seventeen objected. R. 26. Such strong support for the Settlement strongly weighs in favor of approval of the Settlement. *See, e.g.*, *Hibbs,* 19 A.D.3d at 233, 797 N.Y.S.2d at 464.

The lower court's decision to approve the Settlement of this action is reviewed for abuse of discretion. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001), quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).[8] Appellant here fails to meet this high standard of review. In *D'Amato*, the Second Circuit upheld the district court's decision to approve a class action

[7] Actually, over 99% of the Class members supported the Settlement.

[8] New York State courts look to their federal counterparts for guidance on evaluating class actions. *In re Colt Indus. S'holder Litig.*, 77 N.Y.2d 185, 194, 565 N.Y.S.2d 755, 760 (1991).

settlement negotiated prior to class certification after determining that both the negotiation process and the settlement were fair and reasonable. *D'Amato*, 236 F.3d at 85. Like Justice Sherwood here, the district court in *D'Amato* concluded that the "settlement was the product of arms-length negotiations conducted by experienced counsel, knowledgeable in complex class actions" and thus the Second Circuit concluded that the district court did no approve its discretion in approving the settlement. *Id.* at 86; *compare with* R. 93 (May 2 Tr. at 63:2-4 ("I am completely satisfied that this settlement is the result of arm's length and intense negotiation between [the] parties.")).[9]

The lower court carefully considered the Settlement and the negotiation process in this action, and rightfully concluded that this Settlement, worth over $155 million in cash, securities, and tax benefits was "fair, reasonable and adequate." R. 30. Appellant fails to demonstrate that the lower court's approval of the Settlement constitutes an abuse of discretion.

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[9] Appellant relies extensively on *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108 (S.D.N.Y. 1999) to support his argument that the lower court erred in approving the settlement, but the settlement at issue in *Polar Int'l* was strikingly different from the Settlement in this case. In *Polar Int'l*, the court refused to approve a settlement that provided *no* monetary relief to the class, concluding that the proposed settlement was "virtually worthless." *Id.* at 114. In stark contrast, the Settlement approved by Justice Sherwood in this case consists of a $55 million settlement fund to be distributed to the Class, as well as tax benefits valued at over $100 million.

B. Objector-Appellant Fails to Demonstrate Any Error by the Lower Court in its Approval of the Settlement With Respect to the Overrides Claim

Appellant cannot establish that the lower court's approval of the Settlement – a Settlement that specifically addressed the Overrides[10] claim – was made in error. App. Br. at 26-30. Appellant's objection boils down to the baseless speculation that Appellant could have done a better job than Class Counsel. The record is clear and undisputed that the lower court – upon the briefs and affidavits submitted by all sides – had a reasoned basis to conclude that the Settlement, and specifically Plaintiffs' resolution of the Override claim, was fair, adequate and reasonable. R. 30; *see Fiala*, 27 Misc. 3d at 606, 899 N.Y.S.2d at 537 (approval of a class action settlement is based on the Court's consideration of the settlement's fairness, adequacy and reasonableness).

First, Appellant attempts to create a misimpression about the nature of the Override by referring to it as a "'so-called' voluntary override." App. Br. at 26. To be clear, the Overrides were explicitly agreed-to by the Participants, and only ESBA and 60 East 42nd Street Participants who agreed to the Overrides were subject to such Overrides in the Transaction. Those who did not agree did not

[10] The "Overrides" refers to additional compensation for the Malkin Defendants for their management of the subject properties based on certain performance criteria, payable in the event of a capital transaction. R. 435 (Letter from Peter L. Malkin to Participants, dated Sept. 13, 1991); 1184-85 (Letter from Lawrence L. Wein to Participants, dated Feb. 26, 1968). The Complaints originally alleged that the Overrides should not be paid in connection with this Transaction. *See, e.g.*, R. 147-48 (Cmpl. ¶¶ 72-78).

have their Transaction consideration reduced by any Overrides paid to the Malkin Defendants-Respondents. R. 186-90 (Plan of Allocation).

Second, Appellant purports to have calculated and identified several undefined and facially speculative "losses" stemming from the voluntary Overrides. App. Br. at 26-27. Appellant, however, offers no independent support or calculation for such losses, and does not explain how any such losses equate to legally compensable damages. In any event, Appellant's (at best) back-of-the-envelope assertion of speculative losses ignores the fact that the Participants consented to the Overrides, the fact that the Plaintiffs and Settlement specifically compensate for the Override claim and that Plaintiffs thoroughly considered and addressed the risk of continued prosecution of the Override claim, in the Settlement of such claim (discussed *infra*), including the points raised by the Appellant. R. 854-56 (Affidavit of James M. Vodola ("PASCORP Aff.") ¶¶ 38-40); R. 90-91 (May 2 Tr. at 60:24-61:15).

