

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

STEVE VERGARA, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

APPLE REIT NINE, INC. now known as
APPLE HOSPITALITY REIT, INC.,

Defendant.

Civil Action No.: 1:19-cv-02027-DLI-RML

PRELIMINARY APPROVAL ORDER

WHEREAS, the above-titled class action (the “Class Action” or the “Litigation”) is pending before the Court;

WHEREAS, this matter is before the Court for consideration of (a) whether the proposed Settlement reached by the parties should be preliminarily approved, (b) and the proposed plan for notifying the class and establishing procedures for class members to participate in the settlement and/or object to the settlement or exclude themselves from the settlement (the “Notice Plan”) be adopted.

WHEREAS, this action was commenced on April 8, 2019 by filing of a Summons and Complaint in this Court (ECF No. 1). Thereafter Plaintiff filed an Amended Complaint (ECF No. 6);

WHEREAS, Defendant filed a motion to dismiss the action in its entirety. ECF No. 9;

WHEREAS, the Plaintiff filed Memorandum of Law in Opposition to Defendant’s Motion to Dismiss;

WHEREAS, on March 31, 2020, this Court granted in part and denied in part Defendant's Motion to Dismiss (ECF No. 19);

WHEREAS, on April 20, 2021 Defendant filed its Answer and Affirmative Defenses (ECF No. 21);

WHEREAS, on May 15, 2021, Plaintiff filed a Motion for Class Certification pursuant to Fed. R. Civ. P. 23 (ECF No. 23) and Defendant filed its opposition thereto (ECF No. 26). On February 5, 2021, Magistrate Judge Levy recommended that a class as described below be certified (ECF No. 31);

WHEREAS, on March 1, 2021, this court adopted the Report and Recommendation of Magistrate in a docket entry order on March 1, 2021;

WHEREAS, the Court has certified the following class:

All persons and entities that elected to participate in the A-9 DRIP between April 8, 2013 through the end of the A-9's Dividend Reinvestment Plan and received A-9 common stock in lieu of the declared cash dividend at a value of \$10.2 per share. Any person in the United States who acquired shares of Apple REIT Nine, Inc. pursuant to the DRIP for Apple REIT Nine, Inc. from April 8, 2013 to June 27, 2013 inclusive. Excluded from the Class are: (a) Defendant; (b) its parents or any subsidiaries of Defendant; any entity in which Defendant has a controlling interest; any former executive officers or directors of Defendant and their legal representatives, predecessors, successors, and assigns; the Court and any employees of the Court; any persons or entities who validly and timely exclude themselves from the Class.

WHEREAS, the parties engaged in further fact discovery which was concluded in accordance with the Schedule set by the Court;

WHEREAS, upon completion of fact discovery but prior to designation of experts under Rule 26, the parties mutually agreed to attempt to mediate towards a settlement and thereafter with the assistance of Judge Levy chose a mediator and after a full day of mediation presided by

mediator David Berger, Esq., selected from this Court's panel of mediators, the parties agreed in principle to the settlement presented now for Preliminary Approval;

WHEREAS, Plaintiff and Defendant have entered into a Settlement Agreement dated November 12, 2021, which is subject to review and approval under Rule 23(e) of the Federal Rules of Civil Procedure and which, together with the exhibits thereto, sets forth the terms and conditions for the proposed settlement of the Litigation (the "Settlement") and the dismissal of the Litigation with prejudice;

WHEREAS, the Counsel for Plaintiff have submitted a motion for preliminary approval of settlement pursuant to Rule 23(e), declaration of counsel and accompanying memorandum of law in support of preliminary approval of the proposed Settlement;

WHEREAS, the Court has read and considered the proposed Settlement Agreement¹ and exhibits thereto, and the accompanying documents;

WHEREAS, the Parties to the Settlement have consented to the entry of this Order; and

Accordingly, good cause appearing in the record, now

IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:

Preliminary Approval of the Proposed Settlement And Notice Plan

1. Having reviewed the proposed Settlement Agreement, together with its exhibits, and based upon the relevant papers and all prior proceedings in this matter, the Court has determined the proposed Settlement satisfies the criteria for preliminary approval under Rule 23(e), Fed. R. Civ. P. and therefore the proposed Settlement Class should be preliminarily certified, and the proposed Notice Plan approved.

