UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re AMERICAN REALTY CAPITAL PROPERTIES, INC. LITIGATION | : | Civil Action No. 1:15-mc-00040-AKH |
| | : | CLASS ACTION |
| This Document Relates To: | : | |
| ALL ACTIONS. | : | |

DECLARATION OF LAYN R. PHILLIPS IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT

I, Layn R. Phillips, declare as follows under 28 U.S.C. §1746:

1. I am filing this Declaration in my capacity as the mediator in the above-captioned action (the "Litigation"). As set forth herein, I submit this Declaration in support of Plaintiff's Motion for Final Approval of the Settlement.

## I. Relevant Professional Background and Experience

2. I currently serve as a mediator and arbitrator with my own alternative dispute resolution company, Phillips ADR Enterprises ("Phillips ADR"), based in Corona Del Mar, California. I am a member of the bars of Oklahoma, Texas, California and the District of Columbia, as well as the U.S. Courts of Appeals for the Ninth, Tenth and Federal Circuits.

3. I served as the United States Attorney for the Northern District of Oklahoma from 1984 to 1987. I personally tried many cases and oversaw the trials of numerous other cases as a United States Attorney and, prior to my time as a United States Attorney, as an Assistant United States Attorney in California and Florida.

4. While serving as the United States Attorney for the Northern District of Oklahoma, I was nominated by President Reagan to serve as a District Judge for the Western District of Oklahoma, where I served from 1987 to 1991. While on the bench, I presided over a total of more than 140 federal trials and sat by designation on the United States Court of Appeals for the Tenth Circuit. I also presided over cases in Texas, New Mexico and Colorado.

5. I left the federal bench in 1991 and joined Irell & Manella, where for 23 years I specialized in alternative dispute resolution, complex civil litigation, and internal investigations. In 2014, I left Irell & Manella to found Phillips ADR. For more than 25 years, I have devoted the majority of my professional life to serving as a mediator and arbitrator in connection with large, complex cases such as this one.

6. I have successfully mediated numerous complex commercial cases involving Fortune 500 and other publicly-traded companies, including more than one hundred securities class action cases, including cases presided over by this Court. I have mediated hundreds of disputes referred by private parties and courts, and have been appointed a Special Master by various federal courts in complex civil proceedings. I served as a Fellow in the American College of Trial Lawyers, and I have been nationally recognized as a mediator by the Center for Public Resources Institute for Dispute Resolution ("CPR"), serving on CPR's National Panel of Distinguished Neutrals.

## II. Negotiations Resulting in the Instant Settlement

7. The mediation process in this case, like the Litigation itself, was hard fought on both sides. As described below, in addition to four in-person mediation sessions which took place over a period of several years, the mediation of this matter involved numerous teleconferences, emails, and written submissions by both sides. The Settlement is the product of protracted arm's-length negotiations among the parties in the Litigation (the "Parties").

8. In March 2017, the Parties participated in a two-day mediation session before me in New York. Prior to that mediation session, Robbins Geller for Lead Plaintiff, Milbank for VEREIT, Paul Weiss for Schorsch, Kellogg Hansen for AR Capital, LLC, ARC Properties Advisors, LLC, and certain individual Defendants (together with Schorsch, the "AR Capital Parties"), Weil Gotshal for the Non-Management Directors, Sidley Austin for Grant Thornton, Petrillo Klein & Boxer for Lisa Beeson, Morris Manning & Martin for Scott Sealy, Kirkland & Ellis for David Kay, Steptoe & Johnson for Brian Block, and Zuckerman Spaeder for Lisa McAlister all provided me with extensive opening and reply briefing on the then-current procedural history and factual status of the Litigation. Among other things, I reviewed the Parties'

mediation statements and exhibits, including the Third Amended Complaint and the Court's orders denying the motions to dismiss. Members of my mediation support team attended the mediation session and assisted me in facilitating the Parties' negotiations and analyzing the legal and factual issues in this matter.

9. The initial mediation session was not successful as the Parties were far apart financially and maintained highly divergent views on the settlement value of the Litigation. I found the discussions engaged in by the Parties during the first mediation session to be extremely valuable in helping me – and the Parties – to understand the relative merits of each party's position and to identify the issues that were likely to serve as the primary drivers and obstacles to achieving a settlement. Plaintiff's counsel and Defendants' counsel each presented significant arguments to me and to one another regarding their clients' positions, and it was apparent to me that both sides possessed strong, non-frivolous arguments. However, their views on the merits and value of the case diverged drastically. While I am bound by confidentiality with regard to the content of the Parties' discussions and negotiations during this first mediation session, I can say that the arguments and positions asserted by all involved were the product of detailed analysis and hard work, that they were complex, and that, while professional, they were highly adversarial.

10. Following the first mediation, I believed that efforts to settle this case would continue to be challenging as those involved continued to hold strong and vastly divergent views as to the relevant legal and substantive arguments, and that a resolution without further litigation and/or trial seemed highly unlikely. It was also made clear that Lead Counsel Robbins Geller and Lead Plaintiff TIAA would require significant contributions by individual Defendants as a condition of any settlement. I believe that this position also made a settlement difficult to achieve.

