SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CITY OF PITTSBURGH COMPREHENSIVE MUNICIPAL PENSION TRUST FUND, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

BENEFITFOCUS, INC., THE GOLDMAN SACHS GROUP, INC., GS CAPITAL PARTNERS VI PARALLEL, L.P., GS CAPITAL PARTNERS VI OFFSHORE FUND, L.P., GS CAPITAL PARTNERS VI FUND, L.P., GS CAPITAL PARTNERS VI GMBH & CO. KG, MERCER LLC, MARSH & MCLENNAN COMPANIES, INC., MERCER CONSULTING GROUP, INC., MASON R. HOLLAND, JR., RAYMOND A. AUGUST, JONATHON E. DUSSAULT, DOUGLAS A. DENNERLINE, JOSEPH P. DISABATO, A. LANHAM NAPIER, FRANCIS J. PELZER V, STEPHEN M. SWAD, ANA M. WHITE, J.P. MORGAN SECURITIES LLC, GOLDMAN SACHS & CO. LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, PIPER JAFFRAY & CO., RAYMOND JAMES & ASSOCIATES, INC., WEDBUSH SECURITIES, INC., AND FIRST ANALYSIS SECURITIES CORPORATION,

Defendants.

Index No. 651425/2021

IAS Commercial Part 53

Hon. Andrew Borrok

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

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Pursuant to Civil Practice Law and Rules ("CPLR") Article 9, Plaintiff City of Pittsburgh Comprehensive Municipal Pension Trust Fund ("Pittsburgh CMPTF" or "Lead Plaintiff"), on behalf of itself and the proposed Settlement Class, respectfully submits this memorandum of law in support of: (i) final approval of the proposed Settlement of the above-captioned class action (the "Action"); (ii) approval of the proposed plan of allocation for distributing the proceeds of the Settlement to eligible claimants (the "Plan of Allocation"); and (iii) final certification of the Settlement Class.[1]

The Motion is based on the following memorandum of law and the Affirmation of Alfred L. Fatale III in Support of (I) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, (the "Fatale Affirmation"), submitted herewith.[2] A proposed final order and judgment, negotiated by the Parties as part of the Settlement, will be submitted with Lead Plaintiff's reply papers, after the deadlines to object or seek exclusion have passed.

PRELIMINARY STATEMENT

As detailed in the Stipulation, Lead Plaintiff and Defendants have agreed to settle all claims asserted in the Action against Defendants, or that could have been asserted, arising out of the Company's secondary public offering of 6,560,472 shares of common stock, commenced on or about March 1, 2019 (the "SPO" or "Offering"), in exchange for the payment of $11,000,000 (the

[1] All capitalized terms not otherwise defined herein have the same meanings as set forth in the Stipulation and Agreement of Settlement (the "Stipulation"), which was filed with the Court on April 13, 2022. NYSCEF Doc. No. 188.

[2] The Fatale Affirmation is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation, among other things. Citations to "¶" in this memorandum refer to paragraphs in the Fatale Affirmation.

"Settlement Amount") for the benefit of the Settlement Class. The terms of the Settlement were reached with the assistance of a highly regarded mediator, Michelle Yoshida, Esq., and are set forth in the Stipulation, which was executed by the Parties on April 11, 2022.

The Settlement will bring to a close nearly two years of litigation that included, among other things: (i) a thorough investigation concerning the allegedly material false and misleading statements and omissions in the Offering Documents issued in connection with the Company's SPO;[3] (ii) the filing of an initial complaint and Amended Complaint; (iii) motion practice in connection Defendants' motion to stay discovery, Defendants' three motions to dismiss the Amended Complaint, which were denied in substantial part by the Court, Defendants' motions to reargue those motions, and Lead Plaintiff's motion for class certification; (iv) completed briefing of Defendants' four appeals arising from orders on the motions to dismiss; (v) interviews of former Benefitfocus employees and other persons with relevant knowledge; (vi) consultation with experts on damages and causation issues; (vii) negotiation of a discovery protocol and case schedule; (viii) discovery, including propounding document requests and interrogatories and the analysis of highly relevant documents produced by Benefitfocus prior to mediation; and (ix) robust arm's-length negotiations between counsel, facilitated by a well-respected and experienced mediator, and preceded by the exchange of detailed written mediation statements. *See generally* Fatale Aff. at §§III-V.

