UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

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. 14-00067

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

I. INTRODUCTION

Plaintiffs, DCG&T f/b/o Jack Battaglia/IRA, Jack Battaglia, and DCG&T f/b/o Lori Battaglia/IRA, by their undersigned counsel and pursuant to FED. R. CIV. P. 23.1, respectfully submit this Memorandum of Law in support of the Motion for Final Approval of the Proposed Settlement of this shareholder derivative action brought on behalf of Apple Nine REIT, Inc. ("A-9"), which is set out in the Stipulation of Settlement (" Settlement Agreement") dated July 23, 2015.

For the reasons set forth below, Plaintiffs respectfully request that this Court (1) approve

the Settlement and Plan of Allocation, pursuant to Rule 23.1, as being fair, reasonable, and adequate, and in the best interests of A-9 and its shareholders and (2) enter the proposed Order and Final Judgment, which is annexed to the Settlement Agreement.

This Court's attention is directed to the Joint Declaration of Kevin P. Roddy and Lee Squitieri in Support of Final Approval of Settlement and Plan of Allocation ("Joint Decl.") for facts which support the motion for approval of the Settlement Agreement and Plan of Allocation.

II. DISCUSSION OF AUTHORITY

A. The Settlement Of Complex Litigation, Including Shareholder Derivative Actions, Is Highly Favored

In the words of the Fourth Circuit: "Settlement here is favored for the reasons that settlements generally are favored: disputes are resolved; the resources of litigants and courts are saved; and, in the case of a derivative action, management can return its attention and energy from the courtroom to the corporation itself." *Zimmerman v. Bell*, 800 F.2d 386, 392 (4th Cir. 1986). There is an overriding public interest in settling and quieting litigation and this is particularly true in complex litigation, such as shareholder derivative actions. *See, e.g.*, *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation"); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement"), *overruled on other grounds*, *Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998); *In re AOL Time Warner S'holder Deriv. Litig.*, No. 02 Civ. 6302, 2006 U.S. Dist. LEXIS 63260, at *7 (S.D.N.Y. Sept. 6, 2006) ("Public policy, of course, favors settlement.").

Accordingly, and because the goal of settlement is to avoid the waste and expense of

further litigation, this Court does not "decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981); *see also EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (in considering a settlement, a district court must "refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights"). A court's inquiry "is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate." *Isby*, 75 F.3d at 1196; *accord AOL Time Warner*, 2006 U.S. Dist. LEXIS 63260, at *6 ("Before approving the settlement of a derivative action, the Court must be satisfied that the compromise fairly and adequately serves the interests of the corporation on whose behalf the derivative action was instituted.") (quotation marks and citations omitted). *See also In re MicroStrategy, Inc. Sec. Litig.*, 150 F. Supp. 2d 896, 903-904 (E.D. Va. 2001) ("Simply put, the Court must assess whether the settlement here is both fair and adequate under the circumstances.").

B. The Applicable Settlement Approval Standards

Pursuant to Rule 23.1, the settlement of a shareholder derivative action requires court approval, a decision left to the sound discretion of this Court. *Zimmerman*, 800 F.2d at 391; *Strougo v. Bassinni*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003). Before approving the settlement of a shareholder derivative action, this Court must be satisfied that the compromise fairly and adequately serves the interests of the corporation on whose behalf the derivative action was instituted. *Zimmerman*, 800 F.2d at 391; *Domonoske v. Bank of Am.*, NO. 5:08CV0066, 2010 U.S. Dist. LEXIS 7242, at *4 (W.D. Va. Jan. 27, 2010); *AOL Time Warner*, 2006 U.S. Dist. LEXIS 63260, at *6.

As Judge Ellis recognized in *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001), the Fourth Circuit applies a two-part test to determine whether a proposed

settlement meets the requirements of the Federal Rules of Civil Procedure by considering two elements: "fairness," which focuses on whether the proposed settlement was negotiated at arm's-length, and "adequacy," which focuses on whether the consideration provided to class members (or other distributes) is sufficient. *Id.* at 663 (The "Fourth Circuit adopted a bifurcated analysis, separating the inquiry into a settlement's "fairness" from the inquiry into a settlement's 'adequacy.'") (quoting *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 155, 158-159 (4th Cir. 1991)).

The factors which courts should consider in determining fairness are: (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. *See Jiffy Lube*, 927 F.2d at 158-159; *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975). The adequacy inquiry considers the substantive factors of the settlement, including: (a) the relative strength of plaintiffs' case on the merits; (b) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (c) the anticipated duration and expense of additional litigation; (d) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (e) the degree of opposition to the settlement. *See Jiffy Lube*, 927 F.2d at 159; *Flinn*, 528 F.2d at 1173-1174.

In assessing the fairness and adequacy of a settlement, courts give a " strong initial presumption that the compromise is fair and reasonable." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). "Absent evidence to the contrary, the Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *Deem v. Ames True Temper, Inc.*, No. 10-cv-01339, 2013 WL 2285972, at *2 (S.D. W.Va. May 23, 2013). Because compromise and settlement are favored, "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of

success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions." *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Thus, the Court should not "turn the settlement hearing into a trial or a rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case." *S.C. Nat'l Bank*, 749 F. Supp. at 1424 (internal quotation marks omitted).

