FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DAVID LERNER ASSOCIATES, INC. (CRD No. 5397), and DAVID LERNER (CRD No. 307120), Respondents.	Disciplinary Proceeding No. 2009020741901 Hearing Officer: MC **ORDER ACCEPTING OFFER OF SETTLEMENT** Date: October 22, 2012

INTRODUCTION

Disciplinary Proceeding No. 2009020741901 was filed on May 27, 2011 and amended on December 13, 2011, by the Department of Enforcement of the Financial Industry Regulatory Authority (FINRA) (Complainant). Respondents David Lerner Associates, Inc. (DLA) and David Lerner (Lerner), (collectively, Respondents) submitted an Offer of Settlement (Offer) to Complainant dated October 16, 2012. Pursuant to FINRA Rule 9270(e), the Complainant and the National Adjudicatory Council (NAC), a Review Subcommittee of the NAC, or the Office of Disciplinary Affairs (ODA) have accepted the uncontested Offer. Accordingly, this Order now is issued pursuant to FINRA Rule 9270(e)(3). The findings, conclusions and sanctions set forth

in this Order are those stated in the Offer as accepted by the Complainant and approved by the NAC.[1]

Under the terms of the Offer, Respondents have consented, without admitting or denying the allegations of the Complaint, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party, to the entry of findings and violations consistent with the allegations of the December 13, 2011 Amended Complaint, and to the imposition of the sanctions set forth below, and fully understands that this Order will become part of Respondent's permanent disciplinary record and may be considered in any future actions brought by FINRA.

BACKGROUND

David Lerner Associates, Inc. (DLA), CRD No. 5397, has been a member of FINRA since 1976 and is a privately-held broker dealer that operates a total of six branches in the New York tri-state area and Florida. DLA employs approximately 190 registered representatives. On April 4, 2012, a FINRA Hearing Panel found, in Disciplinary Proceeding 20050007427, that DLA had willfully charged excessive municipal bond markups on certain transactions in violation of MSRB Rules G-30 and G-17, and that DLA had charged excessive markups in the sale of collateralized mortgage obligations ("CMOs") on certain transactions in violation of NASD Conduct Rule 2440, IM-2440-1 and NASD Conduct Rule 2110. DLA is, and at all times

[1] As noted in the Offer of Settlement, in further consideration of the promises made in that Offer, Respondents have agreed that within two days of FINRA's formal acceptance of the Offer, (1) DLA will file a Notice of Withdrawal of Appeal that seeks to withdraw its appeal from the Hearing Panel Decision dated April 4, 2012 in Disciplinary Proceeding No. 20050007427 ("Panel Decision"), and (2) take all steps necessary to effect its intent that (a) the appeal and cross-appeal in FINRA Disciplinary Proceeding No. 20050007427 be dismissed, and (b) the Panel Decision rendered in Proceeding No. 20050007427 and the sanctions ordered therein become final, including but not limited to that DLA will pay $2,325,000 in fines, along with restitution as assessed in the Panel Decision, which payments are among the sanctions described herein (as detailed below). In addition, Respondents submitted the Offer on the further condition that, within two days of FINRA's formal acceptance of the Offer, Enforcement will file a Notice of Withdrawal of Cross-Appeal in Proceeding No. 20050007427, and take all steps necessary to effect FINRA's intent that (a) DLA's appeal and FINRA's cross-appeal in Proceeding No. 20050007427 be dismissed, and (b) the Panel Decision and the sanctions ordered therein become final.

relevant herein was, a member of FINRA and remains subject to the jurisdiction of FINRA under Article IV, Section 1 of FINRA's By-Laws.

David Lerner (Lerner), CRD No. 307120, age 76, founded DLA and is, and at all relevant times has been, the firm's President, Chief Executive Officer, and majority shareholder. He is registered as a General Securities Representative, General Securities Principal, and FINOP. Lerner is, and at all times relevant herein was, associated with a member of FINRA and remains subject to the jurisdiction of FINRA under Article IV, Section 1 of FINRA's By-Laws.

FINDINGS AND CONCLUSIONS

It has been determined that the Offer be accepted and that findings be made as follows:

SUMMARY

1. Between January 2011 and at least December 2011, Respondent David Lerner Associates, Inc. ("DLA") recommended and sold over $442 million of a $2 billion non-traded real estate investment trust (REIT) — Apple REIT Ten — without performing adequate due diligence in violation of its suitability obligations. Earlier Apple REITs under the same management inappropriately valued the REITs' shares at a constant artificial price of $11 notwithstanding years of market fluctuations, performance declines, increased leverage and excessive return of capital to investors. DLA, in its capacity as best efforts underwriter for Apple REIT Ten, solicited thousands of customers to purchase Apple REIT Ten without performing adequate due diligence to determine that there was a reasonable basis to recommend the security to any customer. Through at least the date of the filing of the Amended Complaint (December 13, 2011), DLA sold Apple REIT Ten targeting unsophisticated and elderly customers to buy the illiquid security.

2. Through June 2011, DLA misleadingly marketed Apple REIT Ten on its website by presenting performance information for earlier Apple REITs, which implied that Apple REIT Ten may be able to achieve similar results. The performance results for Apple REIT Six, Apple REIT Seven, Apple REIT Eight, and Apple REIT Nine (collectively, the "closed Apple REITs") were themselves misleading because (1) they did not reflect a recent reduction in distribution rates and (2) DLA did not disclose that income from those REITs was insufficient to support their 7–8 percent returns and that the distributions were partially funded by debt that further leveraged the REITs. The website misleadingly and inaccurately characterized the source of distributions as "net income and a return of capital, primarily in the form of depreciation" when the return of capital was not primarily from depreciation.

3. Between January 2011 and at least December 2011, DLA sold Apple REIT Ten based mostly upon the strength of the Apple REIT programs' shared management team and the prior performance, steady distribution rates, unchanging valuations, and prospects of the closed Apple REITs. To that end, between at least April 28, 2011 and November 17, 2011, DLA and its President, Respondent David Lerner, made false, exaggerated and misleading claims regarding the investment returns, market values, performance and prospects of the closed Apple REITs to over a thousand customers during at least four DLA investment seminars. Lerner also made untrue statements of material fact and material omissions regarding the closed Apple REITs, and he has exaggerated the prospects of Apple REIT Ten, such as calling it a "fabulous cash cow."

4. At all of the firm's investment seminars to sell Apple REIT Ten held during 2011, Lerner and DLA have used slide presentations that violate FINRA's Advertising rules. Since March 11, 2011, FINRA's Advertising Regulation Department ("Advertising Regulation") has repeatedly reviewed the slides and clearly informed DLA that these presentations omitted

material information causing the communications to be misleading. These presentations also contained specific statements and claims that were misleading, exaggerated, or unwarranted. Of particular concern are misleading claims regarding Apple REIT performance, such as annualized returns, distribution rates, and distributions per share, and misleading claims regarding price stability. Advertising Regulation repeatedly instructed DLA not to use the slides in their current form. Lerner and DLA continued to use the violative slides without adequately addressing FINRA's concerns.

5. On June 6 and July 27, 2011, to counter negative press regarding DLA and the Apple REITs in the wake of the original Complaint, Lerner signed and sent letters to over 50,000 DLA customer households that contained exaggerated, false, or misleading statements that omitted material information regarding the valuations, performance, prospects, risks, liquidity, and practices of the Apple REIT programs. Lerner's July 27 letter discussed the possibility of an "opportunity" for closed Apple REIT shareholders to participate in a consolidation, sale, listing on a national exchange, or other event that would allow them to dispose of their illiquid shares at favorable prices in an exaggerated and misleading manner that implied the opportunity was imminent.

6. Between at least July 13, 2011 and December 2011, Lerner and DLA made unsupported claims at seminars and elsewhere that the closed Apple REITs might be merged into a single REIT that may issue shares that may trade on a national exchange. Although the closed Apple REITs are all illiquid and were worth less than their $11 per share offering price, DLA representatives told customers that the merger and IPO would result in a "windfall" to investors who hold on to their shares. In mid-November 2011, while pitching Apple REIT Ten to investors at a DLA investment seminar, Lerner represented that the closed Apple REITs might

be combined into a $5 billion REIT and may be offered to the public on a national exchange in early to mid-2012, at which point, he claimed, their shares would be liquid and worth as much as $20 per share. Lerner also made unwarranted, exaggerated, and misleading claims that the closed REITs are a potential "gold mine" whose combined earnings might be "highly profitable."

7. Lerner had no basis for making any statement regarding a potential merger of the closed Apple REITs. None of the closed Apple REITs had given any indication that a potential merger and public offering of all closed Apple REITs is even possible, that it would occur by any particular date, that shares would list on a national exchange, or that shares in such a combination or separately could be worth anything near $20 per share. In their only public statements on the issue at the time of the statements, the boards of directors of the closed Apple REITs merely authorized the evaluation of a potential consolidation, and they specifically disclaimed that any decision on any transaction has been made or will be made according to any particular timetable.

8. Accordingly, DLA violated NASD Rule 2310, and FINRA Rules 2310(b) and 2010, by failing to conduct adequate due diligence, thereby leaving it without a reasonable basis for recommending its customers purchase Apple REIT Ten, and Lerner and DLA violated NASD Rule 2210(d)(1), Section 17(a) of the Securities Act of 1933, and FINRA Rule 2010 by failing to provide a complete and balanced picture of the economic status of the Apple REITs and omitting material information and by making false, misleading, exaggerated or unwarranted statements and claims regarding the Apple REITs, particularly with respect to the performance and prospects of the closed Apple REITs, to discourage redemptions of those REITs and promote sales of Apple REIT Ten.

9. Between February 1, 2007 and the date of this Offer (the "Municipal Bond Period"), David Lerner Associates, Inc. ("DLA" or "Member) charged excessive markups and/or otherwise failed to meet its obligation to provide a fair and reasonable price at the time of the transaction on thousands of municipal bond transactions. Each of these transactions violated Rules G-30 and G-17 of the Municipal Securities Rulemaking Board ("MSRB"). DLA also failed to show the terms and conditions and the time of the receipt on the memorandum on hundreds of brokerage orders in municipal bonds. Each of these instances was a violation of MSRB Rule G-8. DLA also charged excessive markups in over 800 collateralized mortgage obligation ("CMO") securities transactions between September 1, 2007 and the date of this Offer (the "CMO Period"). This conduct violated NASD Conduct Rule 2440 and IM-2440-1, NASD Rule 2110, and FINRA Rule 2010.

FACTS

The Apple REITs

10. Since 1992, DLA has served as best efforts underwriter and sole distributor of a series of ten REITs that have issued approximately $7 billion in securities to date. A REIT is a company that owns and usually operates income-producing real estate. 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 percent of its taxable income to shareholders annually in the form of dividends.

11. All of the REIT companies at issue were founded and managed by Glade Knight and his affiliates, and as each REIT closed to new investors, Knight opened another. The last seven REITs, the so-called "Apple REITs," have invested almost exclusively in the same sector:

extended stay hotels of only two national chains.[2] Knight currently serves as Chairman and Chief Executive Officer of Apple REIT Ten.

12. The securities of each Apple REIT company were registered with the Securities and Exchange Commission and each Apple REIT company became a reporting, non-traded public company. Although many REITs are traded on national stock exchanges, the Apple REITs do not trade on any exchange and are illiquid. Several of the earlier Apple REITs have been acquired by other companies. Apple REIT Six, Apple REIT Seven, Apple REIT Eight, and Apple REIT Nine continue to operate but are closed to new investors. Apple REIT Ten opened in January 2011 and is still open to new investors.

13. The closed Apple REITs opened between April 2004 and April 2008 and all completed offerings at a price of $11 per share.[3] Through at least December 2011, Apple REITs Six through Nine never changed the value of their shares from the $11 price despite (1) market fluctuations, including the economic downturn for commercial real estate in general and the hotel and hospitality industry in particular; (2) net income declines; (3) increased leverage through borrowings; and (4) return of capital to investors through distributions. Nearly all other participants in the non-traded REIT industry performed revaluations during this period. The $11 per share valuation Apple REITs Six through Nine adopted was inaccurate.

14. Each of the Apple REITs pays out monthly distributions, which are ordinarily funded by income producing properties. Each of the Apple REITs provides for both dividend reinvestment at $11 per share through its Dividend Reinvestment Plan ("DRIP") and limited redemption of shares at $11 (after being held for three years) under its Unit Redemption Program

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[2] The only exception is Apple REIT Nine, which invested $147 million of its assets in income producing oil or natural gas property, with the rest invested, like the other Apple REITs, in extended stay hotels of two national chains.

[3] The Apple REITs all offered the first 5 percent of shares at $10.50, and $11 thereafter.