Third, Appellant's analysis about the Override claim is wrong in many respects. App. Br. at 28-30. The record reflects that the lower court had before it Appellant's argument (App. Br. at 27-28) about the "principle of *expression unius est exclusive alterius*," or, in other words, "the omission of an item from a list may imply its exclusion." *See, e.g.,* S.R. 97 (Objection of Alice P. Henkin). Pointing to another provision of the original ESBA partnership agreement which mentioned

the word "REIT," Appellant claims that because the Transaction results in the formation of a REIT but the word "REIT" was not used in the override provision, the override provision cannot be triggered. App. Br. at 28. Moreover, Appellant also relies on the views expressed by another ESBA Participant, Robert A. Machleder, who, prior to the Transaction and Settlement, provided his thoughts on the voluntary overrides to the Malkin Defendants, as well as to the Securities & Exchange Commission ("SEC"); the Malkin Defendants publicly responded to Mr. Machleder's thoughts. App. Br. at 30 (citing to Letter from Mr. Machleder); *see* R. 1148-56, 1161, 1162-67, 1180-83, 1186-88 (Mr. Machleder's correspondence); and R. 1157-60, 1168-69 (Malkins Defendants' responses to Mr. Machleder's correspondence).

The record reflects that Plaintiffs reviewed numerous documents and conducted interviews that revealed, among other things, that Participants were obligated to pay the Overrides out of the proceeds from a "capital event" or a "capital transaction," and from distributions after the participants received a priority return on their cash investment. R. 1005-06. A purpose of the Overrides, Plaintiffs determined, was to give Malkins an incentive to manage the buildings in a way that would maximize capital proceeds and thus align the interests of Malkin with Participants. R. 855 (PASCORP Aff. ¶ 39). It was revealed that the various contracts which govern the payment of the Overrides refer to the payment of the

Overrides out of the proceeds from a "capital event" or a "capital transaction," and from distributions after Participants have received a priority return on their cash investment. *Id*. Thus, Plaintiffs assessed whether the Transaction represented a capital event or qualifying transaction, considered that the Transaction involved the transfer of each entities' assets to a new entity, and pored over the definition of "Capital Transaction." Pursuant to the ESBA Participation Agreement, a "Capital Transaction" is described as one of the following:

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

Id. Plaintiffs concluded that the Transaction and IPO could qualify under (ii) or (iv), and as a distribution or payment of amounts after satisfying the priority return. *Id.* None of the Appellants' arguments refute the fact that the work performed by Plaintiffs and Class Counsel, and the ultimate resolution of the Override claim for a discounted payment of monetary consideration as part of the Settlement, were adequate and reasonable.

The lower court recognized that in the litigation and as part of the Settlement, Class Counsel had specifically considered and addressed the Overrides

claim; and, that Class Counsel had assessed the substantial risk that on a motion for summary judgment the court would conclude, based on the documentary evidence (including that relied on by Appellant) that the Defendants were entitled to payment of the Overrides in connection with the Transaction. R. 29. The lower court specifically noted the "proof" that existed in support of such conclusion. *Id.* Accordingly, the Settlement is reasonable, fair and adequate with respect to the treatment of the Override claims.

C. Appellant Fails to Demonstrate Any Error by the Lower Court in its Approval of the Settlement With Respect to the Allocation of Value and Debt Between ESBA and ESBC

Appellant argues that the Settlement inadequately compensates the ESBA Participants for their claim that Defendants-Respondents improperly split the value of the Empire State Building "50/50" between the owner/lessor (ESBA) and the net lessee (Empire State Building Company ("ESBC"), which was the majority owned by the Helmsley Estate). App. Br. at 30-33. However, Appellant provides no basis for such a conclusory argument. Instead, Appellant cites to Plaintiffs' expert, Mr. Vodola, touts Mr. Vodola's "extensive analysis" (App. Br. at 31), points out how Mr. Vodola "extensively evaluated and discussed" the allocation of value issue between ESBA and ESBC (*id.* at 32), and cites to Mr. Vodola's work product and conclusions (*id.* at 33). Appellant never asserts, because he cannot, that Plaintiffs failed to consider this issue. Appellant simply believes that he

somehow could have done better for the Class. Such a speculative and baseless position, however, presents insufficient grounds on which to reverse the lower court's ruling as to the adequacy of the Settlement.

The Empire State Building was subject to a ground lease. *See* R. 846 (PASCORP Aff. ¶ 22). In order to determine the allocation of value in the Transaction between ESBA and the lessee, Defendants and Duff & Phelps ("D&P") first determined the market value of the land and building, then deducted the present value of the fixed rent payments on the property, and lastly, split the adjusted value evenly between the lessor and the lessee. *See id.* Appellant does not challenge the analysis of Plaintiffs' expert, James Vodola, nor does he challenge the extensive review and analysis Mr. Vodola and Class Counsel conducted of the pertinent documents and D&P's work product, the various methodologies available to determine damages, the related arguments and positions proffered by Defendants concerning the allocation of value, and the assessment of the exchange value that *was* allocated to the ESBA Participants by Defendants in the Transaction. *See* R. 844-47, 850-54 (PASCORP Aff. ¶¶ 18, 22-25, 32-47).

