UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

DCG&T f/b/o JACK BATTAGLIA/IRA; JACK BATTAGLIA and DCG&T f/b/o LORI BATTAGLIA/IRA, Plaintiffs, v. GLADE M. KNIGHT, MICHAEL S. WATERS, ROBERT M. WILY, BRUCE H. MATSON, JAMES C. BARDEN and DOES 1-10, Defendants, and APPLE REIT NINE, INC., Nominal Defendant.	Civil Action No: 3:14-cv-00067

PLAINTIFFS' RESPONSE TO OBJECTIONS OF SHAREHOLDERS JOYCE VEISHLOW, MURRAY BEAVER, EVAN WASSERMAN, AND BRIAN A. EISEN

Plaintiffs, DCG&T f/b/o Jack Battaglia *et al.*, by their counsel and pursuant to this Court's Order dated July 31, 2015, *see* Dkt. No. 114, hereby file their Response to the following objections to the proposed Settlement:

(1) The objection(s) submitted by shareholders Joyce Veishlow and Murray Beaver dated August 18, 2015, *see* Dkt. No. 119 (the "Veishlow/Beaver Objection");

(2) The objection submitted by shareholder Evan Wasserman dated August 25, 2015, *see* Dkt. No. 125 (the "Wasserman Objection"); and

(3) The Objection of Brian A. Eisen to the Court's [*sic*] Approving the Settlement Agreement dated August 28, 2015, *see* Dkt. No. 123 (the "Eisen Objection").

For the reasons set forth herein, the Veishlow/Beaver Objection, the Wasserman Objection, and the Eisen Objection to the proposed Settlement should be overruled.

I. STATEMENT OF THE CASE

Following the hearing held on July 30, 2015, on July 31, 2015, this Court entered its Order Regarding Preliminary Approval and Notice, *see* Dkt. No. 114. Pursuant to that Order, on August 6, 2015, the Settlement administrator, Garden City Group ("GCG"), disseminated copies of the Settlement Notice and proposed Plan of Allocation via first-class mail to approximately 38,000 shareholders of Apple REIT Seven, Inc. ("A-7), Apple REIT Eight, Inc. ("A-8"), and Apple REIT Nine, Inc. ("A-9"). As of August 28, 2015, the deadline set by this Court, just ***four*** objections have been received by the parties and GCG. This represents less than 0.0002% of the shareholders who received written notice.

The paucity of objectors to the proposed Settlement is significant and weighs heavily in favor of its approval by this Court. As the Fourth Circuit stated in approving the settlement of a shareholder derivative action:

> Horowitz also challenges the adequacy of the settlement. As noted earlier, Horowitz is one of only two objectors, out of tens of thousands of shareholders. It would be rare for such minimal dissent to derail settlement of a derivative suit on grounds that the settlement afforded insufficient relief.

Zimmerman v. Bell, 800 F.2d 386, 391 (4th Cir. 1986) (citing *Shlensky v. Dorsey,* 574 F.2d 131, 148 (3d Cir. 1978) ("Here the overwhelming majority of Gulf shareholders have not objected to the settlement and Gulf, for the benefit of which the suit was filed, has agreed to its terms.")).[1]

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[1] Similarly, in *In re Jiffy Lube Sec. Litig.,* 927 F.2d 155 (4th Cir. 1991), where the Fourth Circuit affirmed the district court's approval of a partial settlement of a securities fraud class

As Plaintiffs have stated, *see* Dkt. No. 116 at 10-11, this factor weighs in favor of approval of the proposed Settlement. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 257-258 (E.D. Va. 2009) (an absence of objections "gives the Court a great deal of confidence" in the settlement's adequacy).[2]

As set forth below, the four objections that have been received do not raise any substantive issues that are sufficient to derail this Court's anticipated final approval of the proposed Settlement.