("URP"). DRIP reinvestment is unlimited, whereas URP redemption has been limited to three percent of the weighted average number of Units outstanding during the 12-month period immediately prior to the date of redemption. In May 2011, after redemption requests exceeded the 3 percent limit in the first quarter of 2011 (investors sought to redeem triple the amount of shares over the first quarter of 2010), Apple REIT Eight raised the redemption percentage to 5 percent but lowered the payout on non-DRIP shares to 92 percent of the purchase price. The URPs for each of the closed Apple REITs and Apple REIT Ten prohibit redemptions in the first year of purchase and impose a penalty of 7.5 or 8 percent for several years thereafter.

Most of DLA's Revenue Derives From Sales of Apple REITs

15. Although there is no formal affiliation between DLA and the Apple REIT companies, DLA has sold approximately $7 billion of Apple REIT securities into approximately 122,600 customer accounts in its role as sole distributor (managing dealer) of the offerings.

16. Although all of the Apple REITs are illiquid and concentrated in one subsector, extended stay hotels, a substantial number of DLA's customers own two or more of the Apple REITs. Many of DLA's customers are senior and/or unsophisticated, and DLA solicits customers by general means such as the internet, radio, cold calling, mailings, and open-invitation seminars at senior centers, restaurants and country clubs.

17. DLA earns 10 percent of all offerings of Apple REIT securities, composed of 7.5 percent in commissions and 2.5 percent in selling fees. The firm also earns fees for account maintenance services. The approximately $600 million generated from Apple REIT sales has accounted for 60–70 percent of DLA's business annually since 1996.

18. DLA has earned over $42 million in commissions and marketing allowances related to sales of Apple REIT Ten shares alone.

19. All or nearly all of DLA's sales of the Apple REITs were solicited.

Earlier Apple REITS Artificially Valued Their Shares at $11, Which Was a Red Flag Requiring DLA to Conduct Further Due Diligence Before Recommending Apple REIT Ten

20. When it began to recommend and sell Apple REIT Ten, DLA was aware or should have been aware of valuation irregularities and other improprieties relating to earlier Apple REITs that should have caused it not to recommend and sell Apple REIT Ten before performing appropriate due diligence. DLA's due diligence into Apple REIT Ten was inadequate and has not rebutted the concerns underlying the issue of suitability of Apple REIT Ten. DLA therefore did not have a reasonable basis for recommending and selling Apple REIT Ten.

21. Apple REIT Ten invests in the same real estate subsector, nationally branded extended stay hotels, as the closed Apple REITs. In fact, Apple REITs Six through Ten all invest primarily in properties of the same two hotel chains. The Apple REITs are managed by the same individual and are closely interrelated.

22. Apple REITs Six through Nine all issued shares at $11 per share and never changed that valuation since Apple REIT Six commenced its offering in April 2004. The Apple REITs based their unchanging valuations solely upon the fact that they were currently selling shares at $11 to existing shareholders under the DRIP and redeeming shares at $11 under the URP. DLA accepted this justification and recorded the Apple REITs at $11 per share on customer account statements until June 2011, when it changed the market value to "not priced" following FINRA's original Complaint.

23. The Apple REITs' unsupported $11 valuations, which were inaccurate through at least December 2011, also substantially affected the financial condition and performance of

those REITs. Customers purchasing additional shares at $11 per share through the DRIP either overpaid or underpaid, depending upon whether $11 per share was an overvaluation or undervaluation. Likewise, customers redeeming shares at $11 through the URP (which was capped at three percent) were either overcompensated to the detriment of the REITs' remaining investors or undercompensated.

24. As alleged below, numerous factors should have caused the closed Apple REITs to revisit and adjust their valuation using timely market data, but they never did so. These failures were red flags requiring DLA to conduct further due diligence before recommending Apple REIT Ten to customers.

The Closed Apple REITs Failed to Adjust Their $11 Share Value Throughout Years of Significant Market Fluctuations

25. Since April 2004, when Apple REIT Six commenced its offering, until at least December 2011, Apple REITs Six through Nine steadfastly maintained that their illiquid shares were worth the same $11 per share price at which they were issued. During this period, the general economy and market in which the Apple REITs invest has undergone substantial market fluctuation. For example, the sector in which Apple REITs invest, extended stay hotels, suffered a significant, material downturn in 2008 and 2009 due to the overall economic crisis. Unlike most other market participants, the closed Apple REITs did not adjust their valuations.

26. DLA knew or should have with adequate due diligence known that market conditions were affecting the value of Apple REITs Six through Nine. Most or all of the data reflecting market conditions was available in public filings by the Apple REIT companies.

27. The failure of Apple REITs Six through Nine to adjust their uniform $11 valuations notwithstanding changes in market conditions was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

The Closed Apple REITs Failed to Adjust Their $11 Share Value Notwithstanding Substantial Performance Declines

28. The performance of all of the Apple REITs has varied due to a number of factors since each REIT's inception. In particular, Apple REIT Six and Apple REIT Seven suffered substantial performance declines in 2008 and 2009, which did not fully recover in 2010. For example, in 10-K filings with the SEC, Apple REIT Six disclosed substantial declines in all material financial metrics from 2008 to 2009:

a. Cash flows from operations declined from $88,747,000 in 2008 to $66,029,000 to 2009.

b. Total revenues declined from $258,913,000 in 2008 to $216,323,000 in 2009.

c. Net income declined from $58,502,000 in 2008 to $33,379,000 in 2009.

d. Funds from Operations in 2009 was down 27 percent from 2008.

e. Revenue per room in 2009 declined 15.7 percent from 2008.

29. Likewise, Apple REIT Seven suffered substantial declines in all material financial metrics from 2008 to 2009:

a. Cash flows from operations declined from $69,025,000 in 2008 to $55,460,000 to 2009.

b. Total revenues declined from $214,291,000 in 2008 to $191,715,000 in 2009.

c. Net Income declined from $38,063,000 in 2008 to $20,713,000 in 2009.

d. Funds from Operations in 2009 was down 20 percent from 2008.

e. Revenue per room in 2009 declined 14 percent from 2008.

30. In the five years prior to sale of Apple REIT Ten, the book values of all of the closed Apple REITs had been steadily declining:

a. Apple REIT Six net book values per share were reported in its December 31, 2010 Form 10-K filing as $9.20 in 2006, 9.04 in 2007, 8.82 in 2008, 8.28 in 2009, and 7.87 in 2010.

b. Apple REIT Seven net book values per share were reported in its December 31, 2010 Form 10-K filing as $9.56 in 2006, 9.47 in 2007, 9.04 in 2008, 8.47 in 2009, and 7.97 in 2010.

c. Apple REIT Eight net book values per share were reported in its December 31, 2010 Form 10-K filing as 9.72 in 2007, 9.11 in 2008, 8.43 in 2009, and 7.78 in 2010.

d. Apple REIT Nine net book values per share were reported in its December 31, 2010 Form 10-K filing as 9.50 in 2008, 9.31 in 2009, and 9.01 in 2010.

31. DLA knew or should have with adequate due diligence known of changes and declines in performance that were affecting the value of Apple REITs Six through Nine. Most or all of the data reflecting performance changes and declines were available in public filings by the Apple REIT companies.

32. The failure of Apple REITs Six through Nine to adjust their uniform $11 valuations notwithstanding changes or declines in financial performance was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

The Apple REITs Failed to Adjust Their $11 Share Value Or Sufficiently Adjust Their Distribution Levels After Incurring Debt and Increasing Leverage to Maintain Distributions and Meet Redemption Requests

33. Even during performance declines, and even before they acquired more than a handful of income-producing assets, the Apple REITs have distributed 7–8 percent returns to

investors since the inception of the REITs. As alleged below, DLA has used this prior performance to sell shares of Apple REIT Ten.

34. The returns Apple REITs Six through Nine distributed to investors were not paid entirely from income generated by those REITs. Similar to other non-traded REITs, Apple REITs use Funds from Operations ("FFO"), a non-GAAP measurement, in their public financial documents as a means to calculate income generated by properties that support distributions.[4] Because 90 percent of a REIT's taxable income must be distributed to investors, a REIT that makes distributions that are fully covered by income will have a distribution/FFO payout ratio of approximately 90–100 percent or less. However, as illustrated below, since 2008, Apple REITs Six through Nine did not achieve anywhere near the FFO necessary to pay investors 7–8 percent returns and the payout ratio nearly always exceeded 100 percent. Further illustrating the declining performance trends, "cumulative distributions greater than net income" has steadily worsened:

Apple REIT Six (offered April 2004 – March 2006)

Year	Total Distribution (Rate)	Funds From Operations	Payout Ratio	Cumulative Distributions Greater than Net Income[5]
2008	$81.7M (8.0%)	$87.8M	93%	($95.9M)
2009	$82.2M (7.0%)*	$64.3M	128%	($144.7M)
2010	$72.3M (7.0%)	$69.2M	105%	($182.6M)
Q1 2011	$17.6M (7.0%)	$17.3M	102%	($190.8M)

[4] FFO as defined by NAREIT, means net income, computed in accordance with U.S. GAAP, excluding gains (or losses) from sales of real estate, plus real estate depreciation and amortization, and after adjustments for unconsolidated partnerships and joint ventures.

[5] Apple REIT 6 Cumulative distributions greater than net income on a per share basis: -$1.05 (2008); -$1.58 (2009); -$2.00 (2010); -$2.08 (Q1 2011); -$2.13(Q2 2011); -$2.16 (Q3 2011).

Q2 2011	$17.6M (7.0%)	$21.5M	82%	($195.5M)
Q3 2011	$18.1M (7.2%)***	$23.5M**	77%	($198M)

Apple REIT Seven (March 2006 – July 2007)

Year	Total Distribution (Rate)	Funds From Operations	Payout Ratio	Cumulative Distributions Greater than Net Income[6]
2008	$81.4 (8.0%)	$66.5M	122%	($79.5M)
2009	$75.4M (7.0%)*	$53.1M	142%	($134.2M)
2010	$71.3M (7.0%)	$58.4M	122%	($177.2M)
Q1 2011	$17.7M (7.0%)	$13.55M	130%	($189.7M)
Q2 2011	17.6M (7.0%)	$13.55M	130%	($199.6M)
Q3 2011	$17.6M (7.0%)	$16.9M	104%	($208.7M)

Apple REIT Eight (July 2007 – April 2008)

Year	Total Distribution (Rate)	Funds From Operations	Payout Ratio	Cumulative Distributions Greater than Net Income[7]
2008	$76.4M (8.0%)	$36.3M	210%	($71.2M)
2009	$74.9M (7.0%)*	$38.4M	195%	($140.6M)
2010	$72.5M (7.0%)	$45.9M	158%	($202.2M)
Q1 2011	$18.2M (7.0%)	$6.7M	272%	($222.5M)

[6] Apple REIT 7 Cumulative distributions greater than net income on a per share basis: -$0.85 (2008); -$1.43 (2009); -$1.93 (2010); -$2.08 (Q1 2011); -$2.18(Q2 2011); -$2.28 (Q3 2011).

[7] Apple REIT 8 Cumulative distributions greater than net income on a per share basis: -$0.77 (2008); -$1.50 (2009); -$2.14 (2010); -$2.35 (Q1 2011); -$2.51(Q2 2011); -$2.57(Q3 2011).

Q2 2011	$18.1M (7.0%)	$13.97M	130%	($235.8M)
Q3 2011	$12.9M (5.0%)*	$16.1M	80%	($241.6M)

Apple REIT Nine (May 2008 – December 2010)

Year	Total Distribution (Rate)	Funds From Operations (modified)	Payout Ratio	Cumulative Distributions Greater than Net Income[8]
2008	$13M (8.0%)	$4.4M	295%	($10.9M)
2009	$57.3M (8.0%)	$33.1M	173%	($51.4M)
2010	$118.1M (8.0%)	$60.2M	196%	($153.2M)
Q1 2011	$39.9M (8.0%)	$27.9M**	143%	($178.2M)
Q2 2011	$40.1M (8.0%)	$33.4M**	120%	($197.9M)
Q3 2011	$40.2M (8.0%)	$31.8M**	126%	($217.4M)

*Distribution rate decreased.

**Modified Funds From Operations (MFFO).

***Distribution rate increased.

35. The Apple REITs were able to make distributions — 8 percent at the outset, reduced to 7 or 7.2 percent in May 2010[9] — that well exceeded FFO in two ways. First, the Apple REITs borrowed funds and used the loan proceeds to fund the distributions. For example, in October 2010, shortly before DLA began selling Apple REIT Ten, Apple REIT Eight opened a $75 million credit line "for general corporate purposes, including capital expenditures, redemptions and distributions." In April 19, 2011, months after DLA began selling Apple REIT Ten, Apple REIT Eight secured a $20 million loan, personally secured by a guarantee from the

[8] Apple REIT 9 Cumulative distributions greater than net income on a per share basis: -$0.27 (2008); -$0.52 (2009); -$0.85 (2010); -$0.98 (Q1 2011); .-$1.08 (Q2 2011); -$1.19 (Q3 2011).

[9] Apple REIT 8 further reduced its distribution rate to 5 percent in June 2011.

Apple REITs' founder GK, for "working capital purposes, including the payment of redemptions and distributions." Apple REIT Eight has since failed to comply with covenants on a credit line and loan totaling $100 million and had to restructure those loans and take on an additional $60 million loan.

