SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: COMMERCIAL DIVISION

IN RE ALTICE USA, INC. SECURITIES LITIGATION	Master Index No. 711788/2018 Hon. Joseph Risi, J.S.C. Motion Seq. No. 7

MEMORANDUM OF LAW IN SUPPORT OF (1) PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION; AND (2) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES AND AWARDS TO PLAINTIFFS

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Pursuant to CPLR Article 9, Plaintiffs[1] (consisting of State Plaintiffs Andrew O'Neill, Brian LaPoint, and Ryan Newman in this State Action, together with Federal Plaintiffs Andrea Hadzimichalis, Garfield Anderson, Stephanie Garcia, and Franck Chauvin in the related Federal Action), and Lead Counsel in this State Action and Lead Counsel in the Federal Action, respectfully submit this single brief in support of (a) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation (the "Final Approval Motion") and (2) Lead Counsels' Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (including Awards to Plaintiffs (the "Fee and Expense Application")).

The proposed Settlement's terms are set forth in the Stipulation of Settlement (the "Stipulation"), filed July 26, 2021 (NYSCEF No. 138).

PRELIMINARY STATEMENT

After nearly two years of litigation, the parties in this State Action -- and in the substantially similar securities action brought on behalf of the same putative class in federal Court (the "Federal Action") -- have reached an agreement to settle, on a global basis, all claims asserted against all Defendants in both Actions for $4,750,000 in cash, plus Defendants' payment of the first $200,000 in Notice and Administration Costs associated with the Settlement (collectively, the "Settlement Consideration"). Plaintiffs in both Actions alleged that Defendants violated certain federal securities laws by conducting the IPO for Altice USA Inc. ("AliceUSA") pursuant to defective Offering Materials that contained material misrepresentations and/or omissions concerning (a) Altice USA's implementation of the "Altice Way", and (b) certain operational problems and

[1] Unless otherwise indicated herein, all capitalized terms have the meanings set forth in the Stipulation; all citations and internal quotation marks are omitted; and all emphasis is added.

adverse business trends being experienced in Europe by AlticeUSA's ***parent*** corporation, Altice N.V. ("AlticeNV"), and certain of AlticeNV's European subsidiaries.

The proposed Settlement was only reached after arm's-length negotiations under the auspices of a highly experienced mediator, Gregory Lindstrom, Esq. of Phillips ADR (the "Mediator"). As set forth below, the $4.950 million Settlement represents a meaningful recovery in the face of substantial litigation risk involving two securities class actions, and was reached only after significant litigation, discovery, and an arm's-length mediation. Significantly, although detailed individual Notice Packets have been mailed to 14,312 potential Settlement Class Members or their nominees, to date ***no*** objections (or even "opt-out" requests) have been received. *See* accompanying Affidavit of Kari Schmidt Regarding Distribution of Class Notice, Report on Requests for Exclusion, and Notice and Administration Costs Incurred to Date ("Schmidt Aff."), ¶¶8, 9, 14, 15.

For these and the other reasons detailed herein, the Settlement readily meets the standards for approval under the CPLR. In addition, the proposed Plan of Allocation ("POA"), designed by Plaintiffs' damages expert, provides for a customary *pro rata* distribution of the Net Settlement proceeds to Settlement Class Members, and should also be approved.

Lead Counsel also respectfully submit that they have earned an attorneys' fee of one-third (33⅓%) of the Settlement Consideration. As detailed below, State Lead Counsel diligently pursued this Action, beginning with a comprehensive fact investigation and continuing through, *inter alia*, the preparation of their detailed Consolidated Complaint ("Complaint" (NYSCEF No. 58)), obtaining certain document discovery, and fully briefing Defendants' motion to dismiss this Action. And then – after this Court granted Defendants' Motion to Dismiss on June 26, 2020 and Defendants cancelled a mediation that had been scheduled to commence the next month – they

continued to fight for their clients by seeking leave to amend and preparing a further amended complaint supported by an affidavit from a financial economics expert. Similarly, Federal Lead Counsel also conducted their own independent and comprehensive fact investigation, prepared and filed initial and amended complaints, and fully briefed Defendants' separate Motion to Dismiss in the Federal Action – and they also took steps to obtain leave to further amend their operative complaint to proactively bolster their allegations after reviewing this Court's June 2020 opinion dismissing the substantially similar claims asserted in this action. As a result of their tenacity and hard work, and despite this Court's June 2020 opinion, State and Federal Lead Counsel were ultimately able to negotiate a nearly $5 million global settlement of the claims asserted in both Actions, with the assistance of the Mediator. See accompanying Joint Affirmation in Support of Plaintiffs' Final Approval Motion and Lead Counsel's Fee and Expense Application ("Joint Aff."), ¶¶34-46.