II. ARGUMENT

A. The Veishlow/Beaver Objection And The Wasserman Objection Should Be Overruled

1. The Plan Of Allocation Is Fair And Reasonable

Both the Veishlow/Beaver Objection and the Wasserman Objection assert that the proposed Plan of Allocation is neither fair nor reasonable because the Net Proceeds will be distributed to Eligible Distributees whose Eligible Old A-9 Shares were voted against the 2014

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action, the appellate court noted that after preliminary settlement approval had been granted, "[n]otices were sent to approximately 12,000 purchasers of JLI stock during the class period; only one shareholder expressed opposition to the settlement terms." *Id.* at 158. The Fourth Circuit stated with approval that "[a]s indicative of adequacy from the point of view of informed class members, the district court also gave great weight to the fact that only one of over 12,000 class members notified expressed opposition to the terms of settlement." *Id.* at 159.

[2] *See also Maher v. Zapata,* 714 F.2d 436, 457 (5th Cir. 1982) (stating that "minimal nature of shareholder objection" is a factor favoring approval of shareholder derivative settlement); *Ryskamp v. Looney,* 2012 U.S. Dist. LEXIS 114190, *11 (D. Colo. Aug. 14, 2012) (approving settlement of shareholder derivative action in which only two objections to the settlement were received, despite the fact that notice was sent to at least 805 shareholders; "This fact weighs heavily in favor of the derivative litigation settlement.") (citing, *inter alia, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,* 396 F.3d 96, 118 (2d Cir. 2005) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.")); *In re UnitedHealth Group Inc., Shareholder Deriv. Litig.,* 631 F. Supp. 3d 1151, 1158 (D. Minn. 2009) (where "thousands of notices" have been disseminated and a single objection has been received, this "complete absence of negative shareholder reaction ... weighs in favor of the settlement").

Merger of A-7, A-8, and A-9. The Veishlow/Beaver Objection asserts that shareholders who voted in favor of the Merger were invariably "misled and coerced" into voting in favor of the Merger. Dkt. No. 119. The Wasserman Objection asserts that because the proposed Settlement was negotiated on the basis of alleged breach(es) of fiduciary duty that harmed A-9, the proceeds of the Settlement should be distributed to ***all*** A-9 shareholders, even those who voted ***in favor of*** the Merger. *See* Dkt. No. 125.

The first point to remember is that under the Stipulation of Settlement, this Court's approval of the Plan of Allocation is ***not*** a prerequisite for approval of the Settlement and dismissal of claims. Stipulation of Settlement, ¶ 15. *See* Dkt. No. 111 at 12. Thus, these objectors' protests about the proposed Plan of Allocation do not present grounds for rejection of the proposed Settlement. In that regard, it should be noted that Objector Wasserman agrees that the $12 million Settlement fund is reasonable. *See* Dkt. No. 125.

Significantly, neither the Veishlow/Beaver Objection nor the Wasserman Objection state or otherwise indicate ***how*** these objectors voted when the Merger was approved in 2014. GCG's review of the voting data supplied by Bainbridge Financial Solutions (the company hired to conduct the balloting for the 2014 Merger) reveals that while Ms. Veishlow and Mr. Beaver voted ***in favor of*** the Merger, Objector Wasserman ***did not vote at all***. The proposed Plan of Allocation limits the distribution of the Net Proceeds of the Settlement Fund to A-9 shares that were voted "against" the Merger. Dkt. No. 113 at 2-3. Thus, Mr. Wasserman's A-9 shares do not qualify.

As Plaintiffs have previously stated, *see* Dkt. No. 116 at 12, a plan of allocation "must be fair and adequate." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 668 (E.D. Va. 2001) (citations omitted). As Judge Ellis recognized in that case, the plan of allocation may

