UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SUSAN MOSES, on behalf of herself and all others similarly situated,	:	
Plaintiff,	:	MEMORANDUM & ORDER
-against-	:	14-CV-3131 (SMG)
APPLE HOSPITALITY REIT, INC.,	:	
Defendant.	:	

GOLD, STEVEN M., U.S. Magistrate Judge:

INTRODUCTION

Representative plaintiff Susan Moses ("plaintiff" or "Moses") brings this breach of contract action on behalf of participants in defendant Apple Hospitality REIT, Inc.'s ("defendant") Dividend Reinvestment Plans ("DRIPs"). Second Amended Complaint ¶ 1, Docket Entry 21. Plaintiff contends that defendant overvalued DRIP shares, breaching the parties' contract and causing damage to class members by charging inflated prices for the shares they acquired under the DRIPs. *Id.* ¶¶ 4, 12-13.[1]

The parties eventually reached a settlement agreement and moved for preliminary approval of the settlement and preliminary certification of a settlement class. Docket Entry 47. The Court heard oral argument on plaintiff's motion, Docket Entries 53-54, and received revised submissions addressing questions raised at that argument, Docket Entries 60-62. Thereafter, on September 19, 2017, this Court granted plaintiff Susan Moses's motion for preliminary certification of a settlement class and preliminary approval of a class action settlement. *See* Order dated September 19, 2017, Docket Entry 68. The Court's Order also approved the notice

[1] The Second Amended Complaint uses the terms "shares" and "units" interchangeably, and this Memorandum and Order does as well.

that the parties proposed to have mailed to class members, as well as a summary notice they proposed for publication. *Id.*

The settlement agreement provides for a $5,500,000 fund from which class members' claims, incentive awards, attorneys' fees, and costs will be paid. Stipulation of Settlement ¶ 4, Docket Entry 63. The net fund, consisting of the portion of the fund remaining after disbursements for incentive awards, attorneys' fees, and costs are made, will be allocated to the class members. *Id.* ¶¶ 4, 1(cc)-(ee). Of the net fund, 85% will be distributed to class members pro rata based on shares purchased during what the parties refer to as the tender offer period for each Real Estate Investment Trust ("REIT"). *Id.* Ex. D. The remaining 15% of the net fund will be distributed in the same manner based on shares purchased outside the tender offer period. *Id.*

The settlement class is defined as follows: "Any person in the United States who participated in the DRIPs for Apple REIT Seven and/or Apple REIT Eight from July 17, 2007 to June 27, 2013 inclusive." *Id.* ¶ 1(e). The class excludes: "(a) Defendant, any entity in which Defendant has a controlling interest or which has a controlling interest in Defendant; (b) Defendant's legal representatives, predecessors, successors and assigns; and (c) any persons who affirmatively exclude themselves from the Class pursuant to the procedures described in the Class Notice." *Id.* ¶ 1(f).

Interim class counsel engaged a third-party settlement administrator, Kurtzman Carson Consultants LLC ("KCC"). Declaration of Justin Hughes dated December 29, 2017 ("Second Hughes Decl.") ¶ 1, Docket Entry 72. After receiving lists containing the names and addresses of class members, KCC mailed the approved notice to 24,242 class members and re-mailed about five hundred notices that were initially returned as undeliverable. *Id.* ¶ 3. KCC further caused the summary notice approved by the Court to be transmitted over *PR Newswire*, established a

toll-free telephone hotline offering information about the settlement, and created a website with links to the Notice and other key documents relevant to the litigation. *Id.* ¶¶ 5-7. As of December 29, 2017, the telephone hotline had received nine calls and the website had been visited 3,067 times. *Id.* ¶¶ 6-7.

Four class members timely asked to be excluded from the settlement class. Declaration of Justin Hughes dated January 5, 2018 ("Third Hughes Decl.") ¶ 4, Ex. A, Docket Entry 81. The Court received one objection, which is discussed below. Objection of Class Member Dorothy Wenzel ("Objection"), Docket Entry 69.

The parties now seek an Order (1) finally certifying the class for settlement; (2) approving the terms of the revised settlement agreement; (3) approving the plan of allocation; and (4) appointing Moses as class representative and interim class counsel as class counsel. *See* Plaintiff's Memorandum of Law in Support of Final Settlement Approval ("Final Approval Mem.") at 2, Docket Entry 74.