The $11,000,000 Settlement Amount represents a recovery of approximately 8% of

[3] Benefitfocus' common stock, issued in the Company's SPO, was registered with the U.S. Securities and Exchange Commission (the "SEC") pursuant to a shelf registration statement filed with the SEC on Form S-3ASR (the "Registration Statement") on February 26, 2019. On March 1, 2019, Benefitfocus filed with the SEC its final prospectus supplement for the SPO on Form 424B7, which forms part of the Registration Statement. The Registration Statement and the Prospectus are referred to collectively herein as the "Offering Documents."

estimated damages of $138 million. However, full statutory damages may not have been recoverable here as Defendants would have pressed a robust "negative causation" defense, which, if credited by the Court or a jury, would have significantly decreased damages. Lead Plaintiff's consulting damages expert analyzed various negative causation arguments that, if successful, could have reduced damages to as low as approximately $20.8 million, making the Settlement a recovery of approximately 53% of class wide damages. Lead Counsel, which has extensive experience and expertise in prosecuting securities class actions, believes that the Settlement represents a very favorable resolution of this complex litigation in light of the specific risks of continued litigation, particularly Defendants' challenges and defenses regarding the statute of limitations, standing, control, negative causation, and falsity. Lead Plaintiff was active throughout the Action, diligently representing the Settlement Class, and has approved the Settlement. *See* Affidavit of Jennifer Gula on behalf of Pittsburgh CMPTF, dated October 26, 2022, Ex. 1.[4]

Accordingly, Lead Plaintiff respectfully requests that the Court grant final approval of the Settlement and certify the Settlement Class. In addition, the Plan of Allocation, which was developed with the assistance of Lead Plaintiff's consulting damages expert, is a fair and reasonable method for distributing the Net Settlement Fund and should also be approved by the Court.

PRELIMINARY APPROVAL AND THE NOTICE PROGRAM

On August 15, 2022, the Court entered an order preliminarily approving the Settlement and approving the proposed forms and methods of providing notice to the Settlement Class (the

[4] All exhibits referenced herein are annexed to the Fatale Affirmation. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex.__-__." The first numerical reference is to the designation of the entire exhibit attached to the Fatale Affirmation and the second alphabetical reference is to the exhibit designation within the exhibit itself.

"Notice Order"). *See* NYSCEF No. 198. Pursuant to and in compliance with the Notice Order, through records maintained by Benefitfocus' transfer agent and information provided by brokerage firms and other nominees, the Court-appointed Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), caused the Notice and Claim Form (together, the "Notice Packet") to be mailed by first-class mail to potential Settlement Class Members. *See* Affidavit of Adam D. Walter Regarding: (A) Mailing of Notice and Claim Form; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received to Date, dated October 26, 2022, Ex. 2 at ¶¶2-8. A total of 21,548 Notice Packets have been mailed as of October 27, 2022. *Id*. at ¶8. On September 12, 2022, the Summary Notice was published in *The Wall Street Journal* and was disseminated over the internet using *PR Newswire*. *Id*. at ¶9 and Exhibits B and C attached thereto. The Notice and Claim Form were also posted, for review and easy downloading, on the website established by A.B. Data for purposes of this Settlement. *Id*. at ¶11.

The Notice described, *inter alia*, the claims asserted in the Action, the contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum amounts that would be sought in attorneys' fees and expenses, the Plan of Allocation, the right to object to any aspect of the Settlement, and the right to seek to be excluded from the Settlement Class. *See generally* Ex. 2-A. The Notice also gave the deadlines for objecting, seeking exclusion, submitting claims, and advised potential Settlement Class Members of the scheduled Settlement Hearing before this Court. *Id*. While the deadline for requesting exclusion or objecting to the Settlement (November 10, 2022) has not yet passed, to date no requests for exclusion or objections to the Settlement have been received.[5]

[5] Should any objections or requests for exclusion be received, Lead Plaintiff will address them in its reply papers, which are due to be filed with the Court on November 23, 2022.