"sensibly make[] interclass distinctions based upon, *inter alia,* the relative strengths and weaknesses of class members' individual claims...." *Id.* at 669. In their First Amended Verified Complaint filed in March 2014, Plaintiffs alleged that the Proxy Statement for the 2014 Merger contained false and misleading statements. Dkt. No. 23, ¶¶ 98-113. Count III asserted a shareholder claim based upon such alleged false and misleading statements. *Id.,* ¶¶ 133-136. However, Defendants' motion to dismiss Count III was granted by this Court. *DCG&T f/b/o Battaglia v. Hutchens,* 68 F. Supp. 2d 579, 584-585 (E.D. Va. 2014). Thus, in the words of Judge Ellis, the proposed Plan of Allocation "fairly and rationally" allocates the Settlement consideration, *MicroStrategy,* 148 F. Supp. 2d at 669, taking into account that (a) certain A-9 shareholders who voted in favor of the Merger desired the anticipated benefits flowing from the joinder of A-9 with A-7 and A-8, and/or (b) other A-9 shareholders, who claim that they were "misled and coerced" into voting in favor of the Merger, have weaker misrepresentation claims that were, in fact, dismissed by this Court.

Finally, this Court should consider the fact that the original non-disclosure claims asserted in Plaintiffs' Complaint, *see* Dkt. No. 1 (filed Jan. 31, 2014), were filed well in advance of the final vote by shareholders and were given ample publicity in the media. Indeed, Plaintiffs' allegations were also identified in supplemental proxy materials that were distributed to the voting shareholders, including these objectors.[3] Thus, any A-9 shareholders who voted ***in favor of*** the Merger did so while fully informed of the allegations of Plaintiffs' non-disclosure claims. At the very least, fairness requires that such shareholders should not be allowed to share in

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[3] Under the heading "SUPPLEMENTAL DISCLOSURE CONCERNING PURPORTED CLASS ACTION," the Supplement to the Joint Proxy Statement/Prospectus described the proposed class action that had been commenced by Plaintiffs on Jan. 31, 2014, and stated: "The complaint alleges ... that the Joint Proxy Statement/Prospectus contains false and misleading disclosures about certain matters."

compensation from settlement of the shareholder derivative claim(s) asserted herein when it is those very shareholders whose votes (while knowing of the non-disclosure allegations set forth in Plaintiffs' Complaint) paved the way for the Merger.

2. The Notice Satisfied The Requirements Of Rule 23.1

The Wasserman Objection also complains about the Settlement Notice that was disseminated by GCG in accordance with this Court's July 31, 2015, Order, *see* Dkt. No. 114. As Plaintiffs' Counsel have previously asserted, *see* Dkt. No. 116 at 11, both the Settlement Notice and the notice procedure fully satisfied the requirements of Rule 23.1. *See, e.g., Bell Atl. Corp. v. Bolger,* 2 F.3d 1304, 1317-1318 (3d Cir. 1993) (discussing and affirming sufficiency of notice of settlement of shareholder derivative action); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1839, at 198-201 (2007) ("7C Wright, Miller & Kane") (same); 5 MOORE'S FEDERAL PRACTICE – CIVIL § 23.1.10[a]-[b] (2015) (same). Contrary to Objector Wasserman's assertion, the Notice of Pendency and Partial Settlement of Shareholder Derivative Action that was mailed to A-7, A-8, and A-9 shareholders by GCG on August 6, 2015, contained detailed contact information for GCG, Plaintiffs' Counsel, ***and*** Defendants' counsel, including the names of the attorneys who could answer questions and provide information to shareholders.[4] Each of our law firms maintain Internet websites from which the individual attorneys' e-mail addresses and direct dial telephone numbers can be easily found. Indeed, as Objector Wasserman's written submission makes clear, he spoke with Plaintiffs' Counsel Kevin P. Roddy by telephone on several occasions regarding the proposed Settlement. Given these facts and circumstances, Plaintiffs respectfully submit that

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[4] Settlement-related information, including copies of the relevant Notice documents, pleadings filed by the parties, and this Court's Order dated July 31, 2015, were also posted on GCG's website – www.gardencitygroup.com – and the website maintained by Plaintiffs' Counsel,Wilentz, Goldman & Spitzer, P.A. – www.wilentz.com.

Wasserman's complaints about the Court-approved notice program should be disregarded. *See Bell Atl.*, 2 F.3d at 1318 ("we do not believe the district court abused its discretion in approving this notice" of settlement of shareholder derivative action).