36. Second, to the extent a shortfall remained after borrowing funds, the Apple REITs made up the difference by including a return of capital to investors. In other words, to maintain an artificially high return *on* investment, the Apple REITs made a return *of* investment with the monthly dividend.

37. Returning capital to investors and taking on debt (which must be serviced out of future income and new investor proceeds) would reduce the REIT's ability to acquire income producing assets to generate future income for distribution to investors. Increasing leverage in this manner decreased the REIT's ability to maintain distribution levels in the future and reduced the value of the REIT.

38. DLA knew or should have with adequate due diligence known that making distributions well exceeding FFO, leading to ever higher "cumulative distributions greater than net income," was affecting the value of Apple REITs Six through Nine. All of the data reflecting FFO and cumulative distributions greater than net income were available in public filings by the Apple REIT companies.

39. The failure of Apple REITs Six through Nine to adjust their uniform $11 valuations or sufficiently reduce their 7–8 percent distribution levels notwithstanding that distributions were increasingly unsupported by FFO was a red flag requiring DLA to conduct further due diligence before selling Apple REIT Ten.

DLA's Insufficient Due Diligence

40. Between January 2011 and at least December 2011, DLA sold Apple REIT Ten at $11 per share without having conducted adequate due diligence to determine that it is suitable for investors. DLA has relied mostly upon information in the Apple REITs' securities filings and the opinions issued by the Apple REITs' outside auditors that did not address the Apple REITs' valuation practices. On or about June 1, 2011, shortly after the filing of the Complaint, Knight severely undermined these valuation practices by acknowledging, in an interview with The New York Times regarding the Apple REITs, that he does not "know[] what the value is." On November 21, 2011, the closed Apple REITs filed Forms 8-K regarding the possibility of a merger, and disclosed that the REITs would "likely" not all be valued at the same price.

41. As sole underwriter for the Apple REITs, DLA cannot merely accept the valuation and other material disclosures in the public filings of the Apple REIT companies and must conduct its own due diligence regarding the offerings. As alleged above, the unreasonable valuation and other practices of Apple REITs Six through Nine raised substantial red flags indicating that Apple REIT Ten would engage in similar misconduct. In any event, Apple REIT Ten has recently begun providing its net book value per share, which was $9.26 per share as of September 30, 2011. In a November 18, 2011 amendment to its registration statement, the REIT also announced that the Apple REITs' founder, Knight, would convert 480,000 Series B convertible preferred shares into common shares, which "will result in the dilution of the [other] shareholders' interests."

42. Through its position as underwriter and sole distributor of Apple REITs, DLA was uniquely empowered and had the duty to conduct thorough due diligence of Apple REIT Ten prior to selling it to customers. For example, pursuant to an agency agreement with each of

the Apple REITs, DLA can request certain non-public information concerning the "business and financial condition" of the Apple REITs. DLA has not sufficiently availed itself of this opportunity.

43. Instead, the only due diligence DLA performed consisted of reviewing public filings (which themselves raised red flags), briefly meeting with Apple REIT management, and performing inadequate analyses that, among other failures, did not sufficiently address any of the red flags identified above.

Until June 2011, DLA's Advertising on its Website Provided Misleading Return Figures for Apple REITs Six Through Nine

44. To market Apple REIT Ten, DLA's website included a page titled "REIT History at David Lerner Associates" until June 2011. In addition to identifying Apple REIT Ten, the page provided a description of each of the closed Apple REITs.

45. This page provided return information for each of the closed Apple REITs and did so in a misleading manner. First, although the recitation of "REIT History" included year-by-year "annual yields" for the earliest REITs, it only provided a single figure, "average annualized distribution" since inception, for Apple REITs Six through Nine. Describing the performance of Apple REITs Six through Eight using average distribution since inception is misleading, because it masks that distribution rates for those REITs were cut in May 2010:

a. DLA's website represented that Apple REIT Six has achieved average annualized distribution of "7.9% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.2 percent in May 2010.

b. DLA's website represented that Apple REIT Seven has achieved average annualized distribution of "7.62% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.0 percent in May 2010.

c. DLA's website represented that Apple REIT Eight has achieved average annualized distribution of "7.48% through 3/31/11," but its distribution was reduced from 8.0 percent at inception to 7.0 percent in May 2010.

46. Second, DLA's presentation of returns for Apple REITs Six through Nine was misleading because it did not disclose that income from operations was insufficient to support the 7–8 percent returns the Apple REITs sought to pay.

47. Third, DLA's presentation of returns for Apple REITs Six through Nine was misleading because it failed to disclose that those REITs made distributions that were partially funded by debt that further leveraged the REITs.

48. Fourth, DLA's presentation misleadingly and inaccurately characterized the source of the distributions as "net income and a return of capital, primarily in the form of depreciation" when in fact the return of capital was not primarily from depreciation.

49. By including misleading return figures of previous Apple REITs and failing to disclose significant caveats thereto, and masking the declining returns, DLA's website omitted material information and was misleading.

50. Twice, prior to filing the initial Complaint, Advertising Regulation had specifically warned DLA not to promote Apple REIT Ten using the returns of prior Apple REITs. On March 11, 2011, Advertising Regulation issued a review letter advising the firm not to use a sales presentation DLA submitted for review, in part because it "contains and discusses returns of REIT programs that are no longer available." As Advertising Regulation explained, "the presentation is misleading, as it promotes investment in a new real estate program based on historical results of closed programs, contrary to Rule 2210(d)(1)." When DLA submitted a revised version of these materials, along with the prospectus that would be provided during the

presentation, Advertising Regulation noted in an April 13, 2011 letter that "the performance of prior REIT programs are not substantiated contrary to Rule 2210(d)(1)(A) and must be deleted . . . ."

Since Mid-2011, Sales of Apple REIT Ten Have Plummeted While Investor Requests to Redeem Shares in the Closed Apple REITs Have Skyrocketed

51. On May 27, 2011, FINRA's Department of Enforcement filed its original Complaint in this proceeding alleging that DLA failed to conduct adequate due diligence to determine that Apple REIT Ten was suitable for any customer given certain valuation irregularities and other improprieties relating to the closed Apple REITs. FINRA also alleged that DLA marketed Apple REIT Ten on its website using misleading information relating to the closed Apple REITs.

52. In the wake of FINRA's Complaint, the Apple REITs' valuation and distribution practices were subject to negative media attention, and investors initiated several class action lawsuits against DLA and the management of the Apple REITs alleging misrepresentations, unsuitable sales, and other causes of action. Beginning in June 2011, the sales of Apple REIT Ten declined precipitously.

53. Beginning in June 2011, the number of investors seeking to redeem their shares of the closed Apple REITs through the URP rose dramatically. For the first time in the Apple REITs' history, the three percent caps on quarterly redemption requests was substantially exceeded,[10] and at current levels it will take years for Apple REIT shareholders to redeem their shares under the pro rata system:

[10] Apple REIT Seven and Apple REIT Eight began receiving redemption requests exceeding the three percent cap in December 2010.

Closed Apple REITs[11]	Shares Requested to be Redeemed (% of Shares Actually Redeemed)			
	Q4 2010	Q1 2011	Q2 2011	Q3 2011
Apple REIT Six	606,064 (100%)	683,427 (100%)	4,412,066 (17%)	9,900,000 (7%)
Apple REIT Seven	1,137,969 (63%)	1,303,574 (56%)	5,644,778 (13%)	11,300,000 (6%)
Apple REIT Eight	1,168,279 (61%)	1,529,096 (48%)	8,255,381 (9%)	17,900,000 (4%)
Apple REIT Nine	318,891 (100%)	378,367 (100%)	3,785,039 (41%)	8,400,000 (18%)

Lerner and DLA Misrepresent the Performance of the Closed Apple REITs at Investment Seminars

54. Before and after Enforcement filed its Complaint in May 2011, DLA held investment seminars for large groups of current and potential investors, where it promotes the firm's investment products, including the Apple REITs. Lerner made a lengthy presentation at several of these seminars each month, during which he promoted the sale of Apple REIT Ten.

55. Several of DLA's larger investment seminars were advertised on DLA's website each month and were open to the public. Lerner held these seminars at venues that can accommodate several hundred attendees. In seminar presentations, Lerner and other DLA representatives used dozens of video slides projected on large screens visible to the attendees ("seminar slides").

56. During at least four investment seminars, which constitute public appearances under NASD Rule 2210(a)(5), Lerner and DLA made presentations that omitted material information regarding risks and the current financial status of the Apple REITs that caused the

[11] The Q3 2011 figures are approximations provided by the closed Apple REIT companies in their third quarter Form 10-Q reports.

presentations to be misleading. Lerner also made untrue, false, exaggerated, unwarranted and misleading statements of material fact and claims, including as follows:

a. *April 28, 2011, Boca Raton, Florida*:

i. On April 28, 2011, Lerner and others conducted a two-hour investment seminar on behalf of DLA at the Boca Raton Marriott in Boca Raton, Florida. The seminar was attended by over 100 customers and prospective investors, and Lerner made a lengthy presentation regarding the closed Apple REITs and Apple REIT Ten in his presentation.

ii. Lerner repeatedly provided performance data regarding the closed Apple REITs and made representations regarding the values and prospects of investments in the closed Apple REITs, including:

1. Apple REIT Six:

a. Lerner claimed that $100,000 invested in Apple REIT Six would be worth approximately $172,000 today, and added: "If you had Apple 6, you wanted to redeem your shares, this is what you would get."

b. "The income in Apple 6 is rising significantly. The values are going up significantly."

c. Lerner claimed to have "met last week" with investment bankers from "Wells Fargo" who were "looking to sell Apple 6," and that "all they could do is rave about Apple 6. And they kept saying the longer you wait, the more money you can make for your investors." Lerner noted that "if the

price is right, we're going to sell Apple 6" and concluded: "And I'm confident, that we're going to have wonderful returns for our investors in Apple 6."

d. "Besides the income, that we're going to have some significant appreciation from the value of the investment. So, that's where Apple 6 is, just to let you know."

2. $100,000 invested in Apple REIT Seven would be worth approximately $146,000 today.

3. Apple REIT Seven "averaged 7.62 percent over the last four years. That's been the return — the dividend return for our investors."

4. $100,000 invested in Apple REIT Eight would be worth approximately $132,000 today.

5. With respect to Apple REIT Eight, "we're paying currently seven percent."

6. $100,000 invested in Apple REIT Nine would be worth approximately $125,000 today, and Apple REIT Nine is a "great program" whose prospects are so "incredible" that attendees will name their children after Lerner or GK.

iii. Lerner repeatedly made misleading or exaggerated claims regarding the safety and prospects of investments in the Apple REITs, including characterizing the Apple REITs as a "moderately conservative" investment. With this category, Lerner opined that ". . . while they're not guaranteed, there's a high degree of predictability."

iv. Lerner repeatedly used exaggerated and misleading language to describe the closed Apple REITs, including: "We are the Rolls Royce of this business. It doesn't get any better. These are the facts. . . . So, if you have any of these Apple programs, this is it. You're the Rolls Royce of the business. You have the best that there is in this entire industry."

v. Lerner repeatedly made misleading and exaggerated predictions regarding the prospects for the extended stay hotel industry in which the Apple REITs invest, including: "This is why, in spite of the terrible economy, you're doing beautifully. You are getting better and better. The numbers you're going to see are getting better and better and better. This is one of the stronger places in the economy, that is this extended stay hotel."

vi. Lerner also made misleading statements regarding insurance protection available to his firm's customers, including:

    1. "If you have an account with us, you are insured for 15 million dollars against fraud."
    2. "So, your account is insured for fifteen million dollars against fraud. . . . You're insured for fifteen million dollars against any kind of fraud."
    3. "You have fifteen million dollars in protection on your account, all right?"

vii. Lerner pitched Apple REIT Ten as the same type of investment as the closed Apple REITs and made misleading, and exaggerated claims about the value, liquidity, and prospects of Apple REIT Ten, including:

1. "But if you understand what you have, you have this fabulous cash cow."
2. "You own something — you have a fixed price at eleven dollars. We're going to know the market value of this investment, when we go to sell it. As you've seen in the past, we've been — we've gotten quite a bit more than what we paid for it. And we're hoping to continue this wonderful record. But, there's no guarantee. But again, there's a fixed price of eleven dollars."
3. "And, again, we're very optimistic. You're going to see some wonderful results, because you understand what you saw here tonight, and you look at the history of what we've done."
4. In discussing Apple REIT Ten's "limited liquidity," Lerner failed to disclose the caps on redemption under the URP, and added: "There is limited liquidity — no one, ever, in the history of these two programs, has ever not gotten back their money or has ever lost money — ever , in the history of these programs. All right, I hope everyone understands this. This is a fact."
5. At the conclusion of Lerner's presentation on Apple REIT Ten, DLA played the song "We're in the Money" over the sound system.