Plaintiffs and Mr. Vodola analyzed the value of the lessor entities, including ESBA, by using the discounted cash flow ("DCF") method and by reference to the allocation of debt to the lessee entities. *See* R. 850-54 (PASCORP Aff. ¶¶ 32-37). Plaintiffs determined that Defendants' application of a 50/50 split, rather than

Plaintiffs' allocation based on a DCF and debt analysis, gave the ESBA Participants a potential range of damages of $72 million to $162 million. R. 851, 854 (PASCORP Aff. ¶¶ 32, 37). Plaintiffs and their expert discussed and analyzed the strength of this claim, the damages analyses, and the factual and legal counter-arguments and damages offsets argued by Defendants. Among other things, Plaintiffs considered Defendants' positions that: (i) the entities were structured to achieve the economic attributes of a 50/50 joint venture, which would offer the subject LLC investors favorable, flow-through tax treatment for U.S. federal income tax purposes while at the same time protecting the passive investors in the subject LLCs from general partner liability for building operations; and, (ii) their methodology was appropriate because, after a fixed annual priority distribution of income was made, the agreements between the lessor and lessee provided that the income is shared 50/50 between the investors (i.e. managing partners) in the operating lessee and the cash investors in the lessor through "overage rent" equal to 50% of the remaining property profits. R. 852 (PASCORP Aff. ¶ 35). Plaintiffs also recognized that prior to and at trial Defendants would vigorously challenge Plaintiffs' contention that the debt and any improvements (or debt incurred for improvements) to the properties were the full responsibility of the lessee, by relying on language in the governing contracts and on case law from

prior litigation involving the Empire State Building and one of the Public Entities, 250 West 57th Street. R. 853 (PASCORP Aff. ¶ 36).

Plaintiffs-Repondents also recognized that it was not in the Malkin Defendants' interest to undervalue ESBA because of their over 7% ownership of ESBA (and smaller ownership interest in ESBC). Nevertheless, the Settlement Fund allocation to ESBA Participants of approximately $40 million (R. 189) constitutes a significant portion of their maximum calculated damages on the "50/50 split" issue. R. 854 (PASCORP Aff. at ¶ 37).

In stark contrast, Appellant gives no basis to support the position that the ESBA Participants' claims are essentially 100% compensable or recoverable, or that the Settlement is not fair and adequate. Appellant did not submit any expert opinion that demonstrates a higher value for the EBSA interests over the ESBC interests, and does not take any specific issue with any of Plaintiffs' or their expert's calculation of damages or assessments of the strength of the underlying claim and calculation of damages.[11]

[11] Moreover, Appellant never factors into his arguments, as he must, that: (i) the value of the Transaction to the ESBA Participants included the Participants' opportunity to exchange an illiquid Participation interest for a liquid stock; and (ii) the Transaction may be a means for ESBA to diversify and hedge against any unique challenges and uncertainties facing the Empire State Building in the future, including any impending risk stemming from future competition for tourist dollars from the soon-to-be completed, state of the art observatory in the Freedom Tower, as well as the Freedom Tower's potential to divert antenna revenue from the Empire State Building.

Appellant makes an unsupported claim based on a residual interest in the Empire State Building that would materialize in 2076 (*i.e.*, the value after expiration of the current term of the operating lease). App. Br. at 30. What Appellant ignores, however, is the due consideration to be given, as was done by Plaintiffs and their expert, to the fact that such residual interest did not have material additional value (in excess of the present value of the basic rent to be received under the operating lease), because the scheduled lease terms with renewals were fixed to continue *for more than 100 years* in the future. R. 852-53 (PASCORP Aff. ¶ 35).

Accordingly, based on an analysis and resolution that remains unrefuted, Plaintiffs concluded that the Settlement was fair in light of the substantial risk that a fact finder or jury could: find that Defendants had not breached their fiduciary duties to the Class by utilizing the 50/50 methodology; materially offset Plaintiffs' damages range of approximately $72 million to $162 million with respect to the lessor claims; or, find that Plaintiffs were treated fairly and had no damages at all. *See* R. 850-54 (PASCORP Aff. ¶¶ 32-37).