B. The Eisen Objection Should Be Overruled

At the outset, this Court should consider the fact that under Virginia law, Mr. Eisen no longer has any shareholder rights because he forwarded a signed demand to A-9 for appraisal of his shares on at least several occasions, the earliest demand being made on February 12, 2014, and the latest demand being made on or about April 9, 2014. In either case, once he did so, he lost all shareholder rights. *See* VA. CODE ANN. 13.1-735.1(A) ("in the case of uncertificated shares [such as A-9 shares] ... [the] shareholder loses all rights as a shareholder" once he or she returns the signed form); *Firestone v. Wiley*, 485 F. Supp. 2d 694, 700-701 (E.D. Va. 2007) ("In this case, plaintiff concedes, as she must, that she lost her status as a shareholder [in] mid-November, 2006."). Having opted for the appraisal remedy, that has become Mr. Eisen's exclusive remedy. *See, e.g.*, *Adams v. United States Distributing Corp.*, 184 Va. 134, 147, 34 S.E.2d 244 (1945); *U.S. Inspect, Inc. v. McGreevey*, 57 Va. Cir. 511, 516 (2000).[5] Mr. Eisen's loss of shareholder rights also precludes his standing to object to the proposed Settlement. *See Rosenbaum v. McAlister*, 64 F.3d 1439, 1443 (10th Cir. 1995) (to object to settlement of shareholder derivative action objector needs to own stock in corporation at time of settlement); *Lewis v. Knutson*, 699 F.2d 230, 238 (5th Cir. 1983) (same).

Notwithstanding Mr. Eisen's lack of standing to object to the proposed Settlement, Plaintiffs address in sequence each of the points raised by him. For the reasons set forth below, we respectfully submit that the Eisen Objection should be overruled.

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[5] This appraisal proceeding is pending in the Circuit Court for the City of Richmond: *Apple Hospitality REIT, Inc. v. Brian A. Eisen,* Case No. CL 14-3088-00.

First, as previously stated by Plaintiffs, *see* Dkt. No. 116 at 4, in examining the proposed Settlement for "fairness" and "adequacy" under Rule 23.1 (and/or Rule 23) of the Federal Rules of Civil Procedure, this Court can determine that the Settlement was reached as a result of good-faith bargaining at arm's length, without collusion,[6] on the basis of (a) the posture of the case at the time settlement was proposed; (b) the extent of discovery that had been conducted; (c) the circumstances surrounding the negotiations; and (d) the experience of counsel in the area of shareholder derivative litigation. *See Jiffy Lube,* 927 F.2d at 158-159. Objector Eisen concedes that these are the relevant factors in this Circuit, *see* Dkt. No. 123 at 1-2, but then urges this Court to ignore the fourth factor, claiming that the undisputed experience of Plaintiffs' counsel should be ignored or given "little weight" by this Court when determining the fairness of the Settlement. *Id.* at 2-4.[7]

Of course, the Fourth Circuit's decision in *Jiffy Lube,* 927 F.2d at 158-159, says nothing of the kind. In that case, the appellate court noted with approval that the district court paid heed to "the experience of plaintiffs' counsel" and their assessment of the viability of their case when considering the proposed settlement. *Id.* at 159. Consistent with *Jiffy Lube,* the experience and

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[6] We note that the proposed Settlement was negotiated by Plaintiffs' Counsel, Defendants' counsel, and Defendants' insurance carriers' counsel. "[T]he involvement of multiple counsel from different firms suggests a lack of collusion." *In re Nvidia Corp. Deriv. Litig.,* 2009 U.S. Dist. LEXIS 24973, *11 (N.D. Cal. Mar. 18, 2009) (citation and internal quotation marks omitted).