As set forth below, the Settlement represents an excellent result and satisfies each of the Fourth Circuit factors.

1. The Settlement Is Fair

a. The Extent Of Investigation And Discovery Conducted Supports Fairness Of The Settlement

The Settlement is the product of vigorous and informed arm's-length negotiations. *See* Joint Decl. ¶¶ 29-32. Experienced counsel representing the parties and Defendants' insurance carriers participated in mediation sessions before a private mediator (Retired Justice Elizabeth Lacy of the Supreme Court of Virginia) and Magistrate Judge David Novak. *Id.* Before each of these sessions, the parties prepared and submitted settlement briefing and engaged in several informal mediation discussions. *Id.* Accordingly, the Settlement enjoys a presumption that it was reached without collusion and is fair, adequate, and reasonable.

The opinion of experienced counsel familiar with the facts of the case should be given weight in evaluating a proposed settlement. *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). Indeed, where there is "no indication of any collusion, it is therefore appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole." *S.C. Nat'l Bank*, 139 F.R.D. at 339; *see also Flinn*, 528 F.2d at 1173.

The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work in this case. *See MicroStrategy*, 148 F. Supp. 2d at 665 (noting that "counsel for ***both*** sides are nationally recognized members of the securities litigation bar" when considering the fairness of the settlement). Defendants have been represented by lawyers from McGuireWoods LLP, a law firm with an abundance of experience representing defendants in this type of litigation. Thus, the recommendations of experienced and qualified counsel favor approval of the Settlement.

b. Experienced Counsel Litigated This Action Even As Settlement Negotiations Progressed

This shareholder derivative action has been litigated and settled by experienced and competent counsel on both sides of the case. Plaintiffs' Co-Lead Counsel are well known for their experience and success in complex class action and shareholder derivative litigation and have many years of experience in class litigation involving corporate shareholders. Joint Decl. ¶¶ 9-28. Based on their extensive experience and expertise, Co-Lead Counsel have determined that the Settlement is in the best interest of A-9 and its shareholders after weighing the substantial benefits of the Settlement against the numerous obstacles to a better recovery after continued litigation. Joint Decl. ¶¶ 41-53.

2. The Proposed Settlement Is Adequate

A proposed settlement is determined to be "adequate" by considering "(1) the relative strength of plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement." *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). In

sum, "the fairness prong is concerned with the procedural propriety of the proposed settlement, while the adequacy prong focuses on the agreements substantive propriety. *In re Am. Capital S'holder Derivative Litig.*, Nos. 11-2424, 11-2428, 11-2459, 2013 U.S. Dist. LEXIS 90973, at *9 (D. Md. June 26, 2013). Here, both as a procedural and a substantive matter, the Settlement is fair, reasonable, and adequate to A-9 and its shareholders.

3. The Strength Of Plaintiffs' Claims And Defendants' Defenses

The "first and second *Jiffy Lube* factors ... compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 256 (E.D. Va. 2009). While Plaintiffs are confident in the merits of their claims, they would still have to overcome numerous affirmative defenses asserted by Defendants in order to survive Defendants' summary judgment motions and, ultimately, recover at trial. Further litigation to establish liability thus posed a significant threat to any recovery.

As numerous courts have recognized, shareholder derivative actions are notoriously complex and expensive to prosecute. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (affirming the approval of a derivative action settlement and noting that the "odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful"); *see also AOL Time Warner*, 2006 U.S. Dist. LEXIS 63260, at *8 (approving derivative settlement and noting that "shareholder derivative actions are notoriously difficult and unpredictable"). Plaintiffs would have faced a host of potential risks and costs, including the high costs associated with lengthy and complex litigation, potential loss on summary judgment, and the inherent risks of trial should the case progress that far. Apart from the unique risks of shareholder derivative litigation discussed above, Plaintiffs face all of the risks inherent

in any complex litigation, including highly technical factual and legal issues that require extensive expert witness analysis, as well as the challenge of establishing liability in the face of conflicting testimony and evidence. Should Plaintiffs' claims have survived dispositive motions and proceeded to trial, this Court would have been presented with the Individual Defendants' denial of all wrongdoing.

The Settlement of the claims on behalf of A-9 will require the creation of a fund in the amount of $12 million to be paid on behalf of the Defendants as settlement for release of A-9's claims against the Defendants. The Settlement Fund (net of any award by this Court of counsel fees and expenses and a service award to Plaintiff representative Jack Battaglia) is to be distributed pursuant to the Plan of Allocation, which provides the net fund will be distributed pro rata on a per share basis to all shareholders who voted against the merger or who abstained from voting (and whose votes were therefore counted against the Merger). Joint Decl. ¶ 41.

The Settlement consideration represents a recovery of a substantial percentage of the damages allegedly sustained by Old A-9 shareholders. Plaintiffs' expert witness estimated that the damages from dilution and/or failure of Defendants to do a stand-alone initial public offering ("IPO") of A-9 ranged from $90 million to $119.5 million. Accordingly, the proposed gross Settlement represents a recovery range of approximately 7% to 13% of the estimated dilution and foregone IPO damages. Net of proposed attorney's fees and expenses, the net recovery still represents 6.5% to 9% of the estimated damages. Joint Decl. ¶ 42.