In total, Lead Counsel have spent 2343.81 hours, with a "lodestar" value of $1,788,059, over almost two years of litigation – all on a ***fully contingent*** fee basis. *Id.* ¶¶70-79.[2] The requested 33⅓% fee, which is well within the range of percentage-based fees awarded in other securities class actions, is also merited by the other relevant factors customarily considered by New York courts. And significantly, the reasonableness of the requested 33⅓% fee is also confirmed here by a "lodestar crosscheck." Indeed, because the requested one-third fee equates to no more than $1,650,000 (assuming that Defendants pay the full amount of their commitment to cover up to the first $200,000 of settlement administration costs here), that fee would still be ***less***

[2] Lead State Counsel's time includes the time spent by Jeffrey Leibowitz and Scott Fisher of Jaspan Schlesinger LLP (plus modest additional time spent by Mr. Leibowitz after he moved to Abrams Fensterman LLP in January 2021) and David Hall of Hedin Hall LLP ("Hedin Hall")

than the total combined $1,788,059 lodestar value that Plaintiffs' Counsel have devoted to this case.

Lead Counsel's request for litigation expenses in the amount of $64,748.85 should also be granted, as it seeks reimbursement for expenses (such as electronic research costs, expert fees, and mediation costs) that are routinely reimbursed.

Finally, each Plaintiff's request for a relatively modest $2,000 award for their service to the class is fully merited, and should also be approved.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs respectfully refer the Court to the accompanying Joint Affirmation for a detailed discussion of the history of the Action, the extensive efforts undertaken by Lead Counsel, the risks of continued litigation, and the negotiations under the auspices of the independent mediator that led to the Settlement. Joint Aff., ¶¶19-46.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED

New York courts strongly favor settlements as a matter of public policy. *See IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y. 3d 209, 213 (2009) ("'[s]tipulations of settlement are judicially favored and may not be lightly set aside'").[3] "Strong policy considerations favor" settlements because "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit." *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (courts should be "mindful of the 'strong judicial policy in favor of settlements'").

[3] Unless otherwise noted, all citations are omitted and all emphasis is added.

When considering whether to finally approve a class action settlement, New York courts focus their inquiry on "'the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members.'" *Hosue v. Calypso St. Barth, Inc.*, No. 160400/2015, 2017 WL 4011213, at *2 (Sup. Ct., N.Y. Cnty. Sept. 12, 2017). Specifically, New York courts consider the following factors: (i) the likelihood that plaintiff will succeed on the merits; (ii) "the extent of support from the parties"; (iii) "the judgment of counsel"; (iv) the presence of good faith bargaining; and (v) the complexity and "nature of the issues of law and fact." *See Fernandez v. Legends Hosp., LLC*, No. 152208/2014, 2015 WL 3932897, at *2 (Sup. Ct., N.Y. Cnty. June 22, 2015). In addition, courts have noted that finding "adequacy" involves "balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 73 (2d Dept. 2006); and whether the settlement was '"reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Fiala v. Metro. Life Ins. Co., Inc.*, 899 N.Y.S.2d 531, 538 (Sup. Ct., N.Y. Cnty. 2010).

These factors, commonly referred to as the "*Colt* factors" (after *In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154 (1st Dept. 1990)), all strongly favor approval here.

A. *Colt* Factor One: Likelihood of Success on the Merits and Related Litigation Risk

When assessing a proposed settlement of a class action, courts first take into consideration Plaintiffs' ultimate "likelihood of success on the merits." *Gordon v. Verizon Comm'cns*, 148 A.D.3d 146, 162 (1st Dept. 2017); *Colt*, 155 A.D.2d at 160. As a general matter, Plaintiffs note

that ample cases hold that securities actions are invariably difficult and complex,[4] and this case was certainly no exception as it involved very significant litigation risk.

First, at the time the Settlement was reached, this Court had fully dismissed the State Action, finding, *inter alia*, that (1) certain statements contained in the Offering Materials were ***inactionable*** statements of corporate optimism and puffery; (2) State Plaintiffs had failed to adequately allege that certain alleged deterioration in the Altice Group's European operations had both already occurred and was known to Defendants at the time of the IPO; (3) absent such stronger allegations, Defendants' alleged misstatements were protected by the "opinion doctrine" and/or by Defendants' "risk factor" disclosures and other cautionary language that Defendants provided to investors; and (4) Defendants were under no obligation to make any disclosures regarding the non-public problems being experienced by its parent corporation (Altice NV) in Europe because, *inter alia*, adverse trends occurring at a parent corporation do not typically affect the business and financial position of its separate, publicly-traded subsidiaries. Joint Aff. ¶54.