[7] Ignoring Fourth Circuit precedent (*see* discussion, *infra*), Mr. Eisen hinges his argument on *dicta* from Judge Hellerstein of the Southern District of New York in *Levy v. General Elec. Cap. Corp.,* 2001 U.S. Dist. LEXIS 13099, *15-18 (S.D.N.Y. Aug. 30, 2001). In that shareholder derivative case, the district court declined to approve the proposed settlement because, among other reasons, the settling parties had failed or refused to provide notice in any form to the shareholders, contrary to the express provisions of Rule 23.1. *Id.* at *13 & n.9. In addition, Judge Hellerstein held that the alleged benefits of the settlement were "largely ephemeral." *Levy v. General Elec. Cap. Corp.,* 2002 U.S. Dist. LEXIS 10051, *2 (S.D.N.Y. June 4, 2002). Those two factors clearly distinguish *Levy* from the situation presented here.

opinions of plaintiffs' counsel are always given weight when district courts are considering whether to grant final approval to proposed settlements. *See, e.g., Archbold v. Wells Fargo Bank, N.A.,* 2015 U.S. Dist. LEXIS 92855, *5 (S.D. W.Va. July 14, 2015) ("The opinion of experienced ... counsel, with substantial experience in litigation of similar size and scope, is an important consideration."); *Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.,* 2014 U.S. Dist. LEXIS 124415, *41-42 (E.D. Va. Sept. 5, 2014) (same); *Winingear v. City of Norfolk,* 2014 U.S. Dist. LEXIS 97392, *14 (E.D. Va. July 14, 2014) (same); *Decohen v. Abbasi, LLC,* 299 F.R.D. 469, 480 (D. Md. 2014) (where plaintiffs' counsel had "significant litigation and appellate experience" and have served as lead counsel in previous successful cases, and "have attested to the fairness of the proposal in the Settlement Agreement," their experience "weigh[s] in favor" of fairness); *Domonoske v. Bank of Am.,* 790 F. Supp. 2d 466, 473 (E.D. Va. 2011) (same). Objector Eisen offers no rationale why this Court should ignore these district court decisions that follow *Jiffy Lube*.[8]

In this case, as we have demonstrated, Plaintiffs' counsel have decades of experience in litigating, trying, and settling shareholder derivative actions and class actions. *See* Dkt. Nos. 118-3, 118-4 & 118-5 (declarations and professional resumes of Plaintiffs' Counsel).[9] Thus,

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[8] The same rule is followed in other circuits. *See, e.g., City of Plantation Police Officers' Employees' Retirement Sys. v. Jeffries,* 2014 U.S. Dist. LEXIS 178280, *25 (S.D. Ohio Dec. 30, 2014) (approving settlement of shareholder derivative action: "Experienced counsel on both sides of this case recommends that the Court approve the proposed settlement and this recommendation is entitled to deference.") (citation omitted).

[9] *See also Strang v. JHM Mortg. Sec. Ltd. P'ship,* 890 F. Supp. 499, 501-502 (E.D. Va. 1995) (taking class counsel's "wealth of experience and knowledge" into account); *The Mills,* 265 F.R.D. at 255 (given class counsel's national recognition, "it is entirely warranted for this Court to pay heed to their judgment in approving, negotiating, and entering into the proposed settlement") (citing *MicroStrategy,* 148 F. Supp. 2d at 665). Significantly, counsel for Objector Eisen claims no experience in shareholder derivative actions or class actions, either in this District or elsewhere in the United States.

there is no basis in law – either in the Fourth Circuit or elsewhere – that the experienced opinions of Plaintiffs' Counsel are to be given "little weight" in this Court's determination that the proposed Settlement is fair and reasonable.

Second, Objector Eisen takes issue with Plaintiffs' Counsel's assessments of (a) the strength of Plaintiffs' case on the merits, (b) the measure of damages, and (c) the strength of Defendants' defenses. *See* Dkt. No. 123 at 4-7. Once again, Objector Eisen ignores Fourth Circuit precedent, as well as numerous decisions from judges in this District.