¹ Unless otherwise stated, all capitalized terms used herein have the meanings defined in the Settlement Agreement.

2. Upon review of the submissions of counsel, the Court finds that the proposed Settlement appears to offer a level of consideration to class members in exchange for release of claims that is within the range of fairness and which therefore warrants issuance of Notice to the Settlement Class; the Court further finds that the proposed settlement was reached through an arms-length negotiating process presided over by David Berger, Esq., mediator through this Court's mediation program; the Court further finds that the form, content and procedures for providing class members with Notice of Settlement and right to be heard, will, if executed as ordered, satisfy due process requirements under Rule 23. Accordingly the proposed Settlement is preliminarily approved, subject to Final Approval.

3. The Court approves the substance of the Notice Plan, in the form annexed as Exhibit "A" hereto, the "Notice of Proposed Settlement of Class Action" ("Notice") to be mailed and/or emailed to all potential class members, including a proposed Plan of Allocation ("POA").

4. The Court also approves the procedures for implementation of the Notice Plan and procedures for participation in the Settlement and/or objection or exclusion by Class Members as described herein.

Notice To The Class

5. The Court finds that the form, content, and method of giving Notice to the Settlement Class as described in the Settlement Agreement and exhibits: (a) constitute the best practicable notice to the Settlement Class; (b) are reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, the terms of the proposed Settlement, and their rights under the proposed settlement; (c) are reasonable and constitute due, adequate, and sufficient notice to those persons entitled to receive notice; and (d) satisfy the requirements of Federal Rule of Civil Procedure 23, the constitutional requirement of due process, and any other

legal requirements. The Court further finds that the Notice is written in plain language and is designed to be readily understandable by Class Members.

6. The Notice Plan Procedures set forth in the Settlement Agreement satisfies the requirements of Federal Rule of Civil Procedure 23 and is thus approved. Non-material modifications to the exhibits to the Notice may be made without further order of the Court as mutually agreed by the parties hereto. The Settlement Administrator and Class Counsel are directed to carry out the Notice Plan in conformance with the Settlement Agreement and to perform all other tasks that the Settlement Agreement requires and as may be required by the terms of its engagement.

7. No later than 30 days after entry of this Preliminary Approval Order, Class Counsel shall cause the Notice to be emailed and mailed by the Settlement Administrator to those Class Members who can be identified from records maintained by Apple REIT Nine, Inc. and/or David Lerner Associates and/or Apple Hospitality REIT, Inc. Follow-up efforts by the Claims Administrator to locate current addresses for any undeliverable Notices shall continue as needed. Not later than 10 business days after entry of this Preliminary Approval Order, Class Counsel shall cause the Claims Administrator to establish a website that will provide Class Members with access to this Order, the Settlement Agreement, the Notice, and all of the papers before the Court on this motion and the motion for Final Approval of Proposed Settlement.

Final Approval Hearing

8. A final approval hearing shall take place before the Court on or after (120 days after entry of Preliminary Approval Order) March 17, 2022, at 10:00 a.m. in the United States District Court for the Eastern District of New York at the Courthouse at 225 Cadman Plaza East, Brooklyn, New York 11201, before the Honorable Judge Dora L. Irizzary in Courtroom __ (“Final Approval

Hearing”), to determine, among other things, whether: (a) the Settlement, including the Plan of Allocation, should be finally approved as fair, reasonable, and adequate and, in accordance with the Settlement’s terms, this matter should be dismissed with prejudice; (b) Class Counsel’s application for attorneys’ fees, costs and expenses should be approved; (c) the application for the class representative to receive a service award should be approved; (d) to hear and determine any objections to the proposed Settlement or other relief requested; and (e) any other matters the Court deems necessary and appropriate will also be heard.

9. Any Class Member who has not timely and properly excluded himself/herself or itself from the Settlement Class in the manner described below may appear at the Final Approval Hearing in person or through counsel and be heard, to the extent allowed by the Court as described in the Notice and herein, regarding the proposed Settlement. Provided, however, that no Class Member who has elected to exclude him/her/itself from the Class shall be entitled to object or otherwise appear, and, further provided, that no Class Member shall be heard unless the Class Member complies with the requirements of this Order pertaining to objections, which are described below.