After their case was dismissed Plaintiffs filed a Motion to Amend, including a [Proposed] First Amended Complaint that they believed cured all or most of the deficiencies identified by the Court – and supported that filing with an affidavit by Prof. Vladimir Atanasov, Ph. D, a financial economist from the Mason School of Business at the College of William & Mary. However, Defendants strongly opposed amendment, arguing among other things that (a) the State Plaintiffs

[4] *See, e.g.*, *In re Bayer AG Sec. Litig.*, No. 03 Civ 1546, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008) ("shareholder actions are notoriously complex and difficult to prove"); *In re Viropharma Inc. Secs. Litig.*, Civ. A. No. 12-2714, 2016 WL 312108, at *11 (E.D. Pa. Jan. 25, 2016) ('"To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action.'")); *In re Dozier Fin., Inc.*, No. 4:18-CV-1888, 2018 WL 4599860, at *3 (D.S.C. Sept. 6, 2018), *report and recommendation adopted*, No. CV 4:18-1888, 2019 WL 1075072 (D.S.C. Mar. 7, 2019) (collecting cases recognizing that "federal securities law [cases] . . . are neither straightforward nor routine").

could not meet their burden required to modify or set aside an Order under CPLR 5015, (b) the amendments were futile because they did not include any new information to establish that adverse events were already occurring and that Defendants knew about them; and (c) State Plaintiffs' delay in filing the amendments would unduly prejudice Defendants. Although State Plaintiffs believed their Motion to Amend had merit, they recognized that there was still significant risk that the Court would deny their Motion to Amend and/or dismiss the further amended complaint.

Second, as of the Settlement, the Federal Action had also not yet survived a motion to dismiss. In addition to being subject to all of the same arguments that Defendants had successfully asserted in the State Action, Defendants also had additional colorable arguments that the Securities Act claims in the Federal Action were time-barred, as that action was filed more than a year after a key alleged corrective disclosure. Moreover, the Federal Action also faced higher pleading burdens under the Federal Rules of Civil Procedure to avoid dismissal.

Third, Plaintiffs in both actions also faced substantial risk on causation-related issues. For example, when the "truth" about the lack of full implementation of the "Altice Way" in Europe was disclosed, the price of AlticeUSA shares actually ***increased*** by 76 cents. Indeed, there is little doubt that Defendants would find experts to testify that any decline in the stock price of AlticeUSA during the class period was caused entirely (or nearly so) by factors ***other than*** the matters that Defendants are accused of failing to adequately disclose.

Fourth, even State Plaintiffs' and Federal Plaintiffs' respective Motions to Amend were granted, and Defendants' renewed motions to dismiss were also denied in those Actions, Plaintiffs recognized that their claims still relied on a relatively novel legal theory, that proving the necessary facts was far from certain, and that there was assuredly no guarantee that the case would survive summary judgment. Indeed, with respect to the State Action, State Plaintiffs also faced the further

additional risk that their claims, even if they survived a renewed motion to dismiss in this Court, might well be dismissed on an interlocutory appeal to the Second Department.

Finally, even if the State and Federal Plaintiffs' respective amended pleadings survived dismissal, and even if they survived Defendants' inevitable summary judgment motions and then went on to obtain a favorable jury verdict, there would still be no assurance that such a verdict would survive the inevitable post-trial motions and appeals that Defendants would file.

B. *Colt* Factors Two Through Four: Judgment of Counsel, Extent of Support from the Parties, and Presence of *Good Faith* Bargaining

As for *Colt* factors two through four – the support of the parties, the judgment of counsel, and whether the parties bargained in good faith – these factors also strongly support approval.

First, the Settlement has the support of all Parties, as evidenced by the Stipulation filed July 26, 2021 (NYSCEF No. 138) and the Plaintiffs' affidavits.[5] Moreover, in this context, courts also give weight to the reaction of absent class members, and minimal objections are indicative of a class's approval of a proposed settlement. *See, e.g.*, *Pressner v. MortgageIT Holdings, Inc.*, No. 602472/2006, 2007 WL 1794935, at *2 (Sup. Ct., N.Y. Cnty. May 29, 2007) (approving settlement where was no objection to the proposed settlement). Here, although the Court-established February 3, 2022 deadline for filing objections has not yet passed, no objections to any aspect of the Settlement have been submitted to date. Joint Aff. ¶65; Schmidt Aff. at ¶14.[6]

[5] *See* the respective Affidavits of Plaintiffs Andrew O'Neill (at ¶5), Brian Lapoint (at ¶5), Ryan Newman (at ¶5), Andrea Hadzimichalis (¶5), Garfield Anderson (¶5), Stephanie Garcia (¶5), and Franck Chauvin (¶5) in Support of Plaintiffs' Motion for (1) Motion for Final Approval of the Settlement and Approval of the Plan of Allocation; and (2) An Award of Attorneys' Fees and Reimbursement of Litigation Expenses.

[6] Should any objections be filed after the date of this brief, Plaintiffs will address them on reply.

Second, Lead Counsel strongly believe that the proposed settlement is fair, reasonable, and adequate, particularly given the risks, costs, and uncertainties of continued litigation. Joint Aff. ¶¶61, 63, 67, 72--; *supra* §A.1. New York courts give counsel's views regarding settlement considerable weight, *see MortgageIT*, 2007 WL 1794935, at *2, and it is further respectfully submitted that the combined experience and expertise of the two Lead Counsel firms here makes this factor weigh even more heavily in favor of approval.