ARGUMENT

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

A. The Standards for Final Approval of a Class Action Settlement

New York courts strongly favor settlements as a matter of public policy. *See* IDT Corp. v. Tyco Grp., 13 N.Y.3d 209, 213 (2009) ("'[s]tipulations of settlement are judicially favored and may not be lightly set aside'").[6] "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) (holding that courts should be "mindful of the 'strong judicial policy in favor of settlements'").

When considering whether to finally approve a 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).

These factors, articulated in In re Colt Indus. S'holder Litig., 155 A.D.2d 154 (1st Dep't. 1990), *aff'd,* Colt Indus. S'holder Litig. v. Colt Indus. Inc., 77 N.Y.2d 185, (1991), and reaffirmed

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

in *Gordon v. Verizon Commc'ns, Inc.*, 148 A.D.3d 146, 162 (1st Dep't. 2017), strongly favor approval of the Settlement.

B. *Colt* Factor One: The Likelihood Lead Plaintiff Will Succeed on the Merits Strongly Supports Final Approval

When assessing a proposed settlement of a class action, courts first take into consideration Lead Plaintiff's ultimate "likelihood of success on the merits." *Gordon*, 148 A.D.3d at 162; *Colt*, 155 A.D.2d at 160. Although Lead Plaintiff believes that the case against Defendants is strong, that confidence must be tempered by the fact that the Settlement is certain and that every case involves significant risk of no recovery, particularly in a complex case such as the one at bar. *See In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (noting that "[s]ecurities class actions present hurdles to proving liability that are particularly difficult for plaintiffs to meet."); *In re Alloy, Inc. Sec. Litig.*, No. 03 CIV. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in a securities action presented significant hurdles to proving liability).[7]

Here, there were no admissions by Defendants that the Offering Documents were materially false and misleading or a parallel governmental proceeding, which would have aided Lead Plaintiff in proving key elements of the case. There is no question that to prevail here, Lead Plaintiff would have confronted numerous legal and factual challenges, while trying to prove difficult securities claims.

(a) Risks to Proving Liability

To prevail on its claims, Lead Plaintiff would need to prove the existence of materially false and misleading statements or omissions in the Offering Documents. As an initial matter,

[7] In considering final approval of a settlement, "New York's courts have … looked to federal case law for guidance." *Fiala v. Metro. Life Ins. Co.*, 27 Misc. 3d 599 (Sup. Ct. N.Y. Cnty. 2010).

surviving Defendants' challenges to the Amended Complaint was no guarantee of ultimate success. Defendants have a filed four appeals of the Court's orders on the motions to dismiss and motions to dismiss joinder, and there was no guarantee that the Appellate Division would rule in Lead Plaintiff's favor.

At summary judgment or trial Defendants would likely continue to argue that the Offering Documents did not contain materially false or misleading statements or omissions. ¶¶55-62. For example, with respect to the Amended Complaint's allegations that the Offering Documents were materially false and misleading for failing to disclose the termination of the Mercer Health Agreement prior to the time of the SPO, Defendants would have argued, as a matter of law and to the jury, that they had no duty to disclose the development because it was immaterial. ¶56. Defendants would also have argued that the truth regarding the waning of the Mercer Health relationship was known to the market at the time of the SPO, owing to partial announcements that the business was declining. *Id.* Defendants would have additionally argued that the generalized misstatements concerning Benefitfocus' business lacked the requisite specificity to be deemed actionable at summary judgement or trial. *Id.* Finally, Defendants would have argued that the relevant risk disclosures in the Offering Documents accurately and adequately informed investors that the Company could not guarantee maintenance of strategic relationships, among other risk disclosures. *Id.*

With respect to the Amended Complaint's allegations concerning Benefitfocus' broker channel, Defendants would have similarly argued that the statements and omissions were not actionable. Defendants would have argued that the economics of Benefitfocus' broker channel were well-known to the investing public at the time of the SPO, and that the Offering Document's

risk disclosures explicitly warned that the Company lacked certainty about achieving sales through brokers. ¶57.