Finally, the lower court fully considered but rejected Appellant's attempts to "Monday morning quarterback" the dollar amount of the Settlement with respect to the allocation of value and debt between EBSA and ESBC. R. 29-30. The Lower Court recognized that in the litigation and as part of the Settlement, Class Counsel

had specifically considered and addressed the issue of the allocation of value and debt as between ESBA and ESBC; and, that Class Counsel had "evaluated the strengths and weaknesses of their claim, including proof of the longstanding agreement (followed for over sixty years) of the joint venture…, and came to the conclusion that there was a substantial risk that plaintiffs' challenge to the valuation and methodology used by defendants' consultant, Duff & Phelps, would be unsuccessful." *Id.* Accordingly, Appellant has not demonstrated that the lower court erred in approving the Settlement, or that the Settlement is not adequate, fair or the product of diligent work and good faith by Class Counsel.

D. Class Counsel Played a Vital Role in the Creation of a Tax-Deferred Option for Class Members Worth Approximately $100 Million

Appellant makes a conclusory assertion that Class Counsel was not instrumental in the creation of the tax benefit component of the Settlement (a benefit valued at approximately $100 million). App. Br. at 33-34. Appellant offers no support for this position, but nonetheless accuses Class Counsel of colluding with counsel for the Defendants-Respondents and "lying" to the Class. App. Br. at 34. In reality, Class Counsel negotiated the $100 million tax benefit component of the Settlement over several weeks, and Defendants-Respondents acknowledged that Class Counsel and Plaintiffs were vital to this crucial revision of the initial S-4. R. 224-25

Under the terms of the proposed Transaction as set forth in the February 2012 S-4, Participants in the Public LLCs would have been eligible to receive only taxable Class A Common Stock in the consolidated REIT, as opposed to the tax-deferred OP Units that would be available to the Defendants-Respondents and certain Participants in the Private Entities. R. 222 (Stipulation at 3). As initially drafted, the proposed Transaction would have forced Participants in the Public LLCs to incur massive tax liabilities when they received their Class A shares of stock in the REIT. R. 1003. Class Counsel recognized this, and as counsel for both the Class and the Defendants-Respondents began the investigation and negotiation process in March 2012, Class Counsel pushed counsel for the Defendants-Respondents to revise the Transaction to provide Participants in the Public LLC with the option to receive tax-deferred OP Units. R. 1007.

As a result of these negotiations, on July 2, 2012, Defendants mailed to the Participants in the Public LLCs a letter stating that Defendants-Respondents would amend the terms of the Transaction 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. 1008. As set forth in the Stipulation of Settlement, Defendants-Respondents and Plaintiffs-Respondents agreed that allowing Participants to elect to receive OP

Units provides Participants a substantial benefit that Defendants-Respondents value at over $100 million. R. 224-25. Defendants-Respondents also acknowledged that this tax benefit was provided "to address investor concerns raised by Plaintiffs" and Class Counsel, and thus the commencement of the Actions and the work of Class Counsel were material factors in Defendants' implementation of this change in the Transaction. *Id.*

Appellant makes the nonsensical argument that because Defendants-Respondents *theoretically could have* initially provided Participants with OP Units instead of Class A common stock, Class Counsel's efforts in securing this tax benefit are nullified. App. Br. at 33. Regardless of what Defendants-Respondents *theoretically could have* provided Participants in the initial iteration of the proposed Transaction, in reality, the proposed Transaction as initially drafted by Defendants-Respondents would have burdened Participants in the Public LLCs with substantial tax consequences. As a direct result of the investigation and negotiation efforts of Class Counsel, Defendants-Respondents altered the terms of the proposed Transaction to avoid these tax consequences – a benefit worth approximately $100 million to the Class. R. 225. Appellant's claim that "both Defendant-Respondents' [sic] and Class Counsel agreed to lie" (App. Br. at 34) about Class Counsel's role in securing these tax benefits is both irresponsible and fabricated.

E. The Additional Disclosures are Directly Attributable to Class Counsel and Confer Material Benefits to the Class

In further consideration for the full settlement and release of all Released Claims, Defendants made supplemental disclosures addressing Plaintiffs' claims in: (a) amended Registration Statements filed with the SEC on May 8, 2012, July 3, 2012, and August 13, 2012, and (b) letters to investors in the three Public LLCs filed with the SEC pursuant to Rule 425 under the Securities Act of 1933 on May 31, 2012, July 23, 2012, August 7, 2012, August 24, 2012, and September 6, 2012. In addition, certain new disclosures were made in the final Prospectus/Consent Solicitation Statement.

The work of Class Counsel was a material factor in Defendants making these supplemental disclosures, which regarded, among other things:

- the property appraisals, fairness opinions, valuation methodologies, including the 50/50 joint venture allocation and discounted cash flow methodologies, and the derivation of exchange values used in connection with the proposed Transaction;

- the Malkin family's interests, including ownership interests in the Public and Private LLCs, override interests and interests in management and construction companies, and the valuation of those interests;

- the conflicts of interest between the members of the Class and Defendants;

- the Helmsley Estate's impetus to sell its interests and the risks associated with sale alternatives to the proposed Transaction;

- the exchange value allocated to Defendants;

- the definition and explanation of enterprise value;
- the payment to the Class of excess cash held by the Public LLCs and additional distributions accrued prior to the closing and Transaction;
- the Transaction expenses of the Transaction and their potential reimbursement;
- the estimated distributions by the REIT as compared to historical distributions to Participants;
- the proposed centralized management structure and makeup of the REIT; and
- the assets being contributed to the REIT and improvements made thereon.