Third, the Settlement is the product of protracted, good faith negotiations overseen by a mediator (Mr. Lindstrom) who has a strong reputation for his experience in mediating securities and other complex class actions. *See* Joint Aff. ¶¶40, 51. Indeed, the Settlement reflects the result of an adversarial mediation process, where despite this Court's dismissal of the State Action, State Lead Counsel responded by promptly filing a Motion to Amend, preparing a proposed further amended complaint, and retaining a financial economics expert to bolster their allegations (while Federal Lead Counsel similarly obtained leave to amend and prepared a further amended complaint in the Federal Action. And far from reaching a quick settlement in the fall of 2020, it was not until early November, after the parties appeared to be at or near an impasse, that the settlement was reached after the Mediator made a "mediator's proposal" (which all parties ultimately accepted). *Id.* ¶¶40-45. Nor, it is respectfully submitted, can there be any serious question that both Plaintiffs and Defendants were represented by highly competent and experienced counsel throughout the process. *Id.* ¶74. Accordingly, the "good-faith negotiation" factor also strongly supports approval of the Settlement. *Gordon*, 148 A.D.3d at 157 (courts should presume that negotiations have been conducted at arm's length and in good faith absent evidence to the contrary).

C. *Colt Factor* Five: Complexity and Nature of Case

Finally, courts look to the complexity and nature of the case (which is closely related to Plaintiffs' likelihood of success). *See Saska v. Metro. Museum of Art*, 54 N.Y.S.3d 566, 570 (Sup.

Ct., N.Y. Cnty. 2017) (evaluating the first and fifth *Colt* factors together in granting final approval); *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 393 (Sup. Ct., N.Y. Cnty. 2018) (same).

Numerous courts recognize that securities class action litigation is inherently complex, and as discussed above this case was certainly no exception. *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-CIV-8557 (CM), 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) ("Courts have recognized the 'notorious complexity' of securities class action litigation."). Indeed, this case involved allegations relating to misstatements involving multiple aspects of Altice's global operations and the impact it had on Altice USA's stock price, and would have required expert testimony on financial economics theory as well as testimony from industry experts and damages experts. *See* Joint Aff. ¶¶58, 63. The numerous factual and legal complexities of both Actions clearly presented multiple, serious litigation risks for Plaintiffs. *Id.* ¶¶53-61. In contrast, the Settlement will result in the certainty of a nearly $5 million recovery, and also avoids further lengthy litigation proceedings and related costs. Accordingly, this factor also strong supports approval.

II. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The proposed POA was set forth in full in the Notice sent to Settlement Class Members. *See* Schmidt. Aff., Ex. A, Notice at 9. The standard for approval of a POA in New York federal courts is the same as that for a settlement: "'namely, it must be fair and adequate,'" and a proposed "'allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'" *In re WorldCom, Inc. Secs. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005); *see also In re Advanced Battery Techs., Inc. Secs. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (same).

Lead Counsel developed the POA in close consultation with their damages expert, using allocation methodologies routinely applied in securities cases of this type. *See* Joint Aff., ¶¶64,

68. Specifically, the POA is based on the decline in value of AlticeUSA shares that occurred following the November 3, 2017 corrective disclosure (which in turn reduced the amount of artificial inflation in the stock price allegedly caused by the alleged misstatements and omissions at issue). *Id.* ¶68. The absence of any objections to date to the POA further supports its approval. *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). In sum, the proposed POA is fair and reasonable, and should be approved.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

For purposes of settlement, Plaintiffs seek certification of the Settlement Class, which consists of means all persons or entities who purchased shares of Altice common stock between June 22, 2017, the date of the IPO, and November 2, 2017, inclusive, and were damaged thereby. Stipulation, §1.45. Securities Act cases, which typically have similar class definitions, are "particularly appropriate" for class certification. *Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 21 (1st Dept. 1991); *see also Ft. Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 130 (S.D.N.Y. 2014) (courts "have frequently held that 'suits alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act are "especially amenable" to class certification.'").

This Court preliminarily certified the Settlement Class in its Preliminary Approval Order, NYSCEF No. 141, ¶6, and nothing has changed since it did so. As all required elements of CPLR 901 and 902 are satisfied here, the Court should confirm its prior certification ruling.

A. The Settlement Class Easily Satisfies CPLR 901

CPLR 901 requires that the elements of numerosity, predominating common issues, typicality, adequacy, and superiority are satisfied.

Numerosity: Defendants issued more than 71 million shares in the IPO, which were bought by tens of thousands of investors. Joint Aff. ¶15. As joinder of all parties would plainly

be "impractical," CPLR 901(1)'s numerosity requirement is plainly satisfied. *Compare Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382, 399 (2014) (classes with as few as 18 members may satisfy numerosity); *Pennsylvania Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014) ("Numerosity is presumed for classes larger than forty members.").