As set forth above, in *Jiffy Lube,* 927 F.2d at 159, the Fourth Circuit commanded this Court to consider (a) the posture of the case at the time settlement was proposed; (b) the extent of discovery that had been conducted; and (c) the circumstances surrounding the negotiations. Accordingly, in the motion papers that were filed on August 20, 2015, Plaintiffs' Counsel offered an extensive discussion of each of these factors. *See* Dkt. No. 116 at 5-9.[10]

The first two factors direct this Court to evaluate essentially how far this case has come from its inception in January 2014. *See The Mills,* 265 F.R.D. at 254-255. In cases like this, where "discovery has been substantial and several briefs have been filed and argued, courts should be inclined to favor the legitimacy of a settlement." *Id.* at 254 (citing *MicroStrategy,* 148 F. Supp. 2d at 664). In this case, as this Court is well aware, Plaintiffs' claims and Defendants' defenses to those claims were extensively litigated during 2014-2015, including the motion(s) to dismiss that resulted in this Court's published opinion upholding the shareholder derivative claim

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[10] In the words of Judge Quarles, "[b]ecause a settlement hearing is not a trial, the court's role is more balancing of likelihoods rather than an actual determination of the facts and law in passing upon … the proposed settlement." *Decohen,* 299 F.R.D. at 479 (internal quotation marks omitted) (quoting *Flinn v. FMC Corp.,* 528 F.2d 1169, 1173 (4th Cir. 1975)). *See also* 7C Wright, Miller & Kane, § 1839 at 208-209 ("[T]he proceeding seeking court approval of the settlement should not become a trial of the case's merits" and "the court should not substitute its judgment of what is in the best interests of the parties") (footnotes and citations omitted).

for breach of fiduciary dity. *DCG&T f/b/o Battaglia v. Knight,* 68 F. Supp. 2d 579 (E.D. Va. 2015). As this Court will undoubtedly recall, there were months of contentious motion practice leading to its March 2015 rulings granting Plaintiffs' motions to compel discovery, and Defendants' eventual production in electronic form of the equivalent of 100 boxes of documents and information. Also, it is undisputed that Plaintiffs' counsel thereafter took the depositions of seven key fact witnesses, including the principal actors who devised and carried out the 2014 Merger that is the subject of this shareholder derivative action. Any reasonable assessment of these factors should lead this Court to conclude that the proposed Settlement is fair. *See The Mills,* 265 F.R.D. at 254-255.

As to the third *Jiffy Lube* factor – the circumstances surrounding the negotiations – the proposed Settlement was the product of three mediation sessions conducted by Plaintiffs' Counsel, Defendants' counsel, and counsel for Defendants' insurance carriers with two independent and experienced mediators: Justice Elizabeth Lacy (Ret.) of the Supreme Court of Virginia and Magistrate Judge David Novak of this District. Prior to those mediation sessions, both Plaintiffs' Counsel and Defendants' counsel submitted voluminous mediation briefs (and supplemental briefs) that exhaustively analyzed the facts of the case, Plaintiffs' claim(s), Defendants' defenses, the measure of damages claimed (or disputed), and the likely result at trial. In this case, as the Fifth Circuit stated in *Maher,* 714 F.2d at 456-457, this derivative settlement "was the result of arm's-length negotiation, after extensive discovery and intelligent evaluation of the lawsuit by the parties and their capable counsel."

Objector Eisen's failure to acknowledge the parties' engagement in lengthy mediation proceedings with experienced and well-regarded mediators is difficult to fathom, particularly

because the courts of this Circuit place such importance on this factor.[11] In this case, as in *The Mills,* 265 F.R.D. at 255, neither Objector Eisen nor this Court may ignore the fact that the proposed Settlement was the product of lengthy and contentious negotiations supervised by two independent, experienced mediators. In the words of Judge O'Grady of this District:

> It is apparent to the Court that this settlement was not entered into haphazardly with an underdeveloped understanding of the merits of the case. Rather, as the preceding factors demonstrate, the strengths and weaknesses of this case were well-developed for all parties, such that this factor also militates in favor of the Settlement. Negotiations were sufficiently thorough, contentious, and at arm's length to ensure the propriety of Class Counsel's decision to enter into the settlement and the proceedings leading thereto.