With respect to the Amended Complaint's allegations concerning Benefitfocus' financial condition, Defendants would have argued, as a matter of law and to the jury, that the alleged false and misleading statements were inactionable forward-looking statements and genuinely held opinions. ¶58. In addition, Defendants would also have argued that the truth regarding the financial impacts of changes to the Mercer Health relationship was known to the market at the time of the SPO. *Id.*

Moreover, Defendants would also have argued and sought to present evidence that Lead Plaintiff could not establish that the "trends" alleged in the Amended Complaint had materialized at the time of the SPO, such that they should have been disclosed pursuant to Item 303 or any other legal doctrine. ¶59. Even if Lead Plaintiff could establish that the trends existed at the time of the SPO, Defendants would likely have argued that they were not sufficiently known within the company by sufficiently high-level personnel at the time of the SPO to mandate disclosure under Item 303. *Id.* Defendants would also likely seek to establish that at the time of the SPO, Defendants did not reasonably expect that the issues alleged by Lead Plaintiff would have a material impact on the Company's net sales, revenues, or income, as required under Item 303. *Id.* Among other things, Defendants would likely put forth evidence that they expected the trends to be temporary and reasonably expected to make up any shortfalls through other relationships or in other business segments. *Id.*

Further, Defendants have argued in their pending appeals, and would have continued to argue at summary judgment and trial, that Lead Plaintiff's claims are time-barred under the Securities Act's one year statute of limitations because Lead Plaintiff commenced this case over a

year after Benefitfocus allegedly disclosed the Company was exiting its legacy Mercer Health relationship as late as May 1, 2019. ¶¶65-66. In seeking to reduce or eliminate the recoverable damages in the Action, Defendants would also likely have continued to argue that some or all of the decline in Benefitfocus' stock price was attributable to unrelated events and information. *Id*. Relatedly, Defendants would have also likely continued to argue that: (i) if the Action's claims are not time-barred, then any prior declines in the price of Benefitfocus shares ***were not*** attributable to Defendants' false and misleading statements; or alternatively (ii) if any prior price declines ***were*** attributable to the alleged false and misleading statements, the statute of limitations had run prior to commencement of the Action. *Id*.

Finally, the Underwriter Defendants and the Individual Defendants would have raised additional arguments at summary judgment and trial, including that they conducted robust and thorough due diligence during the offering process to confirm the accuracy and truthfulness of the Offering Documents' disclosures, including participating in extensive meetings with key management at the Company and reviewing relevant key documents. ¶60. The Mercer Defendants and the Goldman Funds Defendants also would have continued to argue that they were not statutory sellers under Section 12(a)(2) of the Securities Act and/or that they did not control the contents of the Offering Documents. ¶¶26-28. Defendant GS& Co. would have continued to argue that it was not a "control person" under Section 15.

(b) Risks Concerning Negative Causation and Damages

Even assuming that Lead Plaintiff successfully established each of the elements of liability, it still faced substantial obstacles to proving damages. Defendants would have pursued a negative causation defense, arguing that factors other than the allegedly undisclosed issues that form the basis of the Action's claims caused the decline of Benefitfocus' share price after the Offering. ¶¶63-74. Defendants would have sought to present evidence supporting their affirmative negative

causation defense, challenging each decline in the value of the Company's stock. *See*, *e.g.*, *McMahan & Co. v. Wherehouse Ent., Inc.*, 65 F.3d 1044, 1048-49 (2d Cir. 1995) (under Section 11, "any decline in value is presumed to be caused by the misrepresentation," and the "defendant . . . bears the burden of proving that the price decline was not related to the misrepresentations").

Defendants' arguments, if credited by the Court or a jury, would have significantly reduced damages. Using the statutory damages formula under Section 11(e) of the Securities Act, Lead Plaintiff's consulting damages expert has estimated statutory class wide damages of $138 million, based upon the 6,560,472 shares of Benefitfocus common stock issued at $48.25 per share in the Offering and the $14.90 closing stock price on March 2, 2021 (the date the Action was commenced). ¶71. This maximum estimation is contingent on Lead Plaintiff's ability to establish liability and gives no credit to Defendants' negative causation arguments (thus assuming 100% of the stock drop from the Offering to the date of suit is attributable to the alleged false statements and omissions). *Id*.