Commonality: Because (as here) Securities Act claims turn on "the truth or falsity of the prospectus' statements," "common questions of law and fact . . . predominate over individual issues." *Pruitt*, 167 A.D.2d at 21; *see also Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 84 (2d Cir. 2015) (commonality "is satisfied if there is a common issue that 'drive[s] the resolution of the litigation' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'")). Here, all Settlement Class Members' claims turn on a common set of alleged material misstatements and omissions in Altice USA's Offering Materials. Moreover, because no individualized issues of reliance can arise (because reliance is not an element of a Securities Act claim), the common issue of the Offering Materials' material falsity and omissions also plainly predominates over any individual issues.

Typicality: Plaintiffs' Securities Act claims are typical of the claims of other Settlement Class Members as they all relate to the same circumstances – namely, the issuance of the same materially false and misleading IPO Offering Materials – and are also based on the same legal theories as those of the other Settlement Class Members. Accordingly, CPLR 901(3)'s typically requirement is met. *In re SunEdison, Inc. Secs. Litig.*, 329 F.R.D. 124, 141 (S.D.N.Y. 2019); *Pruitt*, 167 A.D.2d at 22 (noting that typically requirement is easily met in Securities Act cases because "plaintiff's claims are identical to those of the other [class] members").

Adequacy: Plaintiffs have "fairly and adequately protect[ed] the interest of the class," as shown by (a) their selection of highly experienced counsel and (2) their willingness to devote

significant time to working on matters related to this case, from reviewing pleadings to periodically consulting with their counsel on litigation and settlement matters. *See* Joint Aff. ¶86; O'Neill Aff. ¶¶2, 3; Newman Aff. ¶¶2, 3; LaPoint Aff. ¶¶2, 3; Garfield Aff. ¶¶2, 3); Garcia Aff. ¶¶2, 3; and Chauvin Aff. ¶¶2, 3. Moreover, neither Plaintiffs nor their counsel are aware of any conflicts of interest between any Plaintiff and the Settlement Class. Accordingly, CPLR 901(4)'s adequacy requirements are easily satisfied. *See Pruitt*, 167 A.D.2d at 24.

Superiority: It would be prohibitively costly to require individual Settlement Class Members, many of whom can safely be assumed to have suffered comparatively modest losses, to litigate their own individual claims. Proceeding by class action is thus a far more efficient mechanism to resolve these Securities Act claims. *See Stecko v. RLI Ins. Co.*, 121 A.D.3d 542, 543 (1st Dept. 2014) (class action was "'superior vehicle' . . . 'since the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court'"); *In re SunEdison, Inc.*, 329 F.R.D. at 144 ("Generally, securities actions 'easily satisfy' the superiority requirement 'because "the alternatives are either no recourse for thousands of stockholders" or "a multiplicity and scattering of suits with the inefficient administration of litigation"'"). CPLR 901(5)'s superiority requirements are thus met.

B. CPLR 902's Discretionary Factors Also Support Certification

The five discretionary CPLR 902 factors also support certification. Factors one (the interest of class members in individually prosecuting their claims), two ([in]efficiency of multiple actions), four (desirability of concentrating claims in the particular forum), and five (difficulty of managing class-wide action), are substantively identical to CPLR 901's commonality, typicality, and superiority factors. As discussed above, these factors are equally well-satisfied for CPLR 902

purposes. *Nawrocki v. Proto Constr. & Dev. Corp.*, No. 104229/2007, 2010 WL 1531428, at *5 (Sup. Ct., N.Y. Cnty. April 7, 2010) (describing CPLR 902 factors as '"implicit in CPLR 901'").

Factor 3 – extent and nature of any parallel litigation already commenced – is inapplicable here, as this Settlement resolves all litigations on a global basis. *Id.*

Moreover, this Court's expertise in adjudicating business disputes within its jurisdiction reinforces a factor four finding that this Court is a particularly appropriate forum for this dispute.

The relevant CPLR 901 and 902 factors thus support final certification of the Class.

IV. THE COURT SHOULD APPROVE LEAD COUNSEL'S FEE AND EXPENSE APPLICATION

A. Lead Counsel's Fee Request

Courts have long recognized that attorneys who obtained a common fund recovery for a class are entitled to an award of fees and expenses from that fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Fernandez*, 2015 WL 3932897, at *5 (successful attorneys in common fund class action settlements should generally be awarded percentage of recovery). When awarding attorneys' fees from a common fund, both state and federal courts in New York favor awarding percentage-based fees, as doing so "aligns the interests of class counsel with those of the class." *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013); *see also* fn. 5 below (citing New York state court cases).