These percentages compare extremely favorably to historical precedent recoveries in shareholder derivative cases, which average a recovery of 2.4% of estimated damages. *See In re Atmel Corp. Deriv. Litig.*, No. CV 10-06576, 2010 U.S. Dist. LEXIS 145551, at *40-41 (N.D.

Cal. Mar. 31, 2010) (citing academic studies stating that the average recovery in shareholder derivative litigation is 2.4% of the estimated damages). Joint Decl. ¶ 43.

In sum, Co-Lead Counsel recognized that continued litigation of this action would be complex, time-consuming, and expensive, with the chance of obtaining a recovery greater than that provided for by the Settlement far from assured. The Settlement secures a substantial and immediate benefit undiminished by further litigation expenses, without the delay, risk, and uncertainty of continued litigation. *See MicroStrategy*, 148 F. Supp. 2d at 665-666 ("a fair assessment of plaintiffs' burden of establishing the elements of their claims against the asserted defenses ... on liability and damages grounds firmly supports the propriety of the ... settlement").

4. The Anticipated Duration Of This Action If The Claims Are Not Settled

If the litigation of this shareholder derivative action was to continue beyond its present stage, Defendants' inevitable summary judgment motion(s) and trial preparation efforts would result in a massive undertaking and require considerable additional time and resources be expended by the parties. Indeed, due to the number of potential witnesses in this litigation, Co-Lead Counsel would need to expend many hours preparing for direct and cross-examination, would be required to identify and/or prepare the many exhibits intended for use at trial, and would expect significant pre-trial motion practice. Even the trial itself would require weeks, if not longer, to conduct.

The continued prosecution of this action would require the parties to incur substantial costs, particularly because the case as originally brought involved multiple Individual Defendants, and could be expected to involve numerous other non-party fact and expert witnesses and voluminous documentary evidence. Plaintiffs' claims would also be subject to

the unpredictability of a lengthy and complex jury trial, the possible unavailability of witnesses, and the possibility that jurors could react to the evidence in unforeseen ways.

Should Plaintiffs prevail on liability, they would have continued to face substantial hurdles in demonstrating and quantifying damage to A-9, with any such showing likely to result in a battle of competing experts – another situation fraught with unpredictability. Lastly, even a favorable judgment at *trial* would undoubtedly result in extended multiple post-trial motions. This would obviously involve further delay and expense, possibly postponing final resolution of the claims for years.

5. Shareholder Objections To The Proposed Settlement

Courts view the absence of opposition to a settlement by affected parties as a factor strongly supporting judicial approval of the settlement. *See AOL Time Warner*, 2006 U.S. Dist. LEXIS 63260, at *16 (in shareholder derivative action, "the lack of objections may well evidence the fairness of the Settlement") (quotation marks and citation omitted); *AT&T Mobility*, 789 F. Supp. 2d at 964-965 (approving settlement where only 235 out of over 32 million class members opted out and only 10 objections were filed).[1]

Here, shareholders were first notified of the proposed Settlement shortly after August 6, 2015, when written notice was mailed by Garden City Group to approximately 38,000 shareholders. Joint Decl. ¶ 38. While shareholders are permitted to file objections to the proposed Settlement through August 28, 2015, as of the date of this filing, only two objections

[1] *See also Zimmerman*, 800 F.2d at 391 (affirming approval of settlement where there was 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."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (In class action settlement with more than 100,000 claims, 342 opt-outs and 15 filed objections amounted to "very small percentage" of opposition, supporting approval of settlement.); *Mexico Money*, 164 F. Supp. 2d at 1021 (holding that the fact that more than "99.9% of class members

have emerged. Joint Decl. ¶¶ 39-40. At the same time, dozens of shareholders have contacted Plaintiffs' Co-Lead Counsel to request information on the proposed Settlement. Joint Decl. ¶ 39. Thus, at this juncture, there is no reason to believe that the proposed Settlement is not widely endorsed by A-9's shareholders.

C. Notice To Shareholders Was Adequate

1. Notice Was Effected in Accordance With The Preliminary Approval Order

In accordance with the Preliminary Approval Order entered by this Court on July 31, 2015, the parties provided direct first-class mail notice of the proposed Settlement to A-7, A-8, and A-9 shareholders. Joint Decl. ¶¶ 38-40. In addition to the fact and nature of the proposed Settlement, the Notice advised the shareholders of their right to object to the Settlement and to appear at a fairness hearing regarding the Settlement, as well as the process by which they could do either or both of those things. Joint Decl. ¶¶ 36-39.

2. The Notice Procedures Fully Satisfied Due Process

Rule 23.1 of the Federal Rules of Civil Procedure requires that notice be given to shareholders in derivative actions "in such manner as the court directs." The notice process employed in this case satisfies Rule 23.1 and this Court's Order, and otherwise comports with due process because the notice informed the shareholders of (1) the terms of the Settlement; (2) the availability of further information from the Parties; and (3) the right to object and be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *Bell Atl.*

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have neither opted out nor filed objections . . . is strong circumstantial evidence in favor of the

Corp. v. Bolger, 2 F.3d 1304, 1317 (3d Cir. 1993) (to satisfy due process, the notice "must be sufficiently informative and give sufficient opportunity for response.") (quotation marks and citation omitted).

III. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

Approval of a plan of allocation of settlement proceeds in a class action under Rule 23 is "'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1045; *Beecher v. Able*, 575 F.2d 1010, 1016 (2nd Cir. 1978). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (citing *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993), *aff'd*, 41 F.2d 402 (8th Cir. 1994)). Courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members ... equitably." *Beecher*, 575 F.2d at 1016.

The Plan of Allocation, which is fully described in the Notice, establishes the method by which the Net Settlement Amount will be distributed to shareholders eligible. Joint Decl. ¶¶ 40, 41, 44. The Plan of Allocation was formulated by Co-Lead Counsel, in consultation with their advisors, ensuring its fairness and reliability. Joint Decl. ¶ 42. Under the proposed Plan of Allocation, each authorized claimant will receive a *pro rata* share of the "Net Settlement Amount," *i.e.,* the Settlement consideration less certain fees and expenses, with that share to be determined by the ratio that the shareholders' number of shares bears to the total number of eligible shareholders' total shares. Joint Decl. ¶¶ 41, 44.

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settlement[s]").

Co-Lead Counsel believes that it acted fairly in developing the Plan of Allocation.[2] Accordingly, we respectfully submit that the proposed Plan of Allocation is fair and reasonable and should be approved by this Court.

IV. CONCLUSION

For the foregoing reasons and based upon the authority cited herein, Plaintiffs respectfully requests that this Court grant final approval of the Settlement and enter the proposed Order and Final Judgment, which is annexed to the Stipulation as Exhibit D.

Dated: August 20, 2015

/s/ Jeffrey Hamilton Geiger

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[2] Only two objections to the Plan of Allocation have been received to date. *See* Joint Decl. ¶ 40.

CERTIFICATE OF SERVICE

I certify that on August 20, 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.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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. 14-00067

JOINT DECLARATION OF KEVIN P. RODDY AND LEE SQUITIERI IN SUPPORT OF PLAINTIFFS' APPLICATION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

Kevin P. Roddy and Lee Squitieri, hereby declare that:

1. I, Kevin P. Roddy, am an attorney at law, licensed to practice in the States of New Jersey, New York and California. (I am an associate member of the Virginia State Bar and, from 1982 to 2012, I was an active member of the Virginia State Bar). I am a graduate of the University of North Carolina (B.A. 1977) and the University of North Carolina School of Law (J.D. 1980). I am a shareholder (partner) at the law firm of Wilentz, Goldman & Spitzer, P.A. resident in its main office located in Woodbridge, New Jersey. I am Co-Lead Counsel for Plaintiffs in this shareholder derivative action and I make this Declaration in Support of

Plaintiffs' Application for Final Approval of Settlement Agreement and Plan of Allocation. I was admitted *pro hac vice* in April 2014. I have personal knowledge of the matter set forth herein and, if called as a witness, I could and would competently testify as set forth herein.

2. I, Lee Squitieri, am an attorney at law licensed to practice in the States of New York and New Jersey. I am a partner of the law firm of Squitieri & Fearon, LLP of New York and New Jersey. I am co-lead counsel for Plaintiffs in this shareholder derivative action and I make this declaration in support of Plaintiffs Application for Final Approval of Settlement and Plan of Allocation. I was admitted *pro hac vice* in February 2014. I have personal knowledge of the matters set forth herein and if called as a witness could testify as set forth herein.

I. INTRODUCTION

3. The proposed Settlement and Plan of Allocation merits the approval of this Court because (a) it provides fair and adequate compensation for the release and dismissal of the shareholder derivative claims (the only claims to survive after the partial grant of defendants' motion to dismiss Plaintiffs' Amended Complaint); (b) was the product of arm's-length negotiations between counsel for the adverse parties, (c) was achieved only after all fact discovery had been completed and Plaintiffs' expert witnesses had been retained and consulted and had submitted their reports; (d) the Settlement consideration addresses the specific objective of the litigation, *i.e.*, to cure/ameliorate the alleged dilution caused by the allegedly unfair merger exchange ratios, pursuant to which old A-9 shareholders' interests were diluted; (e) the Plan of Allocation distributes that consideration consistent with the allegations of Plaintiffs' claims and allegations of injury; and (f) no objections have been heard from any A-9 shareholders.

II. THE CLAIMS ASSERTED

4. This case arises out of the merger of two REITs, *i.e.*, Apple REIT Eight, Inc. ("A-8") and Apple REIT Seven, Inc.(" A-7"),[1] into pre-merger Apple REIT Nine, Inc. ("A-9" or "Old A-9"), which was owned by Plaintiffs and other shareholders but which was controlled by Defendant Glade Knight – as were all of the Apple REIT entities. Pursuant to the terms of the merger, which closed on March 1, 2014, one (1) A-9 share was issued for each share of the common stock of A-7, and 0.85 shares of A-9 common stock was issued for each share of the common stock of A-8. Plaintiffs alleged that these ratios grossly undervalued A-9 and resulted in dilution to Old A-9.