The Mills, 265 F.R.D. at 255.

Nothing in the Fourth Circuit's decision in *Jiffy Lube,* or the decisions issued by the judges in this District, requires Plaintiffs' Counsel to now tout the strengths, or reveal the weaknesses, in Plaintiffs' claims for breach of fiduciary duty and/or the measure of damages sought and quantified by Plaintiffs' expert. Those facts and circumstances were thoroughly aired prior to and during the three separate confidential mediation sessions conducted by Justice Lacy and Magistrate Judge Novak in 2014 and 2015. What Objector Eisen advocates is unfounded: According to his brief, Plaintiffs' Counsel should now reveal to the world, and to Defendants and their counsel, whatever weak points might be perceived in Plaintiffs' claims for breach of

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[11] *See Archbold,* 2015 U.S. Dist. LEXIS 92855, at *5 ("Here, there is no suggestion of collusion or bad faith. Instead, it appears to the Court that settlement was reached only after intense, adversarial mediation and negotiations."); *Berry,* 2014 U.S. Dist. LEXIS 124415, at *41 (in approving class action settlement, Senior Judge Spencer "notes that three highly skilled mediators," including two magistrate judges and a private mediator, "have been involved in the negotiation of the Proposed Settlement Agreement"); *Hargrove v. RylaTelesvcs., Inc.,* 2013 U.S. Dist. LEXIS 63902, *18 (E.D. Va. Apr. 12, 2013) (in approving class action settlement, Magis. Judge Miller notes that "[i]n this case, experienced counsel negotiated the settlement at arms-length after enlisting the aid of an experienced independent third-party mediator"). Given the consistency of these precedents, it is inexplicable that Objector Eisen totally ignores the fact that the parties engaged in three mediation sessions before crafting the proposed Settlement.

fiduciary duty and/or the provable damages such that, when and if the proposed Settlement is not approved by this Court (at Objector Eisen's instigation), and the parties revert to a litigation posture, Defendants would then have a road map to file their motion(s) for summary judgment seeking dismissal of Plaintiffs' claims. Undoubtedly, this is why courts and commentators caution against turning the instant proceeding into "a trial of the case's merits." 7C Wright, Miller & Kane, § 1839 at 208 (footnote and citations omitted). The Fourth Circuit agrees. *See Flinn,* 528 F.2d at 1172. So do the judges of this District. *See, e.g., Lomascolo v. Parsons Brinckerhoff, Inc.,* 2009 U.S. Dist. LEXIS 89136, *27-29 (E.D. Va. June 23, 2009).

For these reasons, the arguments raised by Objector Eisen are not supported by Fourth Circuit precedent; nor are they supported by reference to any decisions issued by the judges of this District. Moreover, Objector Eisen simply ignores the inconvenient fact (for him) that the proposed Settlement was the product of three mediation sessions conducted by Plaintiffs' Counsel and Defendants' counsel under the supervision of two separate experienced and independent mediators. Accordingly, the Eisen Objection should be overruled.

III. CONCLUSION

For the reasons stated herein, the Veishlow/Beaver Objection, the Wasserman Objection, and the Eisen Objection to the proposed Settlement of this shareholder derivative action should be overruled. For the reasons set forth in Plaintiffs' moving papers, and for the additional reasons stated herein, the proposed Settlement should be approved by this Court.[12]

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[12] None of these objectors raise any issue as to the propriety of Plaintiffs' Application for an Award of Attorneys' Fees and Expenses and Service Award, *see* Dkt. Nos. 117 & 118.

DATED: September 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 4, 2015, I electronically filed the foregoing with the Clerk of this Court using the CM/ECF system, which will send notification of such filing (NEF) to all CM/ECF registered attorneys indicated on the NEF and I certify further that on September 4, 2015, I sent the foregoing by U.S. Mail, postage prepaid, to:

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