Lead Counsel, pursuant to CPLR 909, respectfully submits that their work fully merits a fee of one-third of the Settlement Consideration, or $1,650,000 (assuming that Defendants pay the full amount of their commitment to cover up to the first $200,000 of settlement administration costs here). Not only is such an award consistent with awards in similar cases by New York state

and federal courts,[7] but it is also fully justified by each of the relevant "*Fiala* factors" that New York courts consider when evaluating fee requests.

Importantly, as discussed below, the reasonableness of the requested fee is also ***strongly*** confirmed by application of a "lodestar crosscheck," which courts across the country also routinely use to assess the reasonability of a given fee request. Significantly, the requested 33⅓% fee here would equate to a fee of roughly $1,650,000 – which is substantially ***less than*** the combined lodestar value $1,788,059.30 of the 2343.81 hours of time expended by Lead Counsel on behalf of the Settlement Class here, resulting in a "negative multiplier" of only 0.92. A "negative multiplier" of ***less*** than 1.0x – which can alternatively be viewed here as an 8% ***haircut*** on all counsels' lodestar – strongly supports the conclusion that the requested fee is fair and reasonable.

B. The *Fiala* Factors Support the Reasonableness of the Requested Fee

The Court in *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S.2d 531, 540 (Sup. Ct., N.Y. Cnty. 2010), sets forth a series of factors that New York courts consider when determining whether a requested percentage fee is reasonable: (i) the risks of the litigation; (ii) whether counsel had the benefit of a prior judgment; (iii) the standing at bar of plaintiffs' and defendants' counsel; (iv) the magnitude and complexity of the litigation and responsibility undertaken; (v) the amount recovered; (vi) what would be reasonable for a counsel to charge in comparable circumstances; and, perhaps most importantly, (vii) the work performed by counsel. An eighth factor, the

[7] *In re Everquote, Inc. Secs. Litig.*, No. 651177/2019, NYSCEF No. 132, at *9 (Sup. Ct., N.Y. Cty. June 11, 2020) (awarding one-third fee, plus expenses); *Fernandez*, 2015 WL 3932897, at *6-7 (awarding one-third fee, plus expenses); *Lopez v. Dinex Grp., LLC*, No. 155706/2014, 2015 WL 5882842, at *5-8 (Sup. Ct, N.Y. Cnty. Oct. 6, 2015) (awarding one-third fee, plus expenses); *Charles v. Avis Budget Car Rental, LLC*, No. 152627/2016, 2017 WL 6539280, at *4-5 (Sup. Ct., N.Y. Cnty. Dec. 21, 2017) (awarding fee of 33%, plus expenses); *In re China MediaExpress Holdings, Inc.*, No. 11-CV-0804, 2015 WL 13639423, at *1 (S.D.N.Y. Sept. 18, 2015) (awarding one-third fee, plus expenses); *Landmen Partners Inc. v. Blackstone Grp. L.P.*, No. 08-cv-03601, 2013 WL 11330936, at *3 (S.D.N.Y. Dec. 18, 2013) (awarding one-third fee, plus expenses).

"lodestar crosscheck," noted above, is also arguably inherent in considering the amount of work performed factor, and is also discussed below. All of these factors support approval of the requested fee.

1. Litigation Risk

This action, like virtually every securities class action, unquestionably involved very significant litigation risk for the reasons already discussed in detail above at §A.1 and Joint Aff., ¶¶53-61.

In this regard, however, it is worth stressing that this Court credited Defendants' defenses and dismissed the State Action. Further, unlike Defendants' counsel, Lead Counsel litigated this matter on a fully contingent basis, and thus faced the substantial risk that they would have received no compensation (or even payment of its expenses) had Defendants prevailed. This risk is all too real given the Court's dismissal of the State Action and that even the most skilled and diligent contingent-fee counsel are often unsuccessful in securities actions after years of litigation. *See, e.g., In re Oracle Corp. Secs. Litig.*, No. C 01-00988, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (granting summary judgment for defendants after eight years of litigation in which plaintiffs' counsel incurred $7 million in expenses, and worked over 100,000 hours with a lodestar value of roughly $40 million); *Hubbard v. BankAtl. Bancorp, Inc.*, 688 F.3d 713, 730 (11th Cir. 2012) (overturning jury verdict for plaintiffs). The road to a successful recovery in complex, contingent cases can be long indeed. *See, e.g., In re Apollo Grp., Inc. Secs. Litig.*, No. CV 04-2147, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (where trial court overturned unanimous jury verdict for plaintiffs, verdict was only reinstated only after appeal and denial of *certiorari* by U.S. Supreme Court).

2. [Non-]Existence of Prior Favorable Judgment

The respective Lead Counsel investigated, brought, and litigated this action and the Federal Action, respectively, without the benefit of any prior judgment against Defendants, or even a parallel regulatory investigation concerning the issues raised by Plaintiffs' claims. Joint Aff., ¶73. Thus, this factor also supports the requested fee.