Defendants, however, would likely counter that a large percentage of the total declines in Benefitfocus' share price occurred prior to: (i) March 3, 2020, when the Company revealed that "headwinds" as a result of the "amended" Mercer Health agreement would worsen in 2020; and/or (ii) November 5, 2020, when the Company disclosed the complete "runoff of [the Company's] legacy agreement with Mercer," making any such price declines unrecoverable as a matter of law. Defendants would also argue with respect to the March 3, 2020 and November 5, 2020 disclosure dates, that there were no statistically significant declines in Benefitfocus' share price on or after either date, and/or that there is no correlation between post-disclosure price declines and the alleged false statements and omissions. Defendants would bolster these arguments by adding that

if any earlier declines are related to the alleged materially false and misleading statements in the Offering Documents, including share price declines following the May 1, 2019 disclosure of disappointing financial results and forecasts due to the "amended" Mercer Health agreement, that the entire Action (commenced March 2, 2021) is untimely, and must be dismissed. ¶¶63-73.

Lead Plaintiff's consulting causation and damages expert analyzed various negative causation arguments and estimated that that if such arguments were successful, realistically recoverable damages could decrease to approximately $20.8 million. ¶72. This estimate assumes that the entire share price declines immediately following the May 1, 2019 and November 5, 2020 disclosures relate to the issues Lead Plaintiff claimed were false and misleading in the Offering Documents. Accordingly, had Defendants' negative causation arguments been accepted, in whole or in part, they could have drastically limited the class's recovery.

Lead Plaintiff believes that Defendants' arguments take too narrow a view of the connection between the allegations and the price declines. Lead Plaintiff further believes that Defendants' contention that the recoverability of stock price declines prior to March 3, 2020 is mutually exclusive with a determination that Lead Plaintiff's claims are timely is incorrect. However, there was no guarantee that the Court or a jury would ultimately agree with Lead Plaintiff. To this point, as the case proceeded, the Parties' respective damages experts would strongly disagree with each other's assumptions and their respective methodologies, and there was no certainty concerning which expert would be credited by the jury, or the Court. Accordingly, the risk that the jury would credit Defendants' damages position over that of Lead Plaintiff had considerable consequences, even assuming liability was proven. *See, e.g.*, *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 427 (S.D.N.Y. 2001) ("'In [a] 'battle of experts,' it is virtually impossible to predict with any certainty which testimony would be credited,

and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.'"). Indeed, Courts favor settlement where, as here, the parties will likely rely on significant expert testimony and analysis. *See, e.g.*, *In re Giant Interactive Grp., Inc., Sec. Litig.*, 279 F.R.D. 151, 161-62 (S.D.N.Y. 2011) (approving settlement where the litigation risks included a "credible defense of 'negative causation'").

C. *Colt* Factors Two, Three, and Four: The Judgment of Counsel, the Extent of Support from the Parties, and the Presence of Good Faith Bargaining All Support Final Approval of Settlement

Next, when considering final approval of a settlement in a class action, courts in New York look to the support of the parties, the judgment of the respective counsel, and whether the parties bargained in good faith. *Gordon*, 148 A.D.3d at 157; *Colt*, 155 A.D.2d at 160. Here, these factors strongly support granting final approval.

Although the November 10, 2022 deadline for objecting to the Settlement and seeking exclusion from the Settlement Class has not yet passed, there has been no objection to any aspect of the Settlement to date and no requests for exclusion have been received. A lack of objections is indicative of the class's approval of a proposed settlement. *See Pressner v. MortgageIT Holdings, Inc.*, 16 Misc. 3d 1103(A) (Sup. Ct., N.Y. Cnty. May 29, 2007) (approving settlement "since there has been no objection to the propose[d] settlement"). Furthermore, Lead Plaintiff supports the Settlement. *See* Affidavit of Jennifer Gula on Behalf of Pittsburgh CMPTF filed concurrently herewith as Exhibit 1 to the Fatale Affirmation.