b. *June 16, 2011, 7 p.m., Great Neck, New York*:

i. On June 16, 2011, Lerner conducted two investment seminars on behalf of DLA at a catering hall, Leonard's of Great Neck, at 3 p.m. and 7 p.m. The

7 p.m. seminar was attended by over 100 attendees, and Lerner focused mainly upon the closed Apple REITs and Apple REIT Ten in his presentation.

ii. Lerner omitted material information regarding the risks associated with the Apple REITs which caused the seminar to be misleading. Lerner also mischaracterized the current economic condition of the closed Apple REITs, in part, by repeatedly providing misleading performance data and making representations regarding the value of investments in the closed Apple REITs, including:

1. $100,000 invested in Apple REIT Six would be worth $171,901 today, and investors in Apple REIT Six are "sitting in the catbird seat."
2. $100,000 invested in Apple REIT Seven would be worth approximately $148,000 today, and the REIT "never lost money."
3. $100,000 invested in Apple REIT Eight would be worth approximately $134,000 today.
4. $100,000 invested in Apple REIT Nine would be worth $125,486 today, and investors are "making 8.00% on your money."

iii. Lerner claimed that there was no basis to revalue the $11 share price for the closed Apple REITs because they had no significant mortgage debt, the assets were not impaired from an accounting standpoint, and "we never stopped making money."

iv. Lerner claimed that most REITs are selling at 20 to 22 times earnings, and that under that scenario, Apple REIT Six is worth $16 per share and Apple REIT Eight is worth $10.60 per share.

v. Lerner repeatedly displayed an opinion letter from the Apple REITs' auditor, Ernst & Young, and represented that the auditors' involvement ensured the accuracy and trustworthiness of Lerner's claims and figures.

vi. Lerner repeatedly used unwarranted and exaggerated language to describe the closed Apple REITs, such as labeling them "the Rolls Royce of the business" and "the best."

vii. Lerner pitched Apple REIT Ten as the same type of investment as the closed Apple REITs, which he falsely characterized as "something where no one has ever lost money . . . ." Although he noted the illiquid nature of the investment, Lerner added that most REITs are sold within five to seven years. Lerner claimed that Apple REIT Ten was appropriate for investors "looking for income, stability and peace of mind."

viii. At the conclusion of Lerner's presentation on Apple REIT Ten, DLA played the song "We're in the Money" over the sound system.

c. *November 16, 2011, Uniondale, New York*:

i. On November 16, 2011, Lerner and others conducted a 1 ½ hour investment seminar on behalf of DLA at the Long Island Marriott in Uniondale, New York (the "Uniondale seminar"). The seminar was attended by over 400 existing and/or potential customers, and Lerner

focused mainly upon the closed Apple REITs and Apple REIT Ten in his presentation.

ii. Lerner omitted material information regarding the risks associated with the Apple REITs which caused the seminar to be misleading. Lerner also mischaracterized the current economic condition of the closed Apple REITs, in part, by repeatedly providing misleading performance data and making exaggerated and misleading representations regarding the value of investments in the closed Apple REITs, including:

1. $100,000 invested in Apple REIT Six would be worth $162,000 today; investors in Apple REIT Six have made an 18 percent return; and Apple REIT Six is earning $.90 per share and paying investors $.80 per share.
2. Apple REIT Seven is earning $.70 per share and achieving average annual distributions of seven percent.
3. Apple REIT Eight is earning $.60 per share and achieving average annual distributions of 7.48%.
4. Apple REIT Nine is making 12–13 percent returns.

iii. Lerner repeatedly used unwarranted, exaggerated or misleading language to describe the closed Apple REITs, such as labeling them "quality" investments that sophisticated investors such as "Warren Buffett" would buy, and claiming that buying Apple REITs is "what the wealthiest people in the world do."

iv. Lerner claimed that Apple REIT Ten is making "10.2 percent in earnings net to investors," which renders Apple REIT Ten "a tremendous cash cow."

v. As alleged below, Lerner also made unsupported, exaggerated and misleading claims regarding a potential consolidation and IPO of the closed Apple REITs.

d. *November 17, 2011, Boca Raton, Florida*:

i. On November 17, 2011, Lerner and others conducted a 1 ½ hour investment seminar on behalf of DLA at the Boca Raton Marriott in Boca Raton, Florida (the "Boca Raton seminar"). The seminar was attended by over 200 existing and/or potential customers, most of whom were elderly. Lerner focused mainly upon the closed Apple REITs and Apple REIT Ten in his presentation.

ii. Lerner omitted material information regarding the risks associated with Apple REITs causing the seminar to be misleading. Lerner also mischaracterized the Apple REITs' economic status in part, by repeatedly providing misleading performance data regarding the closed Apple REITs and making exaggerated or misleading representations regarding the value of investments, including:

1. Apple REIT Six and Apple REIT Eight are making money "hand over fist" and that Apple REIT Seven is "making all kinds of money."

2. Apple REIT Nine has invested in hotels that are generating a 12–13 percent "cap rate," which he represented was the amount of profit the hotels generate.
3. The closed Apple REITs could be a "cash cow."
4. The price of Apple REITs does not go up or down.
5. In the hotel industry, demand, room rates and profits are increasing.

iii. Lerner repeatedly used unwarranted, exaggerated or misleading language to describe his firm and the closed Apple REITs, such as the claim that DLA has performed better than any other brokerage in the country and labeling Apple REIT investors "the luckiest people in the world." He also represented that regulatory issues related to the Apple REITs do not affect investors or their investments.

iv. Lerner also made unsupported, exaggerated, and misleading claims regarding a potential consolidation and IPO of the closed Apple REITs.

57. Lerner's statements at the four seminars regarding the values, distributions, performance, and prospects of the Apple REITs were misleading, exaggerated, or unwarranted. His statements omitted material facts and were not fair and balanced because they failed adequately to disclose the risks of these investments and their excessive distribution practices and unreasonable valuation methods.

58. Prior to, and contemporaneous with, these four seminars, Advertising Regulation repeatedly directed DLA not to include information such as performance data for the closed Apple REITs in seminar slides. Nevertheless, the slides contained aspects of misleading

performance and Lerner continued to include such misleading performance data in his oral presentations.

The Closed Apple REITs File Forms 8-K Stating That They Plan to Evaluate Whether to Merge and Issue Publicly Trading Shares of the Combined REIT

59. On August 19, 2011, each of the closed Apple REITs made a one-page filing with the Securities and Exchange Commission on Form 8-K announcing that "its board of directors has authorized the *evaluation* of a *potential* consolidation transaction" of all of the closed Apple REITs that "*could* also include a listing . . . on a national exchange . . . ." (Emphasis added.)

60. The August 19, 2011 Form 8-K filings also contain a paragraph with several disclaimers regarding the uncertainty of a consolidation of the closed Apple REITs and the timetable thereof:

> The Company has *not made a decision* to pursue any particular transaction, and there can be *no assurance* that the evaluation of a potential consolidation transaction will result in such transaction being accomplished, or that the potential consolidation transaction or any other strategic alternative will be pursued. The Company has *not set a timetable* for completion of the evaluation process, and it *does not expect to comment further unless and until its board of directors has approved a specific transaction, or it otherwise deems further disclosure is appropriate or required by law*. [Emphasis added]

61. There has been no registration statement filed regarding a consolidation or public offering regarding any of the closed Apple REITs or Apple REIT Ten.

62. Prior to the filing of the Amended Complaint, the closed Apple REITs made only one other public pronouncement regarding the possibility of a merger and IPO. On November 21, 2011, each Apple REIT filed a Form 8-K that announced a single additional development regarding a consolidation: Each Apple REIT "had designated a committee consisting of all of its non-management directors to continue the previously announced

evaluation of a potential consolidation transaction . . . ." The Forms 8-K each included the same disclaimer paragraph quoted above, but noted that each REIT "currently anticipates that the evaluation process will be completed no sooner than during the first quarter of 2012."

63. In the November 21, 2011 Forms 8-K the closed Apple REITs also acknowledged for the first time that, notwithstanding their identical $11 share prices, the closed Apple REITs "likely" have different market values:

> The review [of consolidation and public offering options] will include, among other things, an evaluation of *potential exchange ratios to effectuate such a combination*. It is likely that the *ratios will vary by company and may include ratios of less than one to one*. [Emphasis added]

To Prevent Investors From Redeeming Closed Apple REIT Shares Under the URP, and Sell Apple REIT Ten, David Lerner and DLA Vastly Overstate the Likelihood, Timetable and Success of Any Merger and IPO of the Closed Apple REITs

64. During the period July 2011 through at least December 2011, prior to any public statement from the closed Apple REITs on the subject, Lerner and DLA told customers that the closed Apple REITs were planning to merge and issue an IPO that might result in publicly traded shares. To discourage redemptions of shares, some DLA investment counselors advised customers, without any reasonable basis, that the merger and IPO would price shares above the $11 purchase price and/or result in a "windfall" to closed Apple REIT shareholders.

65. Lerner personally raised the possibility of a merger and IPO in a July 27, 2011 letter to all customers. The letter's stated purpose was to counter negative media stories and solicitations from "law firms who have distorted the truth." The letter then made certain enumerated claims about the Apple REITs under the heading "It is critically important that you are aware of certain facts which seem to be ignored by the media." The fourth entry addressed

the Apple REITs' redemption programs, which were all oversubscribed at the time and redeeming on a pro rata basis, and concluded:

> In the meantime, on any shares that have not yet been redeemed, you will continue to earn the full declared distribution rate and will have the *opportunity to participate in potential Apple REIT Companies' sale, merger, consolidation, listing on an exchange or other disposition* of the properties. [Emphasis added]

The letter concluded by stating, "While no one can predict the future with certainty, David Lerner Associates believes [the Apple REIT] programs have strong fundamentals and are well positioned to provide investors with income and growth opportunities."

66. Lerner personally made unsupported, misleading, or exaggerated claims regarding a proposed combination and IPO of the closed Apple REITs, and committed other advertising violations as alleged above, during at least two recent investment seminars in Uniondale, New York and Boca Raton, Florida. These seminars were attended by hundreds of current and prospective investors in Apple REITs, and they were open to the public. At the time of the November 16 and 17, 2011 seminars alleged below, the only publicly available statements from any of the Apple REITs regarding a possible combination and IPO were the August 19, 2011 Forms 8-K filed by the closed Apple REITs.

The November 16, 2011 Uniondale Seminar

67. At the November 16, 2011 Uniondale seminar alleged above, Lerner made a lengthy presentation regarding the Apple REIT program and made misleading or exaggerated statements or predictions regarding a potential merger of the closed Apple REITs followed by an initial public offering of the combined REIT's shares, including as follows:

a. The closed Apple REITs will merge into one $5 billion REIT, which may be listed on the New York Stock Exchange.

b. The merger and IPO will allow existing shareholders to sell their shares.

c. Earnings on the combined REIT may be "highly profitable."

d. Lerner "wouldn't be surprised" if shares in the combined REIT were worth "$20" a share.

e. The combination and IPO will happen sometime between March and June 2012.

f. Although there are "no guarantees," current holders of the closed Apple REITs "could possibly be sitting on a gold mine here."

68. Lerner provided no support for any of these representations, predictions or assumptions, and the only publicly available pronouncements from the Apple REITs were the August 19, 2011 Form 8-K filings alleged above. Directly following his claims and predictions regarding the possibility of a merger of the closed Apple REITs, Lerner discussed Apple REIT Ten.

69. Lerner claimed that Apple REIT Ten was making "10.2% in earnings net to investors," and that because that figure exceeds the 7.5% distribution rate, "it's a tremendous cash cow." To the contrary, Apple REIT Ten is not generating sufficient income to fund its distributions to investors.

The November 17, 2011 Boca Raton Seminar

70. At the November 17, 2011 Boca Raton seminar alleged above, Lerner made a lengthy presentation regarding the Apple REIT program and made misleading or exaggerated statements or predictions regarding a potential merger of the closed Apple REITs followed by an initial public offering of the combined REIT's shares, including as follows:

a. The boards of the closed Apple REITs are considering a merger followed by an IPO of the combined REIT's shares, which may be listed on the New York Stock Exchange.

b. The merger and IPO will allow existing shareholders to sell their shares.

c. The combination and IPO would likely occur in February or March of 2012.

d. Lerner does not know the IPO price, but it could potentially be worth "way more" than the $11 investors paid for shares in the closed Apple REITs.

e. Shares of the closed Apple REITs are the "best investment you've ever made."

71. Lerner advised existing shareholders of the closed Apple REITs that "you don't want to sell your shares" because of the coming IPO.

72. Lerner provided no support for any of these representations, predictions or assumptions, and the only publicly available pronouncements from the Apple REITs were the August 19, 2011 Form 8-K filings alleged above.

73. Directly following his statements regarding the possibility of a merger of the closed Apple REITs, Lerner discussed Apple REIT Ten. During his presentation, Lerner represented that, although Apple REIT Ten currently has very limited liquidity, "maybe up the road" Apple REIT Ten would be "part of the stock market." By speculating about this possibility shortly after predicting that shareholders in the closed Apple REITs would be able to obtain liquidity for their shares at prices above the purchase price, Lerner made exaggerated and misleading claims about the prospects, including the potential liquidity, of Apple REIT Ten.