5. In this shareholder derivative action, Plaintiffs assert claims on behalf of the Nominal Defendant, A-9, which has since been succeeded by Apple Hospitality REIT, Inc. (AHR"), against Defendants, Glade Knight, James C. Barden, Michael S. Waters, Robert M. Wily, and Bruce H. Matson (collectively the "Director Defendants"). Under Virginia law, breach of fiduciary duty is a tort and the tortfeasor(s) is (are) liable for all damages proximately caused by the breach. *See In re Fairfax W. Apt. Owners Ass'n, Inc.*, 1991 U.S. App. LEXIS 9564, *10 (4th Cir. May 14, 1991); *In re LandAmerica Fin. Grp., Inc.*, 470 B.R. 759, 804 (Bankr. E.D. Va. 2012). "Directors and officers of a corporation may be held jointly and severally liable if they jointly participate in the breach of fiduciary duty or approve of, acquiesce in, or conceal a breach by a fellow director of officer." *Id.* at 805.

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[1] A real estate investment trust, or REIT, is an entity that owns and operates income-producing real estate and distributes the income to investors. REITs pool the capital of numerous investors to purchase a portfolio of properties. To qualify as a REIT, a company must have most of its assets and income tied to a real estate investment and must distribute at least 90% of its taxable income to shareholders annually in the form of dividends. To be sustainable, a REIT's dividends should be funded by cash flows from the income-producing properties. Dividend levels and cash flows from properties determine a REIT's value.

6. Through the shareholder derivative claim asserted in Count II of the Amended Complaint (Dkt. No.. 23), Plaintiffs sought to recover the dilution damages. Under Virginia law, breach of fiduciary duty is a tort and a tortfeasor is liable for all damages proximately caused by the breach. Such damages can include loss or diminution in the value of the enterprise, unauthorized transfer of value to individual insiders, diminution in value of operations, and loss of control premium. *See LandAmerica,* 470 B.R. at 804-805.

7. On December 18, 2014, this Court issued a Memorandum Opinion (Dkt. No. 67) upholding that shareholder derivative claim against the Director Defendants' Motion to Dismiss. *Battaglia v. Knight,* 68 F. Supp. 2d 579 (E.D. Va. 2014). In the Memorandum Opinion, this Court stated in pertinent part as follows:

- "[Plaintiffs] allege[] that the Directors breached their fiduciary duties to shareholders and A9 by engaging in a flawed planning process and approving a merger that harmed A9. [Plaintiffs] state[] sufficient facts to plausibly conclude that the Directors breached their fiduciary duties. Accordingly, the Court denies the defendants' motion to dismiss with respect to Count II."

- "[Plaintiffs] state[] sufficient factual allegations throughout [their] 37-page amended complaint suggesting a plausible conclusion that the Directors did not act in good faith for the best interests of the A9 shareholders, but rather for the benefit of themselves or others. ... [Plaintiffs] allege in a variety of ways that the Directors knowingly engaged in a flawed and conflicted decision making process leading up to the merger, much to the detriment of A9 shareholders."

8. In her Rule 26 disclosures, Plaintiffs' designated expert witness estimated that the dilution loss in value to A-9 as a result of the Director Defendants' alleged improper conduct resulted in dilution damages in the range of $90.8 million to $180 million.

III. THE PROCEDURAL AND LITIGATION HISTORY

9. After several months of research concerning the proposed merger, and after petitioning A-9 under Virginia law for access to A-9's books and records, Plaintiffs authorized counsel to make a formal demand under Virginia law to A-9's directors that they reformulate the merger ratios to more fairly reflect the relative values of the three companies in the Merger. After this written demand was ignored, Plaintiffs authorized counsel to draft a complaint as appropriate in our judgment.

10. The action was commenced by filing of a Complaint on January 31, 2014 (Dkt. No. 1). Ten days later, Plaintiffs filed a motion for temporary restraining order ("TRO") and memorandum of law and declaration in support and an application for expedited discovery. (Dkt. Nos. 3-5). Senior Judge Payne, to whom this case was then assigned, scheduled a hearing for the TRO (Dkt. No. 6), and Defendants filed a memorandum of law in opposition (Dkt. No. 8). Later on, in the face of overwhelming A-9 shareholder voting in favor of the merger, Plaintiffs withdrew their TRO application (Dkt. No. 13) and sought an extension of time to file an Amended Complaint, which the Court granted. (Dkt. No. 22).

11. The Amended Complaint was filed on March 24, 2014 (Dkt. No. 23). It was met, on May 5, 2014, with Defendants' motion to dismiss and answer. (Dkt. Nos. 33-34 (motion to dismiss) and 35 (answer)).

12. Senior Judge Payne issued several orders accelerating the pace of the litigation even as the motion to dismiss was being briefed and remained pending (Dkt. Nos. 28, 29, 37 and 39), and setting a trial date for January 20, 2015 (Dkt. No. 37).

13. At the direction of Senior Judge Payne a private mediator was selected (Dkt. No. 39). Retired Justice Elizabeth Lacy of the Supreme Court of Virginia was agreed to by the

parties as the mediator and a day-long mediation session ensued in July 2014, preceded by preparation of detailed mediation briefs analyzing both liability and damage aspect of Plaintiffs' claims. In the meanwhile, Defendants' motion to dismiss was fully briefed and remained *sub judice* (Dkt. Nos. 41-42).