Second, in reaching the Settlement, Lead Counsel concluded that it was fair, reasonable, and adequate, particularly when contrasted with the aforementioned risks, costs, and uncertainties of continued litigation. The judgment of Lead Counsel—a law firm that is highly experienced in securities class action litigation—that the Settlement is in the best interests of the Settlement Class

is entitled to "great weight." *City of Providence v. Aeropostale Inc.*, No. 11 CIV. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd*, *Arbuthnot v. Pierson*, 607 F. App'x. 73 (2d Cir. 2015).

Third, there can be no doubt that the Parties bargained in good faith. The Settlement was negotiated at arm's-length with the assistance of an experienced mediator, Michelle Yoshida, Esq. ¶¶48-49. Prior to the all-day mediation session, which was held on February 8, 2022, the Parties submitted confidential mediation statements, which contained their positions on liability and damages. Indeed, in advance of the mediation, Lead Counsel put extensive time and effort into preparing for the mediation and submitting a detailed mediation statement and related material on behalf of Lead Plaintiff. On February 9, 2022, an agreement in principle was reached to settle the claims against all Defendants. ¶50. Thus, this *Colt* factor supports approval of the Settlement. *Gordon*, 148 A.D.3d at 157 (parties are entitled to the standard presumption that "negotiations are presumed to have been conducted at arm's length and in good faith where there is no evidence to the contrary"); *Fiala*, 27 Misc. 3d at 608 (noting that the help of an accomplished and scrupulous mediator, among other things, spoke to the "lack of collusion and coercion in negotiating the final settlement").

D. *Colt* Factor Five: The Complexity and Nature of the Issues of Law and Fact Further Support Final Approval

The fifth factor New York courts look to, the complexity and nature of the issues of law and fact presented, is closely related to the first factor, Lead Plaintiff's likelihood of success. *See, e.g.*, *Saska v. Metro. Museum of Art*, 57 Misc. 3d 218, 222 (Sup. Ct., N.Y. Cnty. 2017) (evaluating the first and fifth *Colt* factors together in grant of final approval); *City Trading Fund v. Nye*, 59 Misc. 3d 477, 510 (Sup. Ct., N.Y. Cnty. 2018) (same).

Securities class actions like this one are by their nature demanding and challenging, and

courts in New York have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd sub nom*. *In re Facebook, Inc.*, 674 F. App'x. 37 (2d Cir. 2016); *In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012). This case was no exception. As discussed above and in the Fatale Affirmation, the case involved complicated and intricate issues related to negative causation, falsity, and materiality. Additionally, prevailing on summary judgment and then achieving a litigated verdict at trial (and sustaining any such verdict in the appeals that would inevitably ensue) would have been a very difficult and risky undertaking that would have required substantial additional time and expense. *See In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 481 (S.D.N.Y. 2009) (finding that the complexity, expense and duration of continued litigation supports final approval where, among other things "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). Even if Lead Plaintiff were to prevail at all future stages of the litigation, any potential recovery (in the absence of a settlement) would only occur years into the future, substantially delaying payment to the Settlement Class.

The Settlement, therefore, offers certainty to the Settlement Class and it compares favorably to other securities class action settlements. Lead Counsel has researched settlements reached in other cases alleging Securities Act claims and believes the proposed Settlement falls in the higher range of such settlements. For instance, for the ten years from 2012 through 2021, the median settlement amount in Securities Act cases was $8.9 million and $8.4 million in 2021, and the median settlement amount in Securities Act cases from 2012 through 2021 as a percentage of simplified statutory damages was 7.6%. *See* Laarni T. Bulan & Laura E. Simmons, *Securities*

Class Action Settlements –2021 Review and Analysis, at 7 (Cornerstone Research 2021), Ex. 5.

For all the foregoing reasons, it is respectfully submitted that the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court.

II. THE PLAN OF ALLOCATION FOR THE PROCEEDS OF THE SETTLEMENT IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The proposed Plan of Allocation was set forth in full in the Notice sent to Settlement Class Members. *See* Ex. 2-A at 10-12. A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See* *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012); *Bear Stearns*, 909 F. Supp. 2d at 270. A plan with a "rational basis" satisfies this requirement. *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 CM PED, 2010 WL 4537550, at *21 (S.D.N.Y. Nov. 8, 2010); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d at 497. One that reimburses class members based on the relative strength and value of their claims is also reasonable. *See IMAX*, 283 F.R.D. at 192. However, a plan of allocation does not need to be tailored to fit each and every class member with "mathematical precision." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997), *aff'd sub nom.* 117 F.3d 721 (2d Cir. 1997).