74. DLA continued to have "Investment Seminars" after the filing of the Amended Complaint.

At Investment Seminars, Lerner and DLA Have Continuously Used Seminar Slides That Advertising Regulation has Repeatedly Warned Violate the Advertising Rules

75. During 2011, Lerner and DLA repeatedly used seminar slides to promote the sale of Apple REIT Ten and the firm's other investment products. During 2011, Advertising Regulation reviewed several iterations of seminar slides that DLA either proposed to use or had already used regarding the Apple REITs. Many of these seminar slides violated the content provisions of NASD Rules 2210(d)(1), and Advertising Regulation repeatedly directed DLA to cease using the slides immediately.

76. Many of the seminar slides DLA used in 2011 were not fair and balanced, and they omitted material information, most importantly regarding the risks associated with Apple REITs and their current economic status. The omission of the material information caused the communication to be misleading. DLA's seminar slides generally promoted the benefits of Apple REITs and omit or downplay material risks. The seminar slides presented misleading comparisons between the Apple REITs and other REIT programs. The seminar slides contained favorable hotel industry performance and outlook data, and misleadingly suggested that the Apple REITs will match those results instead of disclosing that the Apple REITs generally lag the hotel industry's performance.

77. Many of DLA's slides also contained false, misleading, exaggerated, or unwarranted performance data from the closed Apple REITs and otherwise violated FINRA's Advertising Rules, as follows:

a. *March 23, 2011 Seminar Slides*: By letter dated March 23, 2011, DLA submitted copies of seminar slides that it began using on March 30, 2011. As

detailed in Advertising Regulation's April 13, 2011 response letter, many of the seminar slides violated FINRA's Advertising Rules, including as follows:

i. These slides contained prior performance data regarding the closed Apple REITs. The prior performance was not substantiated contrary to NASD Rule 2210(d)(1)(A) and was used to promote Apple REIT Ten in violation of NASD Rule 2210(d)(1)(B).

ii. The seminar slides failed to provide a sound basis for evaluating Apple REIT Ten. Among other things, the slides included the representation that Apple REIT Ten provides "Current annual distribution 7.5%; paid monthly," but failed to explain conditions and restrictions that could prevent the 7.5% distribution, and failed to disclose whether the 7.5% distribution could or would include return of principal or borrowings.

b. *June 2011 seminar slides*: By letter dated July 22, 2011, DLA submitted copies of seminar slides used at five seminars in June 2011 that took place in Long Island, Connecticut and New Jersey and were attended by well over 1500 investors. As detailed in letters from Advertising Regulation dated August 3, 2011 and November 22, 2011, which directed DLA to cease using them, many of the seminar slides violated FINRA's Advertising Rules, including as follows:

i. The June slides contained prior misleading performance data (average annual distribution rate and yield history) regarding the closed Apple REITs and implied that Apple REIT Ten will achieve similar results. The prior performance data was misleading because it omitted material

information, including that income from the closed REITs was insufficient to support prior distributions and that those distributions were partially funded by return of capital and borrowings that further leveraged the REITs.

ii. The June slides misrepresented the closed Apple REITs' value as $11 per share, and contained false and misleading claims regarding the growth of $100,000 invested in the closed Apple REITs. The slides not only masked the current financial status by inaccurately portraying the current value of the REITs, but identified a value that REIT shareholders would not receive and as a result failed adequately to disclose the current financial condition of the closed Apple REITs.

iii. The June slides failed to include a balanced presentation with respect to Apple REITs, as many risks and material considerations necessary in order to provide a sound basis for evaluation are entirely omitted, causing the slides to be misleading.

iv. The June slides did not adequately disclose the restrictions and limitations on redemptions under the URP.

v. The June slides contained misleading, unwarranted, and materially incomplete comparisons between the closed Apple REITs and other non-traded REITs, which Advertising Regulation repeatedly directed DLA to remove from previous seminar slides.

vi. The June slides mischaracterize Apple REITs as a "moderately conservative" investment with less risk than mutual funds.

vii. The June slides included an excerpt from the auditor's statement that misleadingly implied that the financial information in the seminar is covered by the auditor's review, giving the appearance of credibility.

c. *August/September 2011 seminar slides*: By letter dated August 18, 2011, DLA submitted copies of seminar slides used at over 25 seminars or large group meetings between August 17, 2011 and September 26, 2011 in various locales in New York, New Jersey, Connecticut and Florida, which were attended by well over 1200 investors. As detailed in Advertising Regulation's September 20, 2011 response letter, which directed DLA to cease using them, many of the seminar slides violated FINRA's Advertising Rules, including as follows:

i. The slides failed to provide a sound basis for evaluating the facts with regard to the Apple REITs and their current financial state.

ii. The slides failed adequately to disclose risks of investing in Apple REITs.

iii. The slides contained prior distribution data regarding the closed Apple REITs which was misleading and omitted material information regarding their current financial state, including the specific source from where the distributions were paid.

iv. The slides' treatment of Apple REIT Ten's lack of liquidity was not balanced and contained misleading statements.

d. *September/October 2011 seminar slides*: By letter dated September 27, 2011, DLA submitted copies of seminar slides used at presentations in New Jersey

on September 27 and October 3, 2011. As detailed in Advertising Regulation's October 4, 2011 response letter, which directed DLA to cease using them, many of the seminar slides violated FINRA's Advertising Rules, including as follows:

i. The slides failed to provide a sound basis for evaluating the facts with regard to the Apple REITs and their current financial state.

ii. The slides' discussion of liquidity contained misleading statements that mitigated the liquidity risks.

iii. The slides contained misleading, unwarranted, and materially incomplete comparisons between the closed Apple REITs and the hotel industry, which Advertising Regulation repeatedly directed DLA to remove from previous seminar slides.

78. Since March 11, 2011, Advertising Regulation instructed DLA to cease making exaggerated, unwarranted or misleading statements regarding the Apple REITs and specifically, through December 2011, to cease using seminar slides containing performance data for the closed REITs. DLA has continuously responded with revised seminar slides that fail to comply with NASD Rule 2210. For example:

a. On March 11, 2011, Advertising Regulation sent DLA a letter analyzing proposed seminar slides DLA submitted for review by letter dated February 22, 2011. After "not[ing] that a vast portion of the presentation contains and discusses returns of REIT programs that are no longer available," Advertising Regulation advised DLA that "the presentation is misleading, as it promotes investment in a new real estate program based on historical results

of closed programs, contrary to Rule 2210(d)(1)." Based upon this deficiency and others, the letter concluded "that this presentation does not comply with applicable standards and must not be used . . . ."

b. On March 25, 2011, in response to Advertising Regulation's March 11, 2011 letter, DLA provided revised seminar slides that still contained prior performance information, as well as the Apple REIT Ten prospectus that DLA would provide at the seminar. In an April 13, 2011 response letter, Advertising Regulation noted that 13 slides "contain prior performance of REIT programs" and that "promoting investment in a new REIT program based on performance of prior deals that cannot be substantiated is misleading in contravention of Rule 2210(d)(1)(B)." The letter advised that "the performance of prior REIT programs are not substantiated contrary to Rule 2210(d)(1)(A) and must be deleted . . . ."

c. On June 16, 2011, FINRA staff attended a DLA investment seminar conducted by Lerner, which mostly focused upon the Apple REITs. Notwithstanding FINRA's two prior directives to cease using seminar slides that provide performance information regarding the closed Apple REITs, staff observed that Lerner continued to use seminar slides that highlight closed Apple REIT performance. Advertising Regulation requested copies of the seminar slides by letter dated July 8, 2011, and DLA provided them on July 22, 2011. By letter dated August 3, 2011, Advertising Regulation advised DLA that the revised seminar slides did not address FINRA's concerns and "should no longer be used."

d. On July 6, 2011, DLA submitted revised seminar slides to Advertising Regulation for review, which contained prior performance history of the closed Apple REITs notwithstanding two prior directives from Advertising Regulation to cease including such information in the slides. By letter dated July 19, 2011, Advertising Regulation again directed DLA not to use the seminar slides and specifically to delete closed Apple REIT performance history from the slides. Advertising Regulation further directed DLA to file any revised seminar slides with Advertising Regulation prior to use with the public.

e. On or about August 18, 2011, DLA submitted further revised seminar slides to Advertising Regulation which contained prior performance history of the closed Apple REITs notwithstanding four prior directives from Advertising Regulation to cease including such information in the slides. By letter dated September 20, 2011, Advertising Regulation directed Lerner not to use the seminar slides and to file any revised seminar slides with FINRA prior to use with the public.

79. Notwithstanding repeated instructions to cease using seminar slides that contain performance information for the closed Apple REITs, DLA continued to use seminar slides that contained such information. DLA also repeatedly disregarded Advertising Regulation's repeated instructions, beginning in July 2011, to file with FINRA any revised seminar slides regarding Apple REIT Ten prior to use with the public.

80. To the extent that DLA's seminar slides contained disclaimers or disclosures regarding the investments or other information presented, they were incomplete and in many instances the print was too small to be readable by most attendees at the seminars.

In Response to FINRA's May 27, 2011 Complaint and Negative Media Attention, Lerner and DLA Send Correspondence to All Clients That is Not Fair and Balanced and that Contains False, Misleading, and Exaggerated Statements

Lerner's June 6, 2011 "Dear Valued Client" Letter

81. On June 6, 2011, DLA mailed a letter to over 50,000 existing customers regarding FINRA's May 27, 2011 Complaint, which claimed to "set the record straight." Lerner signed the letter.

82. Lerner's June 6, 2011 letter was not fair and balanced, and contained false, exaggerated or misleading statements that omitted material information, causing the presentation to be misleading, including:

a. "The current, fully-subscribed Apple REIT programs (Apple Six, Apple Seven, Apple Eight and Apple Nine) have, historically, been consistently profitable and have paid distributions, even during recessionary periods." This claim is misleading as it omitted material information in violation of NASD Rule 2210(d)(1)(A) because it failed to disclose that the closed Apple REITs used borrowed funds and return of investor capital to maintain distributions. The claim that the REITs were "consistently profitable" is exaggerated and misleading in violation of NASD Rule 2210(d)(1)(B) because the REITs have not been able to pay distributions without the use of borrowed funds and return of capital.

b. "***Barely 4 months ago, FINRA conducted a thorough review of the Apple REIT Ten offering and specifically approved DLA's role as underwriter and its compensation for such services***." (Emphasis in original.) This claim is false and misleading in violation of NASD Rule 2210(d)(1)(B) because the referenced review by FINRA was a "no objections" opinion with respect to the fairness and reasonableness of the underwriting terms and arrangements as proposed in documents provided by the broker dealer. FINRA does not approve or disapprove of a firm's role as an underwriter with respect to specific offerings. This claim is further misleading because it implies that FINRA's "thorough review of the Apple REIT Ten offering" included an approval of the offering itself.

c. "Regardless of age, in the main, Apple REIT investors seek attractive current returns and an alternative to experiencing stock market fluctuations." This claim fails to provide a sound basis for evaluating the investment in violation of NASD Rule 2210(d)(1)(A) because it fails to disclose that REIT investments are also subject to fluctuations in value and the "attractive current returns" include borrowings and return of investor capital.

d. "And most importantly, **NO ONE HAS EVER LOST MONEY IN ANY OF THE APPLE REIT HOTEL PROGRAMS!**" (Emphasis in original.) This claim is false and misleading in violation of NASD Rule 2210(d)(1)(B) because investors who have redeemed within the first three years of owning Apple REITs have received only 92% of the price they paid per share, exclusive of distributions they had received. It is further misleading in

violation of NASD Rule 2210(d)(1)(B) because all of the closed Apple REITs were worth less than the $11 per share purchase price at the time the statement was made.

83. On June 16, 2011, Advertising Regulation sent DLA a letter advising the firm that "several of the bullet points included in the letter raise serious regulatory concerns" and directing DLA to "cease the use of the letter immediately as it fails to comply with applicable standards." DLA complied with this request and removed portions of the letter that DLA has posted on its website.

Lerner's July 27, 2011 "Dear Valued Client" Letter

84. As alleged above, on July 27, 2011, DLA mailed a letter to all existing customers to counter negative media stories and solicitations from "law firms who have distorted the truth." Lerner signed the letter.