R. 234-35.

Contrary to Appellant's assertions, the extensive supplemental disclosures that preceded the Settlement were made after extensive negotiations and at Class Counsel's request. Moreover, as evidenced in the Stipulation, the additional post-Settlement disclosures were a direct result of Class Counsel's efforts, and were "*identified and requested by Plaintiffs.*" R. 232-35.

Appellant also attacks the adequacy of the disclosures on the purported basis that the Prospectus provided to the investors does not include projections of "cash flow that might be available for distribution to ESBA Participants in future years should the Consolidation not have been approved." App. Br. at 35-36. This argument is fundamentally flawed. These projections were included in Amendments No. 3 and 4 to the Prospectus/Registration Statements (Exhibits

99.48 and 99.59) filed on August 13, 2012, and November 2, 2012. Amendment No. 3 alerted investors "[a] copy of this illustrative valuation [of ESBA without the Consolidation] prepared by the independent valuer…is attached as exhibit 99.48 to the Registration Statement on Form S-4, of which this prospectus/consent solicitation is a part…." The same is true for Amendment No. 4. These cash flow projections were disclosed as a result of dialogue between the Defendants and the SEC, whose job it is to insure that investors are informed of material information.

Moreover, when this same argument regarding the alleged lack of availability of the projections was made below, the Parties to the Settlement pointed out that such projections had been prominently featured by a group of investors opposed to the Transaction on their web site, http://www.empirestatebuildinginvestors.com/.[12] Accordingly, Appellant's continued assertion that the "ball was hidden" from investors is disingenuous.[13]

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[12] A court can take judicial notice of materials made available on a company's website. *In re Tripodi*, 42 Misc. 3d 283, 974 N.Y.S.2d 764, 766 (Sup. Ct. Westchester Co. 2013) *aff'd sub nom.* 111 A.D.3d 586, 975 N.Y.S.2d 347 (2013); *People v. Larsen*, 29 Misc. 3d 423, 425, 906 N.Y.S. 2d 709, 711 (Crim. Ct. N.Y. Co. 2010).

[13] Appellant's objection also ignores established REIT IPO practice. It is standard practice in a REIT IPO to include a so-called "magic page," which provides an estimate of the first year of distributions for the REIT. *See* Fass, Shaff and Zief, *Real Estate Investment Trusts Handbook* § 2:266 (2012-13 ed.). Based on longstanding SEC practice, long-term projections are not provided in a prospectus. *Id.*. In this case, those projections were provided not so that investors can determine what ESBA's standalone income is expected to be, but because they formed the basis for Duff & Phelps' discounted cash flow projections. Because of the inherent uncertainty of these projections, Malkin Holdings made very strong and appropriate disclaimers about the use of the projections. *See*, *e.g.*, Amendment No. 3 to S-4 at C-2 ("The inclusion of the summary of the projections in this prospectus/consent solicitation should not be regarded as an indication

Thus, the disclosures provided were deemed sufficiently adequate by: (i) the SEC; (ii) the trial court; (iii) Class Counsel; and (iv) the overwhelming majority of the Participants, including the ESBA Participants.

III. THE AWARD OF ATTORNEY'S FEES SHOULD BE UPHELD

CPLR 909 provides courts with discretion to award attorneys' fees in class action litigation "based on the reasonable value of legal services rendered. . . ." CPLR 909. In determining the amount of attorney's fees, the court may consider the "substantial benefits" obtained by class counsel, including the creation of a "common fund," as well as "corporate therapeutics" or "deter[ence] of future misconduct by management." *Seinfeld v. Robinson,* 246 A.D.2d 291, 295-98, 676 N.Y.S.2d 579, 581-83 (1st Dep't 1998); *see Mills v. Elec. Auto-Lite,* 396 U.S. 375, 396 (1970); *Michels*, 1997 N.Y. Misc. LEXIS 171, at *93 (assessing enhancements to insurance policy values in determining attorney fee award); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 U.S. Dist. LEXIS 119702, at *83 (S.D.N.Y. Nov. 5, 2010) (recognizing that "[p]ublic policy concerns favor the award of reasonable attorneys' fees in class action securities litigation.").