FACTUAL BACKGROUND

Plaintiff filed a first amended complaint on June 27, 2014, and defendant moved to dismiss. Chief United States District Judge Dora L. Irizarry, to whom this matter was then assigned, granted defendant's motion but afforded plaintiff leave to amend. Memorandum and Order dated March 9, 2015 ("First Order"), Docket Entry 19. Plaintiff then filed a second amended complaint ("SAC"), and defendant again moved to dismiss. Chief Judge Irizarry granted defendant's motion in part, but denied the motion with respect to plaintiff's claim for breach of contract. Memorandum and Order dated September 30, 2016 (" Second Order"), Docket Entry 30.[2]

[2] The First Order is published at 2015 WL 1014327 (E.D.N.Y. Mar. 9, 2015), and the Second Order at 2016 WL 8711089 (E.D.N.Y. Sept. 30, 2016).

I assume familiarity with the facts and procedural history of the case set forth in the First Order and Second Order. Accordingly, only those facts that are particularly germane to the motion now before the Court are set forth below.

Plaintiff held shares in defendant's Real Estate Investment Trusts, and purchased additional shares through defendant's DRIPs. Second Order at 2. The terms of the DRIPs, including the means for determining share prices, were set forth in publically filed forms S-3. *Id.* In the First Order, Judge Irizarry found that the S-3s constituted a valid contract between the parties. First Order at 10. The S-3s set forth the means by which the price of shares sold through the DRIPs would be calculated, as follows:

> The price of units purchased under the plan directly from us by dividend reinvestments will be based on the fair market value of our units as of the reinvestment date as determined in good faith by our board of directors from time to time. Our units are not publicly traded; consequently, there is no established public trading market for our units on which we could readily rely in determining fair market value. Nevertheless, the board has determined that, for purposes of this plan, at any given time the most recent price at which an unrelated person has purchased our units represents the fair market value of our units. Consequently, unless and until the board decides to use a different method for determining the fair market value of our units, the per unit price will be determined at all times based on the most recent price at which an unrelated person has purchased our units. Notwithstanding the foregoing, the board of directors may determine a different fair market value and price for our units for purposes of this plan if (1) in the good faith judgment of the board an amount of time has elapsed since our units have been purchased by unrelated persons such that the price paid by such persons would not be indicative of fair value of our units or (2) our board determines that there are other factors relevant to such fair market value.

SAC ¶ 23. The Apple REIT Seven Registration Statement states that "[t]he most recent price paid by an unrelated person for a unit was $11.00 on June 25, 2007. Accordingly, our board of directors has determined that the offering price for units purchased under the plan will initially be $11.00 per unit." Second Order at 10.

Chief Judge Irizarry found these terms in the S-3 to be ambiguous and therefore denied defendant's motion to dismiss:

> 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. For instance, the fact that an individual may own A8 units and sell them to a third-party does not make those units any less Defendant's units, or affect Defendant's ability to refer to those units as "our units." As such, this ambiguity presents an issue of fact that cannot be resolved properly at this stage of the litigation.

Second Order at 11.

Plaintiff's sole remaining claim is that defendant is liable for breach of contract for failing to determine the prices of DRIP shares in the manner required by the terms of the S-3s. As indicated above, the Apple REIT Seven S-3 disclosed that the most recent price paid by an unrelated person for a unit was $11.00; based on this sale, defendant consistently priced shares at $11 per unit throughout the class period. Mem. in Supp. of Pl.'s Mot. For Final Approval ("Final Approval Mem.") at 3, Docket Entry 74. Plaintiff contends that the $11.00 share price was artificial and did not reflect the most recent price at which a share was purchased by an unrelated person or a fair value determined in good faith by defendant. As a result, plaintiff argues, DRIP participants received fewer shares than they would have if the shares had been properly priced. Final Approval Mem. at 3.

As noted above, 85% of the net settlement proceeds are allocated to DRIP shares purchased during a tender offer period and 15% are allocated to shared purchased before and after the tender offer period. Final Approval Mem. at 4. The basis for this allocation is that bidders paid between $3.00 and $5.50 per share during the tender offer period. SAC ¶ 29; Plaintiff's Amended Memorandum in Support of Preliminary Approval at 21 ("Pl. Am. Mem."),

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