85. Lerner's July 27, 2011 letter was not fair and balanced and omitted material information, causing the communication to be misleading in violation of NASD Rule 2210(d)(1)(A) and (d)(1)(B), as it failed to accurately provide a balanced and complete picture with respect to the current economic status of the Apple REITs. Under the heading "It is critically important that you are aware of certain facts which seem to be ignored by the media," the letter made exaggerated and misleading statements, including:

a. "[F]or 2010, Apple REITs Six through Nine showed profitable operating results, and while past performance is no guarantee of future results, Apple has publicly released favorable estimates for 2011 . . . ." This claim was misleading because neither the claimed "profitable results" nor the "favorable estimates for 2011" had or would result in income sufficient to pay

distributions at the rates set by the closed Apple REITs. All of the closed Apple REITs had to borrow funds and/or return capital to investors to make distributions in 2010 and 2011.

b. The letter provided FFO data and estimates for the closed Apple REITs under the heading: "Apple Funds From Operations (FFO)." The FFO figures were misleading because they omitted material information. The letter failed to explain that income from the REITs was insufficient to support prior distributions, and as such, those distributions were partially funded by debt that further leveraged the REITs and from return of capital.

c. "In the meantime, on any shares that have not yet been redeemed, you will continue to earn the full declared distribution rate and will have the opportunity to participate in potential Apple REIT Companies' sale, merger, consolidation, listing on an exchange or other disposition of the properties." This statement was misleading and exaggerated since at the time this letter was sent to clients, no public statement had been made regarding even a possible combination and IPO of Apple REITs, there was no registration statement that was filed, and no potential or imminent transaction in the pipeline.[12] Additionally problematic was the statement's suggestion that if investors do not redeem, he/she will have the "opportunity" to participate in a non-existent or non-developed transaction.

d. "While no one can predict the future with certainty, David Lerner Associates believes that these programs have strong fundamentals and are well positioned to provide investors with income and growth opportunities." These

[12] The first public statement regarding a possible combination and IPO did not occur until the August 19, 2011 Form 8-K, filed by the closed Apple REITs.

statements were unwarranted and misleading given the Apple REITs' increasing leverage and return of capital to investors.

DLA Failed to Provide Fair and Reasonable Prices to Customers

86. During the Municipal Bond Period, DLA acquired municipal bonds from other broker-dealers and broker's brokers. These municipal bonds were purchased for DLA's inventory, and then sold to DLA's customers.

87. During the Municipal Bond Period, as found in a number of investigations by FINRA's Department of Market Regulation, DLA entered into municipal bond transactions in which, taking into consideration the relevant factors, it charged excessive markups and/or markdowns or otherwise failed to meet its obligation to provide a fair and reasonable price at the time of the transaction on municipal bonds it sold from its own account to a customer and/or purchased for its own account from a customer, in most cases the same day or the next day, thereby causing customers to purchase or sell the municipal bonds from or to DLA at prices that were not fair and reasonable.

88. During the Municipal Bond Period, the Department of Market Regulation conducted ten examinations in which it reviewed DLA's pricing of municipal bond transactions to customers during review periods between April 1, 2008 and June 30, 2011. As found by Market Regulation, in multiple transactions, DLA purchased municipal securities for its own account from a customer and/or sold municipal securities for its own account to a customer at an aggregate price (including any markup or markdown) that was not fair and reasonable, taking into consideration all relevant factors, including the best judgment of the broker, dealer or municipal securities dealer as to the fair market value of the securities at the time of the transaction and of any securities exchanged or traded in connection with the transaction, the

expense involved in effecting the transaction, the fact that the broker, dealer, or municipal securities dealer is entitled to a profit, and the total dollar amount of the transaction. The violative markups and markdowns identified ranged between 3.36% and 22.59%. Each of these fair pricing violations constitutes a separate and distinct violation of MSRB Rules G-17 and G-30(a).

89. In addition, DLA failed to show the terms and conditions and the time of receipt on the memorandum for 1,634 brokerage orders in municipal bonds. Each of these orders constitutes a separate and distinct violation of MSRB Rule G-8.

90. During the CMO Period, DLA acquired CMO securities, typically through its Florida branch office. These securities were purchased for DLA's inventory, and then sold to DLA's customers.

91. During the CMO Period, DLA entered into approximately 880 CMO transactions in which, taking into consideration the relevant factors, it charged excessive markups ranging from 4.09% to 26.28% on CMOs it purchased and then sold to retail customers the same day or the next day, thereby causing customers to purchase the CMOs from DLA at prices that were not fair and reasonable.

92. DLA charged excessive markups on municipal securities and CMO transactions throughout the Municipal Securities Period and CMO Period. The markups on municipal securities remained excessive, even after the staff of the FINRA Department of Enforcement notified DLA that the markups were excessive.

FIRST CAUSE OF ACTION

Reasonable Basis Suitability (NASD Rule 2310; FINRA Rule 2310(b));
Just and Equitable Principles of Trade (FINRA Rule 2010)
Respondent — DLA

93. In addition to its customer-specific suitability obligation, DLA and its registered representatives have a duty to perform reasonable due diligence to understand the potential risks and rewards associated with a security it recommends to customers, and to determine whether the recommendation is suitable for at least some investors based upon that understanding.

94. Based upon sales and account maintenance of all issued Apple REITs, DLA management was or should have been aware of red flags indicating that management of Apple REIT Ten may adopt improper valuation practices and may unreasonably leverage the REIT in order to continue to issue returns unsupported by the REIT's performance.

95. Especially in light of these red flags, and DLA's role as sole underwriter, DLA personnel did not conduct reasonable due diligence to understand the potential risks and rewards of Apple REIT Ten before recommending the security to customers. As a result, DLA was not in a position to determine whether Apple REIT Ten would be suitable for any investor prior to recommending it to customers.

96. By failing to conduct adequate due diligence to fulfill its reasonable-basis suitability obligation, which also violated its duty to observe high standards of commercial honor and just and equitable principles of trade, DLA violated NASD Rule 2310 and FINRA Rules 2310(b) and 2010.

SECOND CAUSE OF ACTION

Misleading Statements, Misleading Omissions of Material Information (NASD Rule 2210(d)(1)); Just and Equitable Principles of Trade (FINRA Rule 2010) Respondent — DLA

97. By providing performance figures for all of the Apple REITs in conjunction with the presentation of Apple REIT Ten on its website, DLA misleadingly implied that Apple REIT Ten would achieve similar results.

98. The performance figures DLA provided were further misleading because they masked reductions in the distributions made by some of the Apple REITs.

99. DLA also failed to disclose material information regarding the prior Apple REIT distributions, including the fact that income from those REITs was insufficient to support the 7–8 percent returns the REITs sought to pay and that the REITs had to borrow funds to meet their distribution goals.

100. The website misleadingly and inaccurately characterized the source of the distributions as "net income and a return of capital, primarily in the form of depreciation" when the return of capital was not primarily from depreciation.

101. By distributing communications with the public that contained misleading statements and omitted material information, which also violated its duty to observe high standards of commercial honor and just and equitable principles of trade, DLA violated NASD Rule 2210(d)(1) and FINRA Rule 2010.

THIRD CAUSE OF ACTION

Making Unbalanced Oral and Written Seminar Presentations, Making False, Exaggerated, Unwarranted and Misleading Statements, Misleading Omissions of Material Information (NASD Rule 2210(d)(1)); Just and Equitable Principles of Trade (FINRA Rule 2010) Respondents — Lerner and DLA

102. Throughout 2011, DLA, through Lerner and other representatives, repeatedly gave seminar presentations to investors using seminar slides that were not fair and balanced and did not provide a sound basis for evaluating the facts in regard to the Apple REITs.

103. The slides DLA used at seminars constitute "Sales Literature" under NASD Rule 2210(a)(2) and were communications with the public under the Advertising Rules.

104. Lerner made oral presentations regarding the Apple REITs at seminars throughout 2011, including in Boca Raton, Florida on April 28, 2011; Great Neck, New York on June 16, 2011; Uniondale, New York on November 16, 2011; and Boca Raton, Florida on November 17, 2011. Each of these seminar presentations constituted a "Public Appearance" under NASD Rule 2210(a)(5) and were communications with the public under the Advertising Rules.

105. The seminar slides and Lerner's seminar presentations were subject to the standards of NASD Rule 2210(d)(1)(A), which requires:

> All member communications with the public shall be based on principles of fair dealing and good faith, must be fair and balanced, and must provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. No member may omit any material fact or qualification if the omission, in light of the context of the material presented, would cause the communication to be misleading.

106. Many of the seminar slides and Lerner's seminar presentations were not fair and balanced and did not provide a sound basis for evaluating the facts in regard to the Apple REIT programs or Apple REIT Ten. The seminar slides and Lerner's seminar presentations also

omitted numerous material facts and qualifications that caused the communications to be misleading.

107. The seminar slides and Lerner's seminar presentations were subject to the standards of NASD Rule 2210(d)(1)(B), which requires:

> No member may make any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public. No member may publish, circulate or distribute any public communication that the member knows or has reason to know contains any untrue statement of a material fact or is otherwise false or misleading.

108. Many of the seminar slides and Lerner's seminar presentations contained numerous false, exaggerated, unwarranted or misleading statements and claims regarding the valuations, performance, prospects, risks, and practices of the Apple REIT programs, as well as customer insurance protection through DLA and the prospects for a merger of the closed Apple REITs.

109. By virtue of the foregoing, Lerner and DLA violated NASD Rule 2210(d)(1) and FINRA Rule 2010.

FOURTH CAUSE OF ACTION

False, Misleading, Unwarranted and Misleading Statements, and Misleading Omissions of Material Information, in Correspondence with Customers (NASD Rule 2210(d)(1)); Just and Equitable Principles of Trade (FINRA Rule 2010) Respondents — Lerner and DLA

110. To counter negative media attention regarding DLA and the Apple REITs following the filing of the original Complaint, Lerner sent letters dated June 6, 2011 and July 27, 2011 to all of DLA's customers.

111. Lerner signed both letters, each of which was mailed to over 50,000 customer households. Each of the letters constitutes "correspondence" under NASD Rule 2211(a)(1)(A)

and pursuant to NASD Rule 2211(d)(1) they are subject to the content standards of NASD Rule 2210(d)(1).

112. Lerner's June 6, 2011 letter to customers omitted material information causing the communication to be misleading. The letter also contained exaggerated, false, and misleading statements regarding the valuations, performance, prospects, risks, and practices of the Apple REIT programs. The June 6 letter makes exaggerated claims regarding FINRA's "no objections" opinion regarding the fairness and reasonableness of the underwriting terms and arrangements.

113. Lerner's July 27, 2011 letter to customers omitted material information causing the communication to be misleading. The letter also contained exaggerated, false, and misleading statements regarding the valuations, performance, prospects, risks, liquidity, and practices of the Apple REIT programs. The July 27 letter made unwarranted, exaggerated, and misleading claims regarding a potential "opportunity" for closed Apple REIT shareholders to participate in consolidation, sale, listing on a national exchange, or other event that would allow them to dispose of their illiquid shares.

114. By virtue of the foregoing, Lerner and DLA violated NASD Rule 2210(d)(1) and FINRA Rule 2010.

FIFTH CAUSE OF ACTION

Intentional or Reckless Misrepresentations and Omissions Constituting Device, Scheme or Artifice to Defraud; Deceptive Practices; Violation of § 17(a)(1) Securities Act of 1933 (FINRA Rule 2010) Respondents — Lerner and DLA

115. Apple REIT Ten is a blind pool offering, which is operated by the same management company as the closed Apple REITs and has proposed to invest in the same extended stay hotel sector and according to the same investment philosophy, strategy and goals as the closed Apple REITs. Lerner and DLA have marketed Apple REIT Ten based upon the

management team, prior performance, steady distribution rates, unchanging valuations, and prospects of the closed Apple REITs.

116. Representations regarding the management team, prior performance, steady distribution rates, unchanging valuations, and prospects of the closed Apple REITs were material to investors considering a purchase of shares in Apple REIT Ten.

117. Among other methods, Lerner and DLA have marketed Apple REIT Ten on DLA's website, in investment seminars, and in customer correspondence.