Indeed, in determining to first reduce and then approve Class Counsel's award of fees and expenses, Justice Sherwood searched the record for substantiated

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that any of the company, the subject LLCs or the supervisor or their respective affiliates, advisors or representatives considered the projections to be predictive of actual future events, and the projections should not be relied upon as such.").

facts and then properly applied those standards. R. 98-104. That decision is entitled to deference, as the lower court is best positioned to determine the appropriate attorney's fees based upon its assessment of the conduct of the litigation and the factual record. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("reemphasiz[ing] that the district court has discretion in determining the amount of a fee award . . . in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters."); *Sanchez v. MTV Networks*, 525 F. App'x 4, 7, (2d Cir. 2013) (approving a 37.5% fee award and finding that "[t]he standard of review of an award of attorney's fees is highly deferential to the district court" because "the amount sought for attorney's fees is dependent on the unique facts of each case." (citations omitted)); *Galasso, Langione & Botter, LLP v. Galasso*, 89 A.D.3d 897, 898, 933 N.Y.S.2d 73, 75 (2d Dep't 2011) ("[t]he determination of a reasonable attorney's fee is generally left to the discretion of the Supreme Court, which is usually in the best position to determine the factors integral to determining reasonable fees") (citation omitted).

Appellant's misplaced arguments as to the application of those fee award principles are not based upon the facts in the Record but upon his own unsupported supposition, innuendo, and conjecture. Putting aside Appellant's unprofessional and unsupported accusations that Class Counsel colluded with Defendants and that

their actions were "reprehensible" and "incredibl[e]" (App. Br. at 47), the lower Court, having presided over and having rendered several well-reasoned decisions in the case, conducted a full review of Class Counsel's actions, analyzed the benefits secured for the Class, scrutinized Class Counsel's fee application, and concluded that Class Counsel should be awarded attorney's fees of $11,599,629.13 and expenses of $265,282.[14] As reflected in its analysis, Justice Sherwood did not simply act as a "rubber stamp" of Class Counsel's fee application. R. 99-104. Rather, he analyzed Class Counsel's application utilizing the criteria established under New York case law and carefully explained his reasoning. *Id.* Having analyzed Class Counsel's application, the Court significantly reduced the award from that requested, thus demonstrating that the Court fully reviewed and applied the controlling legal standards for awarding attorney's fees. *Id.* 102-04.

Other than asserting without support that "[t]he lower Court's findings were questionable" (App. Br. at 40), Appellant ignores both the Court's findings of fact and legal analysis. Based solely upon his own wholly unsupported assertions,[15]

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[14] R. 99 ("Pursuant to CPLR 909, 'the court in its discretion may award attorneys' fees to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered . . .'. *That Class Counsel have acted to produce significant benefits to the class and therefore are entitled to a substantial award is beyond dispute.*") (emphasis added).

[15] *See*, *e.g.*, App. Br. at 42 ("It could not be any clearer that Defendant-Respondents were likely to settle, and quickly."); *id.* ("those issues could have been determined solely on the basis of documentary evidence and construction thereof. . ."). With respect to whether this Action was, as Appellant blithely asserts, destined to "settle" from the outset, the four highly experienced Class Counsel firms here have prosecuted numerous cases that were dismissed at the motion to

Appellant concludes that the award of attorney's fees constituted "a huge windfall." *Id.* at 41. In asserting his position, Appellant dismisses out of hand the tax savings and other benefits such as additional disclosure that the Court below expressly acknowledged, and focuses solely on the $55 million cash portion as the totality of the benefit conferred by Class Counsel's actions. However, as the lower court found, "Class Counsel were able to secure monetary benefits for the class valued at more than $155 million and non-monetary concessions. The sum includes over $100 million in deferred taxes, a benefit that may be considered for the purpose of assessing attorney's fees (*see Seinfeld v. Robinson*, 246 A.D. 2d 291 [1st Dept 1998])." R. 100.

Appellant's refusal to acknowledge the role Class Counsel played in securing Defendants' agreement to modify the proposed Transaction to eliminate the immediate and disastrous tax bills that would have been inflicted upon Class members (but not Defendants) is unsupported by the record. R. 224-25. Defendants have acknowledged that the litigation brought by Class Counsel, and the potential award of damages against Defendants for breach of fiduciary duty being sought in that litigation, was among the important factors considered by

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dismiss stage, summary judgment stage, and even at trial. As the lower court and numerous other courts have recognized, in litigation there is no certainty, and where litigation is undertaken solely on a contingency fee basis there is substantial monetary risk to Class Counsel in invested time and expense. R. 100 ("Class Counsel undertook significant risks in bringing these litigations."); *see also* R. 101-04. Appellant, on the other hand, has benefitted risk-free from Class Counsel's efforts.

them in determining to modify the Transaction, which saved Class Members over $100 million in immediate tax payments. *See* R. 233-34. Appellant also ignores that the material enhancements Class Counsel obtained with respect to the proxy solicitation disclosure conferred a "substantial benefit" on the Class. *See Seinfeld*, 246 A.D.2d at 295-98, 676 N.Y.S.2d at 581-83, citing *Mills*, 396 U.S. at 396; *In re Cablevision Sys. Corp. S'holders Litig.*, 21 Misc. 3d 419, 432, 868 N.Y.S.2d 456, 467 (Sup. Ct. Nassau Co. 2008).[16]

