

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

MS#011

~~PROPOSED~~ **FINAL ORDER AND JUDGMENT**

WHEREAS:

A. As of April 11, 2022, Plaintiff City of Pittsburgh Comprehensive Municipal Pension Trust Fund (“Lead Plaintiff”), by and through its counsel of record, on behalf of itself and all other members of the Settlement Class, on the one hand; and (i) Benefitfocus, Inc. (“Benefitfocus” or the “Company”); (ii) 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, and Ana M. White (the “Individual Defendants” and together with Benefitfocus, the “Benefitfocus Defendants”); (iii) 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., and GS Capital Partners VI GMBH & Co. KG (the “Goldman Funds Defendants”); (iv) Mercer LLC, Marsh & McLennan Companies, Inc., and Mercer Consulting Group, Inc. (the “Mercer Defendants,” and together with the Goldman Funds Defendants, the “Selling Stockholder Defendants”); and (v) J.P. Morgan Securities LLC, Goldman Sachs & Co. LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper Jaffray & Co. (n/k/a Piper Sandler & Co.), Raymond James & Associates, Inc., Wedbush Securities Inc., and First Analysis Securities Corporation (the “Underwriter Defendants,” and together with the Benefitfocus Defendants, Goldman Funds Defendants, and Mercer Defendants, the “Defendants”), on the other, by