118. Throughout 2011, to induce new and existing customers to purchase Apple REIT Ten, Lerner and DLA made untrue representations of material fact or omissions of material fact regarding the prior performance, steady distribution rates, unchanging valuations, and prospects of the closed Apple REITs and/or Apple REIT Ten, including as follows:

a. At an investment seminar presentation in Boca Raton on April 28, 2011, Lerner:

   i. made untrue representations regarding the current value of a $100,000 investment in Apple REIT Six, Apple REIT Seven, Apple REIT Eight, and Apple REIT Nine;

   ii. provided performance and distribution data, and made misleading and exaggerated claims regarding the closed Apple REITs' performance, without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs;

iii. made the untrue statement that "there's a high degree of predictability" regarding the performance of investments such as Apple REITs and failed to disclose material facts regarding the risks that render the performance of the closed Apple REITs unpredictable;

iv. made untrue representations regarding insurance protection for customers who suffer losses related to fraud;

v. made the untrue statement that Apple REIT Ten is a "fabulous cash cow" and failed to disclose the material facts that Apple REIT Ten is currently unable to fund distributions from FFO and that its management may maintain distribution levels with return of capital to investors and through borrowings;

vi. made the untrue statement that Apple REIT Ten shareholders will "see some wonderful results" because of similarities between Apple REIT Ten and the closed Apple REITs, and failed to disclose material facts regarding the condition and performance of the closed Apple REITs; and

vii. failed to disclose the material fact that quarterly redemptions are capped at three percent, which made his discussion of liquidity misleading.

b. At an investment seminar presentation in Great Neck, New York, on June 16, 2011, Lerner:

i. made untrue representations regarding the current value of a $100,000 investment in Apple REIT Six, Apple REIT Seven, Apple REIT Eight, and Apple REIT Nine;

ii. made the untrue statement that Apple REIT Six is worth $16 per share and that Apple REIT Eight is worth $10.60 per share;

iii. made the untrue statement that there was no basis to revalue the $11 share price and that "we never stopped making money;"

iv. made the untrue statement that the closed Apple REITs are "something where no one has ever lost money;" and

v. provided performance and distribution data, and made exaggerated and misleading claims regarding the closed Apple REITs' performance, without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs.

c. At an investment seminar presentation in Uniondale, New York, on November 16, 2011, Lerner:

i. made untrue representations regarding the current value of a $100,000 investment in Apple REIT Six;

ii. provided performance and earnings data, and made exaggerated and misleading claims regarding the closed Apple REITs' performance, without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon

borrowings and/or return of capital to make distributions, which were further leveraging the REITs;

iii. made the untrue statement that Apple REIT Ten is a "tremendous cash cow" and failed to disclose the material facts that Apple REIT Ten is currently unable to fund distributions from FFO and that its management may maintain distribution levels with return of capital to investors and through borrowings; and

iv. made untrue statements regarding the likelihood, timing, and prospects of a merger and IPO of the closed Apple REITs, without disclosing the material fact that the only public announcement from the management of the closed Apple REITs on the subject were the August 19, 2011 SEC Forms 8-K that:

1. revealed that the board of directors of the closed Apple REITs had done nothing more than authorize an evaluation of a consolidation and listing on a national exchange; and

2. denied that any decision had been made or would be made according to any particular timetable.

d. At an investment seminar presentation in Boca Raton, Florida, on November 17, 2011, Lerner:

i. provided performance and earnings data, and made exaggerated and misleading claims regarding the closed Apple REITs' performance, without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon

borrowings and/or return of capital to make distributions, which were further leveraging the REITs; and

ii. made untrue statements regarding the likelihood, timing, and prospects of a merger and IPO of the closed Apple REITs, without disclosing the material fact that the only public announcement from the management of the closed Apple REITs on the subject were the August 19, 2011 SEC Forms 8-K that:

1. revealed that the board of directors of the closed Apple REITs had done nothing more than authorize an evaluation of a consolidation and listing on a national exchange; and
2. denied that any decision had been made or would be made according to any particular timetable.

e. In various iterations of seminar slides with investors used at seminars between at least March 2011 and June 2011, DLA presented distribution and performance data regarding the closed Apple REITs without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs. These omissions caused the communications to be misleading.

f. In various iterations of seminar slides with investors used at seminars between at least March 2011 and December 6, 2011, DLA discussed the closed Apple REITs without disclosing the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or

return of capital to make distributions, which were further leveraging the REITs. These omissions caused the communications to be misleading.

g. In Lerner's letter to customers dated June 6, 2011, Lerner and DLA:

i. made untrue statements regarding the profitability of the closed Apple REITs and failed to disclose the material facts that the closed Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs;

ii. made untrue statements regarding the FINRA's approval of DLA as underwriter and failed to disclose material facts related to the limits of FINRA's review and approval;

iii. made the untrue statement that the Apple REITs are achieving "attractive current returns" and are not "experiencing stock market fluctuations" and failed to disclose the material facts that the Apple REITs could not make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs; and

iv. made the untrue statement that no investor has ever lost money in any of the Apple REIT programs, which failed to disclose the material facts that all of the closed Apple REITs were worth less than $11 per share at that time and none of them could make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs.

h. In Lerner's letter to customers dated July 27, 2011, Lerner and DLA made false and misleading claims that the Apple REITs have "profitable operating results" and "have strong fundamentals and are well positioned to provide investors with income and growth opportunities" but failed to disclose the material facts that all of the closed Apple REITs were worth less than $11 per share at that time and none of them could make distributions from earnings and had to rely upon borrowings and/or return of capital to make distributions, which were further leveraging the REITs.

119. Lerner and DLA made the untrue statements alleged above and omitted the material facts alleged above with intent to defraud investors or with recklessness.

120. DLA's seminars, seminar materials, and letters to customers misrepresenting the values, practices, risks, and prospects of the closed Apple REITs and Apple REIT Ten were a device, scheme, or artifice to defraud investors into purchasing Apple REIT Ten.

121. By making misrepresentations and omissions of material fact in offering Apple REIT Ten to customers, Lerner and DLA failed to observe high standards of commercial honor and just and equitable principles of trade.

122. At seminars, in seminar materials, and in letters to customers, Lerner and DLA violated Section 17(a)(1) of the Securities Act of 1933 and thereby violated FINRA Rule 2010. By making intentional or reckless misrepresentations and omissions at seminars, in seminar materials, and in letters to customers, Lerner and DLA failed to observe high standards of commercial honor and just and equitable principles of trade, which constitute independent violations of FINRA Rule 2010.

SIXTH CAUSE OF ACTION

Negligent Misrepresentations or Omissions of Material Fact; Fraudulent or Deceitful Practices or Course of Business; Deceptive Practices; Violation of §§ 17(a)(2) and (a)(3) Securities Act of 1933 (FINRA Rule 2010) Respondents — Lerner and DLA

123. The untrue statements of material fact or omissions of material fact regarding the prior performance, steady distribution rates, unchanging valuations, and prospects of the closed Apple REITs and/or Apple REIT Ten alleged in the Fifth Cause of Action were made at least negligently.

124. DLA's and Lerner's use of the seminars, seminar materials, and letters to customers alleged in the Fifth Cause of Action constituted a fraudulent or deceitful practice or course of business to offer or sell Apple REIT Ten to investors.

125. At seminars, in seminar materials, and in letters to customers, Lerner and DLA violated Sections 17(a)(2) and (a)(3) of the Securities Act of 1933 and thereby violated FINRA Rule 2010. By making negligent misrepresentations and omissions at seminars, in seminar materials, and in letters to customers, Lerner and DLA failed to observe high standards of commercial honor and just and equitable principles of trade, which constitute independent violations of FINRA Rule 2010.

SEVENTH CAUSE OF ACTION

Violation of MSRB Rules G-30 and G-17– DLA Charged Customers Unfair and Unreasonable Prices for Municipal Bonds. Respondent — DLA

126. During the Municipal Bond Period, DLA charged excessive markups and markdowns and/or otherwise failed to meet its obligation to provide a fair and reasonable price to customers at the time of the transaction on thousands of municipal securities transactions, taking into consideration all relevant factors and circumstances.

127. In each such trade, DLA purchased municipal securities for its own account from a customer and/or sold municipal securities for its own account to a customer at an aggregate price (including any markup or markdown) that was not fair and reasonable, taking into consideration all relevant factors, including the best judgment of the broker, dealer or municipal securities dealer as to the fair market value of the securities at the time of the transaction and of any securities exchanged or traded in connection with the transaction, the expense involved in effecting the transaction, the fact that the broker, dealer, or municipal securities dealer is entitled to a profit, and the total dollar amount of the transaction. Each of these municipal bond trades was a willful violation of MSRB Rules G-30 and G-17.

EIGHTH CAUSE OF ACTION

Violation of NASD Rule 2440 and IM-2440-1, Rule 2110, and FINRA Rule 2010 DLA Charged Customers Unfair and Unreasonable Prices For CMOs. Respondent — DLA

128. During the CMO Period, DLA charged excessive markups on hundreds of CMO transactions.

129. In these trades, Respondents sold CMOs to retail customers at prices that were not fair, taking into consideration all relevant circumstances. Each of these CMO trades was a violation of NASD Rule 2440 and IM-2440-1, NASD Rule 2110, and FINRA Rule 2010.

NINTH CAUSE OF ACTION

Violation of MSRB Rule G-8
DLA Failed to Make and Keep Accurate Books and Records for Municipal Bond Transactions
Respondent — DLA

130. During the Municipal Bond Period, DLA failed to show the terms and conditions and the time of the receipt on the memorandum on 1,634 brokerage orders in municipal bonds. Each of these instances was a violation of MSRB Rule G-8.

Based upon the foregoing, Respondent DLA violated NASD Rule 2310, and FINRA Rules 2310(b) and 2010, and Respondents Lerner and DLA violated NASD Rule 2210(d)(1), Section 17(a) of the Securities Act of 1933, and FINRA Rule 2010. DLA also violated NASD Conduct Rule 2440 and IM-2440-1; NASD Rule 2110; and FINRA Rule 2010. DLA also violated MSRB Rule G-8 and willfully violated MSRB Rules G-30 and G-17.

Based upon these considerations, the sanctions hereby imposed by the acceptance of the Offer are in the public interest, are sufficiently remedial to deter Respondents from any future misconduct, and represent a proper discharge by FINRA, of its regulatory responsibility under the Securities Exchange Act of 1934.

SANCTIONS

It is ordered that Respondents be sanctioned as follows:

David Lerner Associates, Inc.

Censure

Fine and Restitution: A payment in the amount of $14,000,000, reduced by (a) the fines and restitution (including interest thereon) to be paid pursuant to the Panel Decision; and (b) restitution of $597,695.21 to be paid to certain additional customers who were subject to unfair pricing practices on municipal bonds in the trades identified in Exhibits A and B hereto (the "Unfair Pricing Restitution"). The remaining amount (*i.e.*, $14,000,000 minus (a) the fines and restitution imposed in Disciplinary Proceeding No. 20050007427 and (b) the Unfair Pricing Restitution) (such remaining amount hereinafter the "Settlement Fund") shall be distributed as restitution to certain investors in Apple REIT Ten as determined by the Independent Consultant retained pursuant to the terms of this Offer (the "Settlement Fund IC," described below).

DLA agrees to pay (a) the Unfair Pricing Restitution to the customers and in the amounts identified by FINRA; and (b) the Settlement Fund into escrow (the "Settlement Fund Escrow") within 45 days after receiving notice that this Offer has been accepted and that such payments are due and payable.[13] Within 30 days of the payment of the Unfair Pricing Restitution, DLA shall submit to FINRA staff a written confirmation report, not unacceptable to FINRA, setting forth the details by which restitution has been made to all of the customers to whom restitution is due pursuant to the terms of this Offer. If for any reason the DLA cannot locate any customer to whom Unfair Pricing Restitution is owing, after reasonable and documented efforts within 60 days after the period for submitting written confirmation (or such additional period agreed by the

[13] DLA will pay the fines and restitution ordered in Disciplinary Proceeding No. 20050007427 as set forth in the Hearing Panel's order.

staff), DLA shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property, or abandoned property fund for the state in which the customer is last known to have resided. The receipt of money distributed to pay Unfair Pricing Restitution, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies.

DLA specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

DLA further agrees to the following undertakings:

Advertising, Sales Literature and Public Appearances: Commencing on the date on which the Offer of Settlement is accepted by FINRA:

1. DLA must adopt procedures for the supervision and internal approval by an appropriately qualified registered principal of all seminars. Such procedures must include, but are not limited to, a requirement, effective for three years from the date on which this Offer is accepted, that the firm make and retain (a) an audio record of any seminar with expected attendance of more than 25 individuals; and (b) an audio-visual record of any seminar with expected attendance of more than 50 individuals. Such records must be archived and readily accessible for FINRA examination and shall include the date, time and location of each seminar, the name and title of each speaker, the number of attendees, the names of any securities discussed and a copy of any other communications used at the seminar (e.g., speaker's notes, handouts, slides, video).

2. For a period of one year, DLA shall provide to Enforcement on a quarterly basis a log of each seminar held during the preceding quarter. Such log shall indicate

for each seminar, its date, time and location, the name and title of each speaker, the number of attendees, the names of any securities discussed and identify any other communications used at the seminar (*e.g.*, speaker's notes, handouts, slides, video).

3. For a period of six months, DLA shall file with FINRA's Advertising Regulation Department (a) the audio recording of each seminar attended by more than 25 individuals, and (b) the audio visual recording of each seminar attended by more than 50 individuals. Such filings shall occur within 10 business days of the date of the seminar and shall be accompanied by information set forth in NASD Rule 2210(c)(1) (and, after February 4, 2013, the information set forth in FINRA Rule 2210(c)(5)) as well as the date, time and location of the seminar, the name and title of each speaker, the number of attendees, the names of any securities discussed and a copy of any other communications used at the seminar (*e.g.*, speaker's notes, handouts, slides, video). At any time, upon receipt of comments from FINRA on a seminar, DLA shall take all reasonable steps to ensure future seminars reflect the changes specified by FINRA.