3. Counsel's Standing in the Securities Bar

Each of the Lead Counsel firms (Scott+Scott and the Rosen Firm) is highly experienced in securities litigation. *See generally* NYSCEF Nos. 33 (Scott+Scott Firm Resume); and www.rosenlegal.com (Rosen Firm Resume) and Joint Aff., ¶74. Lead Counsel also respectfully submit that their skill and experience were important factors in obtaining a successful result for the Settlement Class here. Moreover, *Fiala* factor three indicates that Lead Counsel's success should also be evaluated in light of the quality of opposing counsel – which here consisted of two pre-eminent firms, Sherman & Sterling LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP. That Lead Counsel were able to obtain a Settlement with a total value of nearly $5 million in this challenging litigation against such formidable opposition further supports the requested fee.

4. Magnitude and Complexity of the Actions

For all of the same reasons that the "complexity" and "litigation risk" factors strongly support approval of the Settlement (*see supra* A.1, A.3 and Joint Aff., ¶¶64, 74), these factors also weigh in favor of approving a one-third fee.

5. Amount Recovered

The Settlement represents a commendable result in light of the significant litigation risks and maximum recoverable damages. Given the strength of Defendants' successful arguments in the State Action that various statements were either not materially misleading or were otherwise inactionable, and their further arguments that they would likely prevail on causation-related issues,

reasonably recoverable damages could well have been little or nothing ***even if*** either or both Actions had survived Defendants' renewed motions to dismiss. Moreover, based on published data, although the proposed Settlement (as one might expect in a matter that has already been dismissed in its entirety) does not rank in the top half of securities settlements, it still appears to rank in roughly in at least the top 25%-30% of such settlements. *See* L.T. Bulan & L. Simmons, "Securities Class Action Settlements: 2020 Review and Analysis" (Cornerstone Research 2020) at 4 (finding that roughly 31% of securities settlements were less than $5 million). Accordingly, the Settlement falls well within the "range of reasonableness."

Accordingly, this factor also supports the requested fee.

6. Fees Charged (or Awarded) in Comparable Cases

A court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-class action, the customary contingent fee arrangement would be in the range of one-third of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 n.19 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

Moreover, as noted in footnote 6 above, both state and federal courts in New York (and indeed across the country) have frequently awarded percentage-based fees of 33⅓% (or more) in other securities actions that have settled for comparable amounts. Accordingly, the requested fee is well within the "range of reasonableness," and this factor also supports the fee request.

7. The Work Performed

As stated in the Joint Affirmation and accompanying affidavits, Lead Counsel spent over 2343 hours and $1,788,059 in lodestar litigating the State and Federal Actions, from pre-filing investigation, through motions to dismiss, and into discovery (in the State Action) – and

culminating in protracted settlement negotiations. Joint Aff. ¶77. This factor therefore also supports the requested fee.

C. The Reasonableness of the Requested 33⅓% Fee Is Strongly Confirmed By a "Lodestar Crosscheck"

As noted earlier, courts also routinely confirm the reasonableness of a requested percentage-based fee by performing a "lodestar crosscheck." To calculate the relevant lodestar, a court takes the hours billed by each timekeeper (attorney or para-professional) and multiplies them by that timekeeper's current hourly rate, which, added together, yields counsel's overall lodestar. *Ousmane v. City of New York*, No. 402648/2004, 2009 WL 722294, at *9 (Sup. Ct., N.Y. Cnty. Mar. 17, 2009). The Court then cross-checks the effective dollar value of the requested percentage-based fee against counsel's lodestar to determine whether the requested fee would result in an unreasonably high "multiplier" on counsel's lodestar. *Clemons v. A.C.I. Found., Ltd.*, No. 154573/2015, 2017 WL 1968654, at *5 (Sup. Ct., N.Y. Cnty. May 12, 2017); *Ryan v. Volume Servs. Am.*, No. 652970/2012, 2013 WL 12147011, at *4-5 (Sup. Ct., N.Y. Cnty. Mar. 7, 2013).

As previously stated, Lead Counsel devoted roughly 2343 hours to the investigation, litigation, and ultimate resolution of the State and Federal Actions over more than two years. The value of that time results in a total aggregate lodestar of $1,788,059 when multiplied by each relevant timekeeper's current hourly rates, which have been accepted by other courts across the country in fee-award contexts. *See* Joint Aff. ¶¶78-79. Because the requested 33⅓% fee here equates to only about $1,650,000 (one-third of the sum of the $4.75 cash consideration and Defendants obligation to pay the first $200,000 in notice and administration costs), here Lead

Counsel's requested fee represents a so-called "***negative*** multiplier" (or ***discount***) of ***0.92*** on Plaintiffs' Counsel's aggregate lodestar.[8]

Given that both state and federal courts in New York routinely award percentage-based awards that result in "positive" multipliers of two to four times (2.0x to 4.0x) the value of counsel's lodestar, *a fortiori* a percentage-based award that, as here, results in a ***negative*** multiplier (discount) on Plaintiffs' Counsel's lodestar is plainly reasonable. *See, e.g., Taft v. Ackermans*, No. 02 CIV. 7951, 2007 WL 414493, at *11 (S.D.N.Y. Jan. 31, 2007) (describing 1.44x multiplier as "modest in relation to lodestar multipliers frequently used in this district"); *In re BioScrip, Inc. Secs. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017) (lodestar crosscheck multiplier of 1.39x "is at the lower range of comparable awards").