Administration

10. Class Counsel shall be responsible for selection, retention and supervision of a Settlement Administrator, who shall be responsible for Notice and for calculation of, and disbursement of, the Net Settlement Fund to Class Members and otherwise pursuant to any order of this Court. The Settlement Administrator’s fees and expenses will be paid from the Settlement Fund pursuant to the Settlement Agreement.

Exclusions from the Class

11. Any Class Member who wishes to be excluded from the Settlement must mail a written notification of the intent to exclude him/her/itself to the Settlement Administrator at the address provided in the notice, postmarked no later than 60 days after the mailing of Notice to Class members (the “Opt-Out Deadline”). The written notification must identify the Class Member by name and the name of the account in which shares were held and mailing and emailing addresses; the notification must also state that the Class Member has chosen to “opt-out” or “exclude” him/her/itself from the Settlement; and identify the number of DRIP shares purchased during the Class Period and must bear the signature of the Class Member.

12. The Settlement Administrator shall provide the parties with copies of all opt-out notifications. Within five business days after the Opt-Out Deadline, a final list of all that have timely and validly excluded themselves from the Settlement Class should be compiled and should be filed with the Court before the Final Approval Hearing.

13. Any Class Member who does not timely and validly exclude himself/herself and/or itself from the Settlement shall be bound by the terms of the Settlement and Preliminary Approval Order. If Final Judgment is entered, any Class Member that has not submitted a timely, valid written notice of exclusion from the Action shall be bound by all subsequent proceedings, orders, and judgment in this matter, including but not limited to the Release set forth in the Settlement and Order of Final Judgment.

14. All those who submit valid and timely notices of exclusion shall not be entitled to receive any benefits of the settlement and shall not be bound by any Order of Final Judgment or the Release.

Objections

15. The Court will consider any objections, and comments in support of, or in opposition to, the proposed Settlement, the Plan of Allocation, or any request for counsel for an award of attorneys' fees, reimbursement of litigation expenses, and an award to Plaintiff only if such comments and any supporting papers are in writing and filed electronically with the Court or with the Clerk of the Court, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Room 130, Brooklyn, New York 11201, and copies of all such papers are served, on or before 60 days after mailing notice to the Class ("Objection Deadline") upon each of the following by U.S. Mail and e-mail:

Lee Squitieri
Squitieri & Fearon, LLP
424 Madison Avenue
3rd Floor
New York, New York 10017
lee@sfclasslaw.com

Stanley A. Roberts
McGuireWoods LLP
800 E. Canal St.
Richmond, VA 23219
sroberts@mcguirewoods.com

16. A class member who complies with the requirement of this Order may assert an objection to the proposed Settlement, Class Counsel's request for fees and expenses, or the request for a service award to the class representative.

17. No Class Member shall be heard, and no papers, briefs, pleadings, or other documents submitted by any Class Member shall be received and considered by the Court, unless the objection is (a) electronically filed with the Court by the Objection Deadline on or before; or (b) mailed first-class postage prepaid to the Clerk of Court, Class Counsel, and Defendant's Counsel, at the addresses listed in the Notice, and postmarked no later than the Objection Deadline,

as specified in the Notice. Objections shall not exceed twenty-five (25) pages. For the objection to be considered by the Court, the objection shall set forth:

- (a) The name of this action;
- (b) The name of the objector and the name of the account in which the objector's shares are held, and the full name, address, email address, and telephone number of any person acting on its behalf with respect to the objection;
- (c) An explanation of the basis upon which the objector claims to be a class member, *i.e.* number of DRIP shares purchased, and A-9 redeemed during the Class Period verified by the Objector, not the Objector's representative, unless accompanied by duly executed Power of Attorney;
- (d) All grounds for the objection, accompanied by any legal support for the objection;
- (e) The identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the settlement, the fee application, or the application for service awards;
- (f) The identity of all counsel representing the objector who will appear at the Final Approval Hearing;
- (g) The title and/or caption of each case in which the objector has made an objection to a class action settlement in the preceding five years;
- (h) If the objector is represented by an attorney who intends to seek fees and expenses from anyone other than the objector he or she represents, the objection should also include (i) a description of the attorney's legal background and prior experience in connection with class action litigation; (ii) the amount of fees sought by the attorney for representing the objector

and the factual and legal justification for the fee being sought; (iii) a statement regarding whether the fees being sought are calculated on the basis of a lodestar, contingency, or other method; (iv) the number of hours already spent by the attorney and an estimate of the hours to be spent in the future; and (v) the attorney's hourly rate;

