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June 13, 2017

VIA ECF AND FED EX

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Hon. Steven M. Gold, U.S.M.J.
United States District Court,
Eastern District of New York
225 Cadman Plaza East, Rm. 1217
Brooklyn, New York 11201

Re: **Moses v. Apple Hospitality REIT, Inc.**
(E.D.N.Y. 14-03131 (DLI)(SMG))

Dear Judge Gold:

I am one of the attorneys for the Plaintiff, Susan Moses ("Plaintiff") in the above-referenced matter. As directed by Your Honor in the telephone conference held June 6, 2017 and a subsequent Minute Entry (ECF No. 51), Plaintiff respectfully submits as follows as and for her supplemental briefing in further support of Plaintiff's motion to certify the class for settlement purposes and preliminarily approve the settlement (ECF No. 48, hereinafter "Preliminary Approval Motion"). We look forward to discussing these matters further with Your Honor at the hearing on the motion on July 7, 2017.

No Revised Papers

As discussed in the telephone conference, Plaintiff's counsel have reviewed the papers filed in connection with the Preliminary Approval Motion. We believe that there is no need for any revisions to the previously-filed papers in light of Judge Irizarry's reference of the Preliminary Approval Motion to Your Honor.

Plan of Allocation

During the June 6, 2017 telephone conference, Your Honor inquired about the proposed Plan of Allocation contained in the Stipulation of Settlement, and requested an explanation of the reasoning behind same. The proposed Plan of Allocation (excerpted) is as follows[1]:

> 85% of the Net Settlement Fund will be allocated to DRIP [*i.e.*, Dividend Reinvestment Program] shares purchased between July 22, 2011 and January 13, 2012 for Apple REIT Seven and between July 22, 2011 and February 19, 2013 for Apple REIT Eight.

* * *

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

> 15% of the Net Settlement Fund will be allocated to DRIP shares purchased between July 17, 2007 and July 21, 2011 as well as January 14, 2012 to June 27, 2013 for Apple REIT Seven and April 23, 2008 to July 21, 2011 as well as February 20, 2013 to June 27, 2013 for Apple REIT Eight... .

The former periods ("Tender Offer Periods"), as to which 85% of the Net Settlement Fund is allocated, begin when purchases of Apple REITs shares under certain third-party tender offers began on July 22, 2011 and end upon the filing of amended Registration Statements on Form S-3[2] that modified the language concerning how the sale price for shares of Apple REITs sold under the DRIPs would be determined.

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

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

Under the Court's ruling, Plaintiff may attempt to prove that Defendant should have priced shares sold in the DRIPs based on prices paid in the tender offers- between $3.00 and $5.50 a share. The prices at which the tender offerors purchased shares during the Tender Offer Periods are a matter of public record. By contrast, purchasers of Apple REITs shares during

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

periods prior to the Tender Offer Periods, *i.e.,* before July 22, 2011, would likely need to provide evidence of the prices paid for Apple REITs shares in the secondary market in order to prove damages. Proof of damages for shares bought outside the Tender Offer Periods would likely be somewhat more challenging due to the fact that there is no central secondary market or price discovery mechanism for shares of public non-traded REITs such as the Apple REITs. *See generally* Financial Industry Regulatory Authority (FINRA) Regulatory Notice 15-02[3] (DPP or non-traded REIT securities are not listed on a securities exchange and are generally illiquid).

Plaintiff's counsel believe that purchasers *after* the Tender Offer Periods may also face more difficulties in prevailing on their claims due to the changes in the language concerning pricing of Apple REITs' shares contained in the amended Registration Statements, because the revised language arguably removes ambiguity by indicating that the price for DRIP sales "will be deemed equal to the most recent price at which an unrelated person has purchased our units from us [*i.e,* from A7 and A8]." In the judgment of Plaintiff's counsel, on these facts lower per-share compensation under the Plan of Allocation is appropriate for shares purchased after the end of the Tender Offer Periods.

The purpose of developing a plan of allocation is to devise a method that permits the equitable distribution of limited settlement proceeds to eligible class members. *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). "As a general rule, the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *Alleyne v. Time Moving & Storage Inc.,* 264 F.R.D. 41, 52 (E.D.N.Y. 2010). A reasonable plan of allocation may consider the relative strength and value of different categories of claims. *In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 462 (S.D.N.Y. 2004); *see also In re Lloyd's Am. Trust Fund Litig.,* No. 96-cv-1262 (RWS) 2002 U.S. Dist. LEXIS 22663 at *54 (S.D.N.Y. Nov. 26, 2002) (Sweet, J.) (allocation formulas reflect the comparative strengths and values of different categories of the claim). "[N]othing requires a settlement to benefit all class members equally. Such a rule would itself result in an inequitable windfall to certain class members, to the detriment of others." *Global Crossing*, 225 F.R.D. at 462.

Here, counsel have reviewed the facts and merits of the claims, and devised a plan that we believe is fair. However, the proposed Plan of Allocation is subject to modification by the Court. In appropriate circumstances, a district court may exercise its "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members more equitably." *Beecher,* 575 F.2d at 1016.