14. As directed by Senior Judge Payne, the parties prosecuted this action expeditiously. Plaintiffs' motion for class certification was filed on June 20, 2014 (Dkt. Nos. 45, 46 and 47). That filing precipitated a demand by Defendants for discovery from Plaintiffs, including taking the deposition in Washington, D.C., of Plaintiff representative Jack Battaglia.

15. Major discovery issues arose after Defendants refused to comply with Plaintiffs' requests for production of documents and interrogatories to Defendants, and after Defendants objected to subpoena duces tecum served upon the investment bankers retained by the merger participants.

16. A telephone conference with Senior Judge Payne was held (Dkt. No. 51) to discuss the outstanding discovery issues. Judge Payne ordered briefing on the issues and set a tight schedule for filing of motions, opposition and replies. *Id.* Thereafter the parties briefed the numerous discovery issues involving complex issues of procedural and substantive law. (Dkt. Nos. 52-55 & 57-59).

17. On August 8, 2014, this action was re-assigned to Judge John A. Gibney, Jr. who has presided over this action to the present.

18. Judge Gibney ordered additional submissions on the motions to dismiss (Dkt. No. 60) and those submissions were timely filed two weeks later. (Dkt. Nos. 61-62). Having been supplied with additional briefing, the Court ordered an in-person conference for December 17, 2014. (Dkt. No. 63).

19. The parties appeared before this Court on December 17, 2014, at which time the pending motions were discussed. This Court issued orders setting a July 13, 2015, trial date (Dkt. No. 64); referring the case to Magistrate Judge David J. Novak for settlement purposes (Dkt. No. 65) and establishing settlement conference procedures (Dkt. No. 66). The very next day, Judge Gibney issued his Memorandum Opinion (Dkt. No. 67) granting Defendants' motion for dismissal of all class claims but denying dismissal of plaintiffs' shareholder derivative claims for breach of fiduciary duty. (*Id.* & Dkt. No. 68).

20. The parties met as directed with Magistrate Judge Novak, who agreed to allow the parties to return to private mediation. However, Magistrate Judge Novak required the parities to report their progress to him in March 2015. Another private mediation session with Justice Lacy was held in Richmond with all parties and counsel present but no settlement was achieved. Nor did the parties even move closer to settlement. When this was reported to Magistrate Judge Novak, he ordered a settlement conference to be held on May 6, 2015, in his chambers with all parties and counsel and insurers present.

21. On February 5, 2015, this Court granted Plaintiffs' motion to compel discovery (Dkt. No. 69). Theoretically, that order, when combined with this Court's ruling permitting the claim for breach of fiduciary duty to go forward, should have allowed this case to proceed. However, production of documents pursuant to that discovery ruling was delayed while Defendants filed a flurry of motions seeking to challenge the ruling and frustrate production of relevant and discoverable documents.

22. Defendants filed a motion to stay and for reconsideration of the discovery rulings and sought certification for interlocutory appeal (Dkt. No. 71). Those motions were accompanied by legal memoranda and, eventually, an amicus filing. (Dkt. Nos. 72, 73 & 76).

Defendants also filed a motion to quash non-party subpoenas (Dkt. Nos. 81-82), and a motion to quash any discovery relating to SEC materials. (Dkt. Nos. 84-85). Although this Court denied in pertinent part all of Defendants' discovery motions (Dkt. Nos. 80, 83, 87 & 97), Defendants refused to yield and filed a motion for "clarification" (Dkt. Nos. 93-94). The discovery issues were resolved and the parties prepared for fact witness depositions.

23. Attempting once again to have Plaintiffs' claims dismissed, Defendants filed a motion to strike Count IV of the Amended Complaint (Dkt. Nos. 77-78).

24. Without pertinent discovery, Plaintiffs' expert witnesses could not complete their reports and, accordingly, Plaintiffs sought an extension of time to submit expert reports (Dkt. No. 92). Defendants, unsurprisingly, opposed the motion (Dkt. No. 95).

25. The parties reported to Magistrate Judge Novak on settlement progress on March 17, 2015. Magistrate Judge Novak set a settlement mediation for May 6, 2015, and advised the parities to submit their respective memoranda (Dkt. No. 104), discussing the factual and legal issues, damages, and settlement positions.

26. The depositions of seven (7) fact witnesses proceeded on an accelerated schedule throughout April and early May 2015. The Court accommodated the parties by adjusting various internal deadlines but maintaining the July 2015 trial date. (Dkt. Nos. 103, 105, 106, 107 & 109).

27. In early May 2015, plaintiffs prepared and served their Rule 26 expert witness disclosures on Defendants.

28. Plaintiffs were in the midst of preparing for the final few depositions in early May, but took a break in the deposition schedule to prepare for the May 6, 2015, settlement mediation with Magistrate Judge Novak.