Even if it were somehow appropriate to focus solely on the $55 million cash benefits obtained by Class Counsel – and, as established by the United States Supreme Court and the New York courts, it is not – Justice Sherwood noted that Class Counsel's initial request for fees, prior to the Court's reduction, "constitute[d] approximately 27.3% of the total settlement value, an amount which is toward the upper range of allowable awards."[17] (emphasis added). R. 101. Once the Court's reduction of fees is taken into account, the fee award constitutes 21% of the $55 million in cash obtained for the Class (and as the Court then explained,

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[16] Class Counsel obtained other relief in the form of IPO protections, including (a) a firm commitment underwriting, (b) notification to Class members invested in Public LLCs of their right to change votes if their LLC's exchange value decreases by 10% or more during the solicitation period, and (c) the need to obtain additional approvals by Class members invested in Public LLCs if less than $600 million in total gross proceeds are committed to the IPO also materially benefitted the Class. R. 234.

[17] Like the rhetoric in his Brief, Appellant's math is inflated. Appellant asserts that 27.3% is "almost one-third of the settlement fund." App. Br. at 38. Of course 27.3% is much closer to "one-fourth", and is over 20% shy of being "one-third."

only "7.5% of the total settlement value."). R. 103. The fee award approved by the lower court is well within the ranges accepted by New York courts under both a percentage and lodestar analysis. R. 102-03 (finding that even 21% of just the cash portion of the benefits obtained by Class Counsel is still only "toward the high end of common fund awards" and that "[t]he selected [lodestar] multiplier falls in the middle range of common multipliers."); *see*, *e.g.*, MANUAL FOR COMPLEX LITIG., § 14, 121 (4th ed. 2004) ("Awarding attorneys 25% of a common fund represents a typical benchmark"); *Ripley v. Int'l Railways of Cent. Am.*, 16 A.D.2d 260, 265, 227 N.Y.S.2d 64, 68-69 (1st Dep't 1961) (awarding a 26.3% fee); *Willson v. New York Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *94-95 (Sup. Ct. N.Y. Co. Nov. 8, 1995), *appeal denied*, 228 A.D.2d 368, 644 N.Y.S.2d 617 (1st Dep't 1996) (applying a 4.6 lodestar multiplier and noting that "other courts have awarded fees that resulted in significantly higher multiples of the lodestar"); *Cornwell v. Credit Suisse Group*, No. 08 Civ. 03758 (VM) (S.D.N.Y. July 18, 2011) (Dkt. No. 117 at 4) (awarding a 27.5% fee); *In re Oxford Health Plans, Inc. Sec. Litig.*, No. MDL 1222, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding a 28% fee); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369, 371 (S.D.N.Y. 2002) (applying a "modest" multiplier of 4.65 and noting that this is "well within the range awarded by courts

in this Circuit and courts throughout the country"); *Cosgrove v. Sullivan,* 759 F. Supp. 166, 167 n.1, 169 (S.D.N.Y. 1991) (applying an 8.74 lodestar multiplier).[18]

Finally, with respect to Appellant's assertions that Class Counsel "colluded with Defendants-Respondents' Counsel" (App. Br. at 46) and took "positions adverse to those whose protection with which they are charged" (*id.* at 47), Appellant fails to acknowledge that Class Counsel has a duty to the Court and the Class not to advance arguments that are not well-founded.[19] This includes claims, such as the breach of fiduciary duty claims against ESBA managers, that upon further investigation and analysis appear to "not constitute serious breaches of fiduciary duties at all." R. 100.[20] Class Counsel also had to assess the strength of

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[18] Even the cases cited by Appellant support the reasonableness of the fee award. *See In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02-MDL-1484(JFK), 2007 U.S. Dist. LEXIS 9450 (S.D.N.Y. Jan. 31, 2007) (awarding class counsel 22.5% of settlement fund despite the fact that the case "largely involved review of publically available documents and was not particularly difficult"); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80 (E.D.N.Y. 2002) (approving a 12% fee award in a case that presented "no ground breaking issue which loomed significant"); *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000) (approving fee award where case "did not hinge on any 'novel' legal issue"); *In re Bausch & Lomb, Inc. Sec. Litig.*, 183 F.R.D. 78 (W.D.N.Y. 1998) (same); *Lasker v. Kanas*, No. 103557/2006, 2007 WL 3142959 (Sup. Ct. N.Y. Co. Sept. 26, 2007) (awarding counsel 15% of common fund, constituting a 3.2 lodestar multiple, for work involving "not overly complex" issues resulting in a settlement less than five months after initiation and based on "limited document discovery").

[19] Appellant also fails to acknowledge that Class Counsel's position and arguments on the so-called "forced buyout under New York Limited Company Law" issue were sustained by the Appellate Division in a separate, but related, appeal. R. 108-16.