The Plan of Allocation is not a material term of the Stipulation of Settlement. Defendant takes no position as to the Plan of Allocation, and if the Court grants preliminary approval, the Court retains discretion to adopt it, adopt it with modification or devise a different plan of

[3] Accessible at http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-02.pdf.

allocation at the final approval stage. *See* Stipulation of Settlement, ECF No. 48-2 at ¶ 1(s) ("Defendant takes no position and has no role, responsibility or involvement in the development, calculations, methodology, petition for approval or execution [of the Plan of Allocation]") and ¶ 12.3.

We would welcome the opportunity to discuss this issue further at the July 7, 2017 hearing.

Proposed Claims Process

The Court also inquired about the proposed claims administration procedure envisioned by Plaintiff during the June 6, 2017 telephone conference. Plaintiff has consulted with Defendant, reviewed documents produced by the sole managing dealer for the subject Apple REITs offerings, David Lerner Associates, and has engaged and consulted with Kurtzman Carson Consults, LLC (the "Settlement Administrator"), an experienced class action settlement administrator, in devising a proposed plan for notice and claims administration. The Settlement Administrator's resume is filed as Exh. 1 hereto.

Under the proposed claims administration procedure, each Class Member will receive a letter from the Settlement Administrator setting forth the sum of the distribution amount payable to that Class Member (derived from the records of the sole managing dealer for the offerings) and the basis for that calculation. Class Members will then have an opportunity to dispute that amount with the Settlement Administrator within the time stated in the letter. If the Class Member does not dispute the proposed distribution amount, he or she will automatically receive payment based on the Claims Administrator's calculation.

Plaintiff believes that this process, which essentially eliminates the claim form stage, will expedite payment of claims and may also provide funds to Class Members who might otherwise fail to submit a claim form. Although such a process might not be feasible in other cases involving publicly-traded securities, where notice is given based on multiple sources of share transfer records, counsel believe that it should be feasible here since all DRIP transactions were effectuated through a single managing dealer and the complete records of such transactions are available from the managing dealer.

SEC Order and Previous Litigation

In February 2014, the Securities and Exchange Commission ("SEC") issued a Consent Order in Administrative Proceeding File No. 3-15750 (Securities Act of 1933 Release No. 9548, hereinafter the "SEC Order"[4]) asserting that Form S-3 Registration Statements for the DRIPs filed by Apple REITs Seven and Eight were materially misleading because "the disclosures omitted to state that the 'fair market value' of the units was not based on an appraisal of the

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

Apple REITs' assets or other valuation methodology." The SEC Order further asserted that the Apple REITs "failed to disclose that, in contrast to an actively traded market, the price last paid for a DRIP share by an unrelated person in the context of a non-traded REIT did not reflect a meaningful estimate of the underlying or realizable value of the units." (SEC Order ¶27; *see also* Second Amended Complaint (EFC No. 21) at ¶¶ 52-59).

The foregoing statements in the SEC Order "are not binding on any other person or entity in [the SEC proceeding] or any other proceeding." *See* SEC Order, p. 2. f.n. 1; *see also Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 892-94 (2d Cir. 1976) (consent judgment that is not the result of an actual adjudication of issues cannot be used as evidence in subsequent litigation between corporation and another party). Further, previous putative class action litigation concerning the Apple REITs has been unsuccessful. *See In re Apple REITs Litig.,* No. 11-cv-2919 (KAM), 2013 U.S. Dist. LEXIS 48565 at *19 (Apr. 3, 2013) (dismissing Securities Act claims of, *inter alia*, A7 and A8 purchasers); *Wenzel v. Knight,* No. 3:13-cv-432, 2015 U.S. Dist. LEXIS 70536 at *3-4 (E.D. Va. Jun. 1, 2015) (rejecting plaintiff's contention that stock sold in the A8 DRIP "was worth less than the dollar amount of the cash dividend declared and paid to non-electing A-8 holders" and dismissing case); *Lewis v. Del. Charter Guar. & Trust Co.,* No. 14-cv-1779 (KAM), 2015 U.S. Dist. LEXIS 42521 at *41-42 (E.D.N.Y. Mar. 31, 2015) (dismissing class action claims against IRA custodian and managing dealer).

Based on the foregoing, as well as Judge Irizarry's previous dismissal of Plaintiff's claims herein (*see* ECF No. 19), Plaintiff respectfully submits that the proposed settlement consideration is fair, reasonable and adequate in light of the substantial litigation risk herein. Plaintiff's counsel intend to more fully address the issues of litigation risk and attorney's fees in separate motion papers to be filed prior to the Final Fairness Hearing.

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We look forward to addressing these and any other matters that may be of interest to the Court at the July 7, 2017 hearing. Thank you for your consideration.

Respectfully submitted,

CHRISTOPHER J. GRAY

Cc: Elizabeth F. Edwards, Esq.
Stanley A. Roberts, Esq.
(Counsel for Defendant)