In sum, all of the foregoing *Fiala* factors strongly support the requested one-third fee.[9]

D. Plaintiffs' Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of This Action

Here, Lead Counsel request reimbursement of $64,748.85 in total litigation expenses. These expenses consist primarily of the costs of hiring an investigation firm, retaining industry and damages experts, legal research (*e.g.*, Westlaw and Lexis charges), document hosting platform

[8] Lead Counsel also note that their lodestar does not include any time for work performed since November 8, 2021 (the date of the Court's preliminary approval order), including time spent on preparing the materials in support of final approval of the Settlement – nor will it include the "[additional] time that they will be required to spend administering the settlement going forward." *Fernandez*, 2015 WL 3932897, at *6.

[9] Courts also frequently consider the reaction of the class and the views of Plaintiffs. *See, e.g.*, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728, 2020 WL 4196468, at *6 (S.D.N.Y. July 21, 2020); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012). Here, all Plaintiffs support the requested fee. *See* Joint Aff. ¶81; O'Neill Aff. ¶5; Newman Aff. ¶5; LaPoint Aff. ¶5-; Garfield Aff. ¶5) ; Garcia Aff. ¶5; and Chauvin Aff. ¶5. Additionally, although the February 3, 2022 deadline for objections as not yet passed, to date no objections to Lead Counsel's requested 33 1/3% fee (which was disclosed in the Notice) have been received. Joint Aff. at ¶13; Schmidt Aff. ¶14.

fees, and the Mediator's fees – all of which were reasonably necessary to Plaintiffs' successful efforts to reach the global settlement in the Actions. *See* Joint Aff., ¶¶82-84; *see also Lopez*, 2015 WL 5882842, at *8 ("'Courts typically allow counsel to recover their reasonable out-of-pocket expenses.'"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *30 (S.D.N.Y. Nov. 8, 2010) ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced.").

Moreover, the Notice informed potential Settlement Class Members that Lead Counsel would seek up to $95,000 in expenses. To date, no objections to this amount have been received. *See* Joint Aff. ¶84. Especially since the amount of expenses actually to be reimbursed sought is significantly ***less than*** what was estimated in the Notice, the lack of objections also supports counsel's expense request.

E. The Requested $2,000 Service Award to Each Plaintiff Is Reasonable

As set forth in the respective Plaintiffs' Affidavits, each took their fiduciary role as a Plaintiff seriously by, *inter alia*, reviewing pleadings and briefs and consulting with Lead Counsel regarding both litigation and settlement matters. Joint Aff. ¶86; O'Neill Aff. ¶¶2, 3; Newman Aff. ¶¶2, 3; LaPoint Aff. ¶¶2, 3; Garfield Aff. ¶¶2, 3; Garcia Aff. ¶¶2, 3; and Chauvin Aff. ¶¶2, 3. Without the Plaintiffs' efforts in commencing and prosecuting this action, there would be no recovery here. Moreover, the requested service awards are relatively modest. *Compare, e.g.*, *Charles*, 2017 WL 6539280, at *2-3, *5 (awarding $10,000); *Lopez*, 2015 WL 5882842, at *3-4, *8 (awarding $20,000); *see also Hosue*, 2017 WL 4011213, at *3, *6 (awarding $5,000). They are similarly unobjected to by any Settlement Class Member to date. Accordingly, they should be approved.

CONCLUSION

For the reasons described above and in the accompanying memorandum of law, the Court should (a) approve the Settlement and Plan of Allocation as fair, adequate, and reasonable; (b) confirm its prior order certifying the Settlement Class; (c) grant Lead Counsel's application for an award of attorneys' fees (covering all Plaintiffs' Counsel) equal to 33⅓% of the Settlement Consideration, plus reimbursement of $64,748.85 in expenses (with interest earned thereon until paid at the same rate as earned on the Settlement Fund from the date it was funded), and (d) award $2,000 to each Plaintiff for their service to the Settlement Class.

Dated: January 20, 2022
New York, New York

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SPECIFICATIONS STATEMENT

1. Pursuant to 22 N.Y.C.R.R. §202.70(g), Rule 17, the undersigned counsel certifies that the foregoing memorandum of law was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

Name of Typeface: Times New Roman
Point Size: 12
Line Spacing: Double

2. The total number of words in the memorandum, inclusive of point headings and footnotes and exclusive of the caption, signature block, and this Certification, is 6,765 words.

DATED: January 20, 2022

Respectfully submitted,

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