IV. THE SETTLEMENT PROCESS AND SETTLEMENT TERMS

29. Plaintiffs and Defendants and their counsel (including Defendants' insurance coverage counsel) conducted two mediation sessions with a private mediator, Retired Justice Elizabeth Lacy of the Supreme Court of Virginia. The first mediation session was held on July 7, 2014. The second mediation session was held on March 13, 2015. Throughout both mediation sessions, Plaintiffs made what we considered to be good faith settlement demands, consistent with (a) our understanding of the facts of the case; (b) our experts' assessments of the strength of Plaintiffs' claims and Defendants' asserted defenses; and (c) the provable damages to A-9, the sizeable amounts of money and/or economic benefits received by some or all of the Director Defendants as a result of the merger, and our understanding of the insurance coverage available to Defendants ($15 million in coverage minus whatever has been "wasted" due to defense costs).

30. During the initial mediation session held in July 2014 (*i.e.*, before this Court had issued its December 2014 rulings on Defendants' motion to dismiss the Amended Complaint), Plaintiffs and Defendants discussed the merits of the claims and defenses thereto. Little progress was made and the parties agreed that further discussions would be fruitless unless and until the motions to dismiss were decided.

31. After this Court issued the December 2014 Memorandum Opinion upholding the breach of fiduciary duty claim against Defendants' motion to dismiss, the parties convened once again in private mediation with Judge Lacy. At the beginning of the second day of mediation in March 2015, and at the urging of Justice Lacy, Plaintiffs lowered their settlement demand. After lengthy discussion with the mediator and back-and-forth discussions using the mediator as a go-

between, the parties reached an impasse. At that point, the second mediation session was concluded.

32. On May 6, 2015, in a mediation session that spanned over eight hours, Magistrate Judge Novak brought the parties together and achieved a Settlement. (Dkt. No. 110).

V. PREPARING THE SETTLEMENT AGREEMENT AND OBTAINING THE COURT'S PRELIMINARY APPROVAL FOR THE PROPOSED SETTLEMENT AND PLAN OF ALLOCATION

33. After Judge Novak shepherded the parties through to a settlement in principle, he required the parties' counsel to remain in court until a signed Memorandum of Understanding had prepared to memorialize the material terms of the settlement agreement.

34. Thereafter, counsel for Plaintiffs drafted a full set of settlement papers, including the Settlement Agreement, (Proposed) Preliminary Approval Order; (Proposed) Order For Final Approval of Settlement, Plan of Allocation, Attorneys Fees and Cost and Case Contribution Awards to Plaintiffs. We provided the full set of papers to Defendants' counsel for their review and comments. Several rounds of drafts and revisions were exchanged until the parties executed the Settlement Agreement on July 24, 2015. Thereafter, counsel for the parties cooperated in drafting and executing final settlement documents and seeking preliminary approval of the proposed Settlement. (Dkt. Nos. 110, 111, 112 & 113).

35. The papers were presented to the Court for its entering of the Order of Preliminary Approval. Thereafter, the Court requested counsel for the parties to appear at a hearing on July 30, 2015, to discuss the Settlement and the Order for Preliminary Approval.

36. On July 30, 2015, counsel for the parties appeared at the hearing and made their respective presentations and answered questions from the Court.

37. As entered by the Court on July 31, 2015 (Dkt. No. 114) the Preliminary Approval Order dictated the process for notice to shareholders, a schedule for submission of briefs and filing of objections by shareholders and set September 14, 2015, as the date of the hearing for final approval of the Settlement.

VI. THE DIRECTIVES OF THE PRELIMINARY APPROVAL ORDER HAVE BEEN FOLLOWED

38. In accordance with the Preliminarily Approval Order, the Parties provided notice of the proposed Settlement to the Company's shareholders by first-class mail on August 6, 2015. Notices and the Plan of Allocation were sent to some 38,000 shareholders. Garden City Group, the notice administrator, has also posted a link to the Stipulation and Notice on its website. In addition, Wilentz, Goldman & Spitzer, P.A. has posted a description of the Settlement and links to the relevant documents on its website.

39. While Apple Hospitality REIT shareholders are permitted to file objections to the propose Settlement through August 28, 2015. As of the date of this Declaration (August 20, 2015), dozens of shareholders have contacted Plaintiffs' Counsel by telephone and/or e-mail to ask questions and request information on the proposed Settlement. In addition, Garden City Group has received communications from shareholders and have referred those shareholders to Plaintiffs' Counsel for follow-up calls. None of these shareholders have expressed any dissatisfaction with the Settlement or Plan of Allocation or any intention to object. The exceptions are New York residents Joyce Velshow (2,639 shares) and Murray Beaver (7,706 shares) who have submitted written objections to the Plan of Allocation.

40. Both of these objectors appear to live in the same household, and both of them submitted identically worded objection letters complaining that the Plan of Allocation unfairly excludes any Apple Nine REIT shareholder who voted *in favor of* the merger. Our reasons for

excluding shareholders who voted in favor of the merger is that we believed that Plaintiffs' disclosure claims were weak and, accordingly, we evaluated the claims of voting shareholders as having no chance of succeeding. Shareholders, who affirmatively voted in favor of the merger, obviously wanted all three companies merged so as to reap the anticipated benefits of being part of a larger REIT. Accordingly, the Plan of Allocation does not allocate any share of the settlement to them. Moreover, disclosure claims belong to shareholders individual but since all individual claims were dismissed, the disclosure claims could not be litigated on any shareholders' behalf.