11. On September 27, 2017, I convened a second in-person mediation session in New York with Robbins Geller and Milbank in an attempt to foster a settlement. During that second mediation session, those Parties discussed the merits of the case and their views on settlement in both joint sessions as well as separate caucuses with me. While progress was made during that second in-person mediation, the Parties remained far apart.

12. On June 27, 2019, Robbins Geller, Milbank, and representatives from VEREIT, Inc. met for a third, half-day mediation session before me in California. They had substantive and productive discussions concerning the merits and settlement value of the Litigation. While no resolution was reached, some progress toward resolution was made. After this session, I continued to have regular dialogue with the Parties about their respective settlement positions.

13. On August 15, 2019, certain of the Parties participated in a full-day mediation session before me in New York. Prior to that mediation session, those Parties provided me with their summary judgment submissions updating me on the factual status of the Litigation, particularly with respect to developments in discovery as it pertained to proving liability and damages. While those Parties made significant progress toward a settlement during this mediation session, they still were unable to resolve the case.

14. Following the August 15, 2019 mediation, I made a "double-blind" Mediator's Recommendation to certain of the Parties to settle the action, whereby each party's response would remain confidential unless both sides agreed to the Mediator's Recommendation. The Mediator's Recommendation required those Parties to respond on or before August 21, 2019. I also continued to discuss the benefits of the Mediator's Recommendation with those Parties over the telephone while it was pending to assist each side in evaluating merits of the proposed settlement.

15. On August 21, 2019, while the Parties were in the midst of pre-trial evidentiary briefing, I informed the Parties that both sides had accepted the Mediator's Recommendation, such that there was an agreement to settle the action for a $1.025 billion cash payment for the benefit of the Class, contingent on reaching agreement in the related shareholder derivative action, *Witchko v. Schorsch, et al.*, No. 1:15-cv-06043-AKH (S.D.N.Y.), which agreement was reached on September 8, 2019.

16. As stated above, the mediation process is confidential. Without discussing specifics of the negotiations, the Mediator's Recommendation reflected my assessment that $1.025 billion was the most that Defendants collectively would pay and the least that Lead Plaintiff would accept to settle the action at that time. It also reflected my assessment of an amount that would be fair, reasonable, and in the best interests of Plaintiff and the Class. The Mediator's Recommendation also reflected TIAA's insistence that individual Defendants make significant contributions to any Settlement. The Mediator's Recommendation also reflected my judgment that the contributions made by various Defendants, which comprised the $1.025 billion, were meaningful and reasonable. Those contributions included (1) a contribution of $225 million by the AR Capital Parties, (2) a contribution of $12.5 million by Brian Block, and (3) a contribution of $49 million by Grant Thornton.

17. I was aware that between the initial mediation session and last mediation session, the Parties had significantly developed the record, completing fact and expert discovery (which included the review of over 12 million pages of documents and more than 60 depositions) and briefing and arguing summary judgment motions that had been denied in material part. The Parties were in the midst of briefing pre-trial evidentiary motions when the last mediation occurred and the agreement to settle was ultimately reached. It is my opinion that at the time the Settlement

was reached, the Parties had thoroughly developed the record, were actively preparing for trial and were keenly aware of their respective strengths, weaknesses, and risks presented by continued litigation.

18. Following the Parties' acceptance of the Mediator's Recommendation, they executed a Memorandum of Understanding memorializing the agreement in principle to settle. Subsequently, the Parties negotiated and executed the Settlement Agreement and related documents.

## III. Endorsement of the Settlement

19. After presiding over the mediation process in this case, it is my professional opinion that the Settlement is the product of vigorous and independent advocacy and is the product of arm's-length negotiations conducted in good faith by the Parties. The Parties were represented by highly skilled and experienced counsel, who were extremely knowledgeable and clearly had spent a considerable effort developing the law and facts in this complex litigation. I believe the Settlement reflects Lead Counsel's well-informed assessment of the best interests of the Plaintiff and the Class.

20. The $1.025 billion Settlement provides the Class with a significant recovery in the face of potentially losing some or all of the critical *Daubert* motions to exclude expert testimony, motions *in limine*, and, of course, the risk of losing at a jury trial or on appeal. The Settlement thus provides the Class with an excellent recovery that entirely eliminates the risk, expense, and delay of further litigation, and avoids the risk of recovering nothing at all.

21. Based on my experience as a trial lawyer, former federal judge, and a mediator, and based on my knowledge of the issues in dispute, my review of the materials and advocacy presented in connection with multiple mediation sessions and extensive protracted

teleconferences, the rigor of the negotiations, and the benefits that will be conferred upon Class members by the Settlement, I believe that the terms of the Settlement are fair, adequate, reasonable and in the best interests of the Class.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 13, 2019 in Newport Beach, California.

LAYN R. PHILLIPS

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 17, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ Debra J. Wyman
DEBRA J. WYMAN

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