4. For a period of one year, DLA shall file with FINRA's Advertising Regulation Department at least 10 business days prior to use all advertisements and sales literature as defined in NASD Rule 2210 (and after February 4, 2013 all retail communications as defined in FINRA Rule 2210) (the "filed communications"). The 10-business-day period shall commence on the date of transmission with respect to filed communications that DLA successfully uploads to FINRA's Advertising Regulation Electronic Filing (AREF) system or on the day following shipment with respect to filed communications DLA sends by overnight delivery. After 10 business

days, DLA may use the filed communications in the absence of comments from FINRA. However, at any time, upon receipt of comments from FINRA on the filed communications, DLA shall take all reasonable steps to withhold, or cause to be withheld, the material from further use until the changes specified by FINRA have been made, and such material will be revised and re-filed 10 business days prior to any use, unless otherwise agreed to by FINRA staff at its sole discretion.

Independent Consultant for Payments to Apple REIT Ten Customers: The payments to be made from the Settlement Fund to Apple REIT Ten customers shall be determined pursuant to the process set forth below.

1. DLA shall:

   a. Retain, within 30 days of the date of the Order Accepting Offer of Settlement, an Independent Consultant (the "Settlement Fund IC"), not unacceptable to FINRA staff, to pay, from the Settlement Fund, restitution to certain Apple REIT Ten shareholders pursuant to factors agreed to by the Settlement IC and FINRA staff;

   b. Exclusively bear all costs, including compensation and expenses, associated with the retention of the Settlement Fund IC, including, but not limited to, the costs of establishing the Settlement Fund Escrow and the costs of paying the escrow agent, such agent to be chosen by the Settlement Fund IC and to be not unacceptable to FINRA;

   c. Cooperate with the Settlement Fund IC in all respects, including by providing staff support. DLA shall place no restrictions on the Settlement Fund IC communications with FINRA staff and, upon request, shall make available to

FINRA staff any and all communications between the Settlement Fund IC and the Firm and documents reviewed by the Settlement Fund IC in connection with his or her engagement. Once retained, DLA shall not terminate the relationship with the Settlement Fund IC without FINRA staff's written approval; DLA shall not be in and shall not have an attorney-client relationship with the Settlement Fund IC and shall not seek to invoke the attorney-client privilege or other doctrine or privilege to prevent the Settlement Fund IC from transmitting any information, reports or documents to FINRA;

d. At the conclusion of the review of Apple REIT Ten customers by the Settlement Fund IC, which shall be no more than 60 days after the date of the Order Accepting Offer of Settlement, require the Settlement Fund IC to submit to the Firm and FINRA staff a Written Report. The Settlement Fund IC shall use criteria agreed upon by the Settlement Fund IC and FINRA to determine how to distribute the Settlement Fund. The Written Report shall address the methods used to determine which DLA customers are entitled to a distribution from the Settlement Fund, provide a list of such customers, and provide a recommendation that such customers be paid a distribution from the Settlement Fund; and

e. Require the Settlement Fund IC to enter into a written agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Settlement Fund IC shall not enter into any other employment, consultant, attorney-client, auditing or other professional relationship with DLA, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with

which the Settlement Fund IC is affiliated in performing his or her duties pursuant to the Order Accepting Offer of Settlement shall not, without prior written consent of FINRA staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with DLA or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

2. Within 30 days after delivery of the Written Report, the Settlement Fund IC shall make payments to customers who purchased Apple REIT Ten in accordance with the Written Report.

3. Within 30 days after the Settlement Fund IC has finished making payments in accordance with the Written Report, the Settlement Fund IC shall provide FINRA staff with a written implementation report, not unacceptable to FINRA, setting forth the details of the implementation of the Settlement Fund IC's recommendations. If for any reason the Settlement Fund IC cannot locate any customer identified in the Written Report after reasonable and documented efforts within 120 days from the date the Offer is accepted, or such additional period agreed to by a FINRA staff member in writing, the Settlement Fund IC shall forward any undistributed restitution and interest to the appropriate escheat, unclaimed property, or abandoned property fund for the state in which the customer is last known to have resided. The receipt of money distributed from the Settlement Fund, and the timing of such ordered payments, does not preclude customers from pursuing their own actions to obtain restitution or other remedies.

4. Upon written request showing good cause, FINRA staff may extend any of the

procedural dates set forth above.

Independent Consultant for Review of Markup Policies Related to Municipal Bonds and CMOs:

1. DLA shall:

a. Retain, within 30 days of the date of the Order Accepting Offer of Settlement, an Independent Consultant, not unacceptable to FINRA staff, to conduct a comprehensive review of the Firm's policies, systems and procedures (written and otherwise) and training relating to markups and markdowns of CMOs and municipal bonds (the "Markup Procedures IC");

b. Exclusively bear all costs, including compensation and expenses, associated with the retention of the Markup Procedures IC;

c. Cooperate with the Markup Procedures IC in all respects, including by providing staff support. DLA shall place no restrictions on the Markup Procedures IC communications with FINRA staff and, upon request, shall make available to FINRA staff any and all communications between the Markup Procedures IC and the Firm and documents reviewed by the Independent Consultant in connection with his or her engagement. Once retained, DLA shall not terminate the relationship with the Markup Procedures IC without FINRA staff's written approval; DLA shall not be in and shall not have an attorney-client relationship with the Markup Procedures IC and shall not seek to invoke the attorney-client privilege or other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports or documents to FINRA;

d. At the conclusion of the review, which shall be no more than 120 days after the date of the Order Accepting Offer of Settlement, require the Markup Procedures IC to submit to the Firm and FINRA staff a Written Report. The Written Report shall address, at a minimum, (i) the nature of the Firm's policies, systems, procedures, and training relating to markups of CMOs and municipal bonds; (ii) a description of the review performed; and (iii) the Markup Procedures IC recommendations, and the reasons therefor, for modifications and additions to the Firm's policies, systems, procedures and training; and

e. Require the Markup Procedures IC to enter into a written agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Independent Consultant shall not enter into any other employment, consultant, attorney-client, auditing or other professional relationship with DLA, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with which the Markup Procedures IC is affiliated in performing his or her duties pursuant to the Order Accepting Offer of Settlement shall not, without prior written consent of FINRA staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with DLA or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

2. Within 30 days after delivery of the Written Report, DLA shall adopt and implement the recommendations of the Markup Procedures IC or, if it determines that a

recommendation is unduly burdensome or impractical, propose an alternative procedure to the Markup Procedures IC designed to achieve the same objective. The Firm shall submit such proposed alternatives in writing simultaneously to the Markup Procedures IC and FINRA staff. Within 30 days of receipt of any proposed alternative procedure, the Markup Procedures IC shall: (i) reasonably evaluate the alternative procedure and determine whether it will achieve the same objective as the Markup Procedures IC's original recommendation; and (ii) provide the Firm with a written decision reflecting his or her determination. The Firm will abide by the Markup Procedures IC's ultimate determination with respect to any proposed alternative procedure and must adopt and implement all recommendations deemed appropriate by the Markup Procedures IC.

3. Within 30 days after the issuance of the later of the Markup Procedures IC's Written Report or written determination regarding alternative procedures (if any), DLA shall provide FINRA staff with a written implementation report, not unacceptable to FINRA, certified by an officer of DLA, attesting to, containing documentation of, and setting forth the details of the Firm's implementation of the Markup Procedures IC's recommendations.

4. Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

Independent Consultant for Suitability of Future Apple REIT Ten Sales:

1. DLA shall:

   a. Retain, within 30 days of the date of the Order Accepting Offer of Settlement, an Independent Consultant, not unacceptable to FINRA staff, to conduct a comprehensive review of the Firm's policies, systems and procedures

(written and otherwise) and training relating to sales of Apple REIT Ten and all non-traded REITs sold by the firm and DLA's suitability standards relating to the sale of non-traded REITs (the "Apple REIT IC"). The Apple REIT IC may be the same person as the Markup Procedures IC if (a) FINRA Staff determines the IC to be not unacceptable to FINRA in both roles; and (b) the IC advises FINRA that he or she reasonably expects to be able to comply with the deadlines set forth herein for both roles.

b. Exclusively bear all costs, including compensation and expenses, associated with the retention of the Apple REIT IC ;

c. Cooperate with the Apple REIT IC in all respects, including by providing staff support. DLA shall place no restrictions on the Apple REIT IC's communications with FINRA staff and, upon request, shall make available to FINRA staff any and all communications between the Apple REIT IC and the Firm and documents reviewed by the Apple REIT IC in connection with his or her engagement. Once retained, DLA shall not terminate the relationship with the Apple REIT IC without FINRA staff's written approval; DLA shall not be in and shall not have an attorney-client relationship with the Apple REIT IC and shall not seek to invoke the attorney-client privilege or other doctrine or privilege to prevent the Independent Consultant from transmitting any information, reports or documents to FINRA;

d. At the conclusion of the review, which shall be no more than 90 days after the Apple REIT IC is retained, require the Apple REIT IC to submit to the Firm and FINRA staff a Written Report. The Written Report shall address, at a

minimum, (i) the nature of the Firm's policies, systems, procedures, and training relating to sales of Apple REIT Ten and DLA's suitability standards; (ii) a description of the review performed; and (iii) the Apple REIT IC's recommendations, and the reasons therefor, for modifications and additions to the Firm's policies, systems, procedures and training; and

e. Require the Apple REIT IC to enter into a written agreement that provides that for the period of engagement and for a period of two years from completion of the engagement, the Apple REIT IC shall not enter into any other employment, consultant, attorney-client, auditing or other professional relationship with DLA, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. Any firm with which the Apple REIT IC is affiliated in performing his or her duties pursuant to the Order Accepting Offer of Settlement shall not, without prior written consent of FINRA staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with DLA or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two years after the engagement.

2. Within 30 days after delivery of the Written Report, DLA shall adopt and implement the recommendations of the Apple REIT IC or, if it determines that a recommendation is unduly burdensome or impractical, propose an alternative procedure to the Apple REIT IC designed to achieve the same objective. The Firm shall submit such proposed alternatives in writing simultaneously to the Apple REIT IC and FINRA staff. Within 30 days of receipt of any proposed alternative procedure, the Apple REIT

IC shall: (i) reasonably evaluate the alternative procedure and determine whether it will achieve the same objective as the Apple REIT IC's original recommendation; and (ii) provide the Firm with a written decision reflecting his or her determination. The Firm will abide by the Apple REIT IC's ultimate determination with respect to any proposed alternative procedure and must adopt and implement all recommendations deemed appropriate by the Apple REIT IC.

3. Within 30 days after the issuance of the later of the Apple REIT IC's Written Report or written determination regarding alternative procedures (if any), DLA shall provide FINRA staff with a written implementation report, not unacceptable to FINRA, certified by an officer of DLA, attesting to, containing documentation of, and setting forth the details of the Firm's implementation of the Apple REIT IC's recommendations.

4. Upon written request showing good cause, FINRA staff may extend any of the procedural dates set forth above.

Review of Apple REIT Ten Sales Prior to Independent Consultant Retention: DLA may continue to sell Apple REIT Ten, provided, however, that commencing on the date that the Offer of Settlement is accepted by FINRA until DLA's submission to FINRA of a written implementation report not unacceptable to FINRA regarding the Firm's implementation of the Apple REIT IC's recommendations, DLA will not sell any shares of Apple REIT Ten to any customer if the sale will cause such customer's total holdings in the Apple REITs (at the per share purchase price set forth on the customer's most recent account statement) to equal or exceed 20 percent of such customer's liquid net worth; provided, however, that such sales may be made if (a) DLA's Chief Compliance Officer, or his or her direct supervisor, personally reviews the sale (which may be done after the order is placed but prior to settlement) and is

responsible for determining that such sale meets the suitability standard set forth in applicable FINRA rules, and evidences such approval in a writing to be maintained in the customer's file; and (b) the customer is advised that the purchase will result in a concentration of a stated percentage in Apple REIT (such stated percentage to accurately reflect the facts with respect to the customer according to the disclosures provided by the customer to DLA), and the customer signs a written acknowledgement to that effect.

David Lerner

All-Capacities Suspension: Suspension from association with any FINRA member in any capacity for a period of one year.

Principal Suspension: Following the all-capacities suspension set forth above, suspension from acting in any principal capacity with any FINRA member firm for a period of two years.

Requalification: Requalification by examination for the Series 7 (General Securities Representative) and Series 24 (General Securities Principal) licenses. Prior to associating with a FINRA member after the expiration of the one-year all capacities suspension period, Respondent David Lerner must first requalify as a General Securities Representative by taking and passing the Series 7 exam. Prior to associating with a FINRA member in a principal capacity after the expiration of the two-year principal suspension period, Respondent David Lerner must first requalify as a General Securities Principal by taking and passing the Series 24 exam.

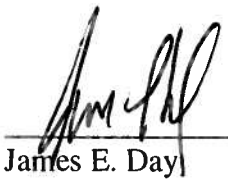
Fine and Restitution: A payment in the amount of $250,000 to be added to the Settlement Fund established pursuant to this Offer, and to be used for the same purposes as that Fund.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

SO ORDERED.

FINRA

Signed on behalf of the
Director of ODA, by delegated authority



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