The proposed Plan of Allocation was drafted with the assistance of Lead Plaintiff's consulting damages expert. It is designed to equitably distribute the Settlement proceeds among the members of the Settlement Class who were allegedly injured by Defendants' misrepresentations and who submit valid Claim Forms that are approved for payment. The plan is consistent with the statutory measure of damages under Section 11 of the Securities Act. Recognized Loss Amounts for purchases after the SPO but during the Class Period are based on trading losses, and are discounted given the unique traceability and liability risks for these claims. ¶¶84-85.

As explained in the Fatale Affirmation, the Claims Administrator will calculate claimants' "Recognized Losses" using the transactional information provided in their Claim Forms, which can be mailed to the Claims Administrator, submitted online using the settlement website, or, for large investors with hundreds of transactions, via e-mail to the Claims Administrator's electronic filing team. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Lead Counsel, and Defendants do not have Settlement Class Members' transactional data and a claims process is required. Because the Settlement does not recover 100% of alleged damages, the Claims Administrator will determine each eligible claimant's *pro rata* share of the Net Settlement Fund based upon each claimant's total Recognized Losses. ¶¶83, 85.

Once the Claims Administrator has processed all submitted claims, notified claimants of deficiencies or ineligibility, processed responses, and made claim determinations, distributions will be made to eligible claimants in the form of checks and wire transfers. ¶86. After an initial distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of initial distribution, the Claims Administrator will, if feasible and economical, after payment of Notice and Administration Expenses and Taxes, if any, re-distribute the balance among eligible claimants who have cashed their checks. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute. *See* Stipulation at ¶26; Ex. 2-A at ¶81. Any balance that still remains in the Net Settlement Fund after re-distribution(s), which is not feasible or economical to reallocate, after payment of any outstanding Notice and Administration Expenses or Taxes, shall be donated to the Consumer Federation of America, a

private, non-profit, non-sectarian 501(c)(3) organization, or as otherwise approved by the Court. Stipulation at ¶26; Ex. 2-A at ¶81.

To date, there have been no objections to the Plan of Allocation, further supporting approval. *Maley v. Del Glob. Techs Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002).

III. THE COURT SHOULD GRANT FINAL CERTIFICATION OF THE SETTLEMENT CLASS

For purposes of the Settlement only, Lead Plaintiff seeks certification of the Settlement Class. The class action remedy is "frequently utilized" for claims of alleged securities violations. *Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 21 (1st Dep't 1991); *see also Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 130 (S.D.N.Y. 2014) ("[C]ourts in this district have frequently held that 'suits alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act are "especially amenable" to class action certification and resolution.'").

The Court previously granted provisional certification of the Settlement Class for settlement purposes. *See* NYSCEF No. 198 at ¶2. Nothing has occurred since then to cast doubt on whether the applicable prerequisites of CPLR 901 and 902 have been met. Accordingly, for all the reasons stated in Lead Plaintiff's Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement and Authorization to Notify Settlement Class, NYSCEF No. 186, and Lead Plaintiff's previously filed Motion to Certify the Class, NYSCEF Nos. 169, Lead Plaintiff requests that the Court reaffirm its determinations and finally certify the Settlement Class for purposes of carrying out the Settlement, appoint City of Pittsburgh CMPTF as Class Representative, and Labaton Sucharow LLP as Class Counsel.

CONCLUSION

For all the foregoing reasons, Lead Plaintiff respectfully requests that the Court finally approve the proposed Settlement, approve the proposed Plan of Allocation, and finally certify the Settlement Class for purposes of the Settlement only.

Dated: October 27, 2022
New York, New York

Respectfully submitted,

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PRINTING 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:

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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 5,440 words.

By: */s/ Alfred L. Fatale III*
Alfred L. Fatale III