[20] As the lower court acknowledged, "[c]ounsel for both the class and defendants are skilled and highly experienced," and "[a]s competent professionals, they worked together from an early stage of the case and achieved significant beneficial results for class members." R. 100. Class Counsel's deep experience and skill allowed the Class to obtain tremendous benefits without the waste of time and resources that a protracted, and possibly unfruitful, litigation would incur. Although Appellant takes issue with the level of involvement certain attorneys had in the

the objectors' argument and the likely effect of a finding that the objectors were "members" under New York LLC law. As is clear from the plain language of the statute and the cases interpreting it – and as recently determined by this Court[21] – the objectors are not "members" under New York LLC law. It also was clear that Class members would fare significantly less well if they were found to be "members" because their remedy would be a "fair value" proceeding under Business Corporations Law § 623, and since they owned illiquid securities, the value of their holdings would be subject to an unmarketability discount (*see Friedman v. Beway Realty Corp.*, 87 N.Y.2d 161, 165, 170, 638 N.Y.S.2d 399, 401-02, 405 (1995)), and the benefits of the Transaction would be lost.

With respect to Appellant's claim that "Class Counsel were duped by Defendant-Respondents" (App. Br. at 47) regarding the amount to be received by Class Members in the Transaction, the Transaction documents were explicit that Class Members would not receive cash but would receive a new security (stock or OP Units) and that the actual value of that new security was unknown and would

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litigation, Appellant does not and could not dispute that Lawrence Kolker, who has 24 years of class action and complex REIT litigation experience, was the ultimate decision-maker on strategic points at issue throughout the litigation and was the primary spokesperson in settlement negotiations and substantive communications with defense counsel and the Court. The time records submitted to and reviewed by the lower Court reflect the important role Mr. Kolker played, and also demonstrate that other attorneys such as Marc Gross, the managing partner of the Pomerantz firm with 36 years of class action litigation experience, made substantial contributions to the creative problem-solving necessary to resolve this litigation. R. 822-37; 873-970; 1023-70.

[21] *See In re Empire State Realty Trust, Inc. Investor Litig.*, 114 A.D.3d 570, 981 N.Y.S.2d 58 (1st Dep't 2014).

not be set by Defendants, much less Class Counsel. Rather, as set forth in the Transaction documents, the value of the security provided to the Class was understood to be set by the bid prices established in the stock market. Since their issuance, the market price of the securities received by the Class has risen approximately 15% to approximately $15 per share. *See* "Empire State Realty Trust, Inc," *Yahoo! Finance*, *available at* http://finance.yahoo.com/q?s=ESRT (last visited April 7, 2014).

Further, in the fourth quarter of 2013 (the only quarter in which the REIT existed), the REIT issued dividends in the amount of $5,247 (annualized) per $10,000 Participation Interest. *See* 2013 10-K, *available at* https://www.sec.gov/Archives/edgar/data/1541401/000144530514001129/esrt12-31x1310xk.htm. By contrast, according to the July 2012 S-4, the average five year distribution to Participants, prior to the Transaction, was only $3,110 per $10,000 Participation Interest. *See* July 3, 2012 S-4 Registration Statement, *available at* https://www.sec.gov/Archives/edgar/data/1541401/000119312512293929/d283359ds4a.htm. Thus, as a result of the Transaction, each former ESBA Participant has exchanged an illiquid security which provided an average return of $3,110 per $10,000 investment per year for a liquid security which provides a return of $5,247 per $10,000 investment per year, and therefore Appellant's argument that he was not adequately compensated for his interest in ESBA is absurd. App. Br. at 30-33.

Indeed, there is nothing Class Counsel could have, or should have, done with respect to the price the market ultimately set for the securities offered in the Transaction.

Accordingly, Justice Sherwood, based upon his thorough analysis and personal observations of the conduct of this litigation, praised Class Counsel as follows: “It is apparent to me, having presided over this case, that class counsel has performed in an excellent manner, and you have represented your clients quite well. You should be complimented for that.” R. 46 (May 2 Tr. at 16:20-23). Justice Sherwood stated that the fee was “intended to reward class counsel handsomely for the very good result achieved for the Class, assumption of the high risk of Plaintiffs prevailing…and the efficiency of effort that resulted in the settlement of the case at an early stage without protracted motion practice.” R. 103 (citations omitted). His judgment should not be disturbed.

CONCLUSION

This Court should uphold the May 17, 2013 Orders of the lower court in this action approving the Settlement and awarding attorneys' fees and expenses to Class Counsel, and should reject this appeal in its entirety.

Dated: April 16, 2014

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Name of Typeface:	Times New Roman
Point Size:	14
Footnote Point Size:	12
Line Spacing:	Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this Statement, is 12,539.

Dated: New York, New York
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