VII. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

41. The Settlement of the claims on behalf of A-9 will require the creation of a fund in the amount of $12 million to be paid on behalf of the Defendants as settlement for release of A-9's claims against the Defendants. The Settlement Fund (net of any award by this Court of counsel fees and expenses and a service award to Plaintiff representative Jack Battaglia) is to be distributed pursuant to the Plan of Allocation, which provides the net fund will be distributed pro rata on a per share basis to all shareholders who voted against the merger or who abstained from voting (and whose votes were therefore counted against the Merger).

42. The Settlement consideration represents a recovery of a substantial percentage of the damages allegedly sustained by Old A-9 shareholders. Plaintiffs' expert witness estimated that the damages from dilution and/or failure of Defendants to do a stand-alone initial public offering ("IPO") of A-9 ranged from $90 million to $119.5 million. Accordingly, the proposed gross Settlement represents a recovery range of approximately 7% to 13% of the estimated dilution and foregone IPO damages. Net of proposed attorney's fees and expenses, the net recovery still represents 6.5% to 9% of the estimated damages.

43. These percentages compare extremely favorably to historical precedent recoveries in shareholder derivative cases, which average a recovery of 2.4% of estimated damages. *See In re Atmel Corp. Deriv. Litig.*, 2010 U.S. Dist. LEXIS 145551, *40-41 (N.D. Cal. Mar. 31, 2010) (citing academic studies stating that the average recovery in shareholder derivative litigation is 2.4% of the estimated damages).

44. The Plan of Allocation proposes that the damages be distributed only to Old A-9 shareholders who did not vote in favor of the Merger and, further, that the distribution be calculated so as to avoid a windfall to A-9 shareholders who also held A-7 and/or A-8 shares at the time of the Merger and who thereby, according to Plaintiffs' allegations, benefitted from the Merger ratio.

45. We respectfully submit that the proposed Settlement meets the standards for final approval set forth by courts in the Fourth Circuit.

46. The proposed Settlement was the product of the multiple rounds of negotiations conducted by Plaintiffs' Counsel with the assistance of a neutral private mediator (Retired Justice Lacy) and Magistrate Judge David Novak. The terms of the proposed Settlement were negotiated in the context of an adversial proceeding conducted at arm's-length and were not the product of collusion.

47. The final Settlement terms were agreed to only after Plaintiffs' Counsel fully informed themselves of the facts and circumstances concerning the fiduciary duty claims by (a) reviewing and analyzing over 100 boxes of documents produced by Defendants and (b) conducting the depositions of seven (7) fact witnesses.

48. Co-Lead Counsel have thoroughly reviewed and analyzed the facts and circumstances relating to the claims asserted in this derivative action, including conducting

arm's-length discussions with counsel for Defendants, reviewing publicly available information, analyzing the discovery produced by Defendants, reviewing applicable case law and other authorities, and consulting with two retained experts. Plaintiffs brought their claims in good faith and continue to believe that there claims have legal merit. However, Plaintiffs recognize that there are legal and factual defenses to the claims asserted in this derivative action, which present substantial risks to the successful resolution of any litigation, especially in complex shareholder derivative litigation. Accordingly, in light of these risks and based on our evaluation of the claims and their substantial experience, Co-Lead Counsel have determined that the Settlement, which confers substantial benefits upon A-9 and its stockholders, is fair, reasonable and adequate, and in the best interest of A-9 and its stockholders.

49. We believe that the claims asserted by Plaintiffs were strong. However, the continued prosecution of this action would carry risk, as all litigation does, that Plaintiffs might not succeed.

50. Defendants were likely to press their argument that the actions taken by the Individual Defendants were protected by the business judgment rule. While Plaintiffs believe that the actions taken by the Individual Defendants were far removed from any presumption, it remained a litigation risk facing Plaintiffs that had the potential to undercut any benefit achieved through the proposed Settlement.

51. Plaintiffs' Counsel balanced the immediate benefits of the proposed Settlement against the risk of delay and expense of further litigation to achieve marginally more relief.

52. All of the Plaintiffs' Counsel are well-versed and experienced in the prosecution of derivative actions such as have been brought here, as is evidenced by their firms' resumes.

53. In our opinions, the proposed Settlement is fair, reasonable, and adequate because it provides immediate and certain compensation to A-9 and its shareholders.

VIII. CONCLUSION

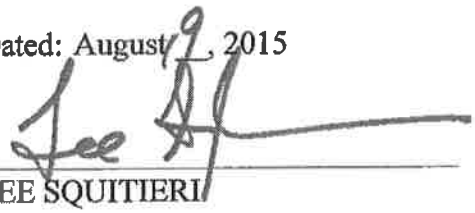
54. For the reasons set forth herein and in the accompanying Memorandum of Law, we respectfully submit that the Settlement and Plan of Allocation are fair, reasonable, adequate, and merit final approval.

The undersigned each individually declares, under penalty of perjury of the United States, that the foregoing is true and correct.

Dated: August __, 2015

KEVIN P. RODDY

Dated: August 7, 2015



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VIII. CONCLUSION

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The undersigned each individually declares, under penalty of perjury of the United States, that the foregoing is true and correct.

Dated: August 19, 2015

KEVIN P. RODDY

Dated: August __, 2015

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