(i) Any and all agreements that relate to the objection or the process of objecting, whether written or verbal, between objector or objector's counsel and any other person or entity;

(j) A description of all information to be presented at the Final Approval Hearing in support of the objection, including a list of any witnesses, a summary of the expected testimony from each witness, and a copy of any document or other non-oral material to be presented; and

(k) A statement confirming whether the objector or representative intends to personally appear and/or testify at the Final Approval Hearing.

18. Attendance at the Final Approval Hearing is not necessary; however, persons wishing to be heard orally with respect to the approval of the Settlement, the Plan of Allocation, and/or any request by counsel for an award of attorneys' fees and reimbursement of litigation expenses, are required to indicate in their written comments or objections their intention to appear and be heard at the Final Approval Hearing.

19. Any class member who fails to comply with the provisions in this Order may be barred from presenting its objection in court, and shall be bound by all the terms of the settlement agreement, this Order, and by all proceedings, orders, judgments, including, but not limited to, the release in the Settlement Agreement if final judgment is entered.

20. Class Counsel shall provide Defendant's counsel with copies of any requests for exclusion as expeditiously as possible, but in no event later than seven (5) calendar days after the Opt-Out Deadline.

Claims Process and Allocation Formula

21. The Settlement Agreement provides for calculation and distribution of the Net Settlement Fund benefits to Class Members who do not exclude themselves from the settlement. The Settlement Administrator will mail payments, calculated pursuant to the Plan of Allocation to each class member who does not exclude him/her/itself from the settlement. The Court preliminarily approves this process, including specifically the Plan of Allocation that describes how payments will be calculated and is attached to the Settlement Agreement, and directs that the Settlement Administrator effectuate the calculation and the distribution process according to the terms of the Settlement Agreement.

Termination of the Settlement and Use of this Order

22. This Order shall become null and void and shall be without prejudice to the rights of the parties, all of which shall be restored to their respective positions existing immediately before this Court entered this Order, if the Settlement is not finally approved by the Court or is terminated in accordance with the terms of the Settlement Agreement. In such event, the Settlement and Settlement Agreement shall become null and void and be of no further force and effect, and neither the Settlement Agreement nor the Court's orders, including this Order, relating to the Settlement shall be used or referred to for any purpose whatsoever.

23. This Order shall not be construed or used as an admission, concession, or declaration by or against Defendant of any fault, wrongdoing, breach, or liability; shall not be construed or used as an admission, concession, or declaration by or against any settlement class

representative or any other class member that its claims lack merit or that the relief requested is inappropriate, improper, or unavailable; and shall not constitute a waiver by any party of any defense or claims it may have in this litigation or in any other lawsuit.

Stay of Proceedings

24. Except as necessary to effectuate this Order, this matter and any deadlines set by the Court in this matter are stayed and suspended. Any and all class members who do not opt-out are enjoined from any litigation against Plaintiff or Defendant arising out of the claims to be settled in this action except as permitted herein pending the Final Approval Hearing and issuance of Order of Final Judgment, or until further order.

Continuance of Final Approval Hearing

25. The Court may change the setting of the hearing from in-person to remote or vice versa and reserves the right to adjourn or continue the Final Approval Hearing and related deadlines without further written notice to the class but notice shall be provided on the docket for this action maintained by the Court.

**Schedule For Providing Notice, Opportunity
To Opt-Out Or Object And The Date of Final Approval Hearing**

26. The settlement agreement, as preliminarily approved in this Order, shall be administered according to its terms pending the Final Approval Hearing. Deadlines arising under the settlement agreement and this Order include but are not limited to the following:

Notice Deadline: December 16, 2021

Objection and Opt-Out Deadline: January 17, 2022

Filing Motion for Final Approval: March 3, 2022

Final Approval Hearing: March 17, 2022 at 10:00 a.m.

IT IS SO ORDERED this ____ day of _____, 2021.

The Magistrate Judge Robert M. Levy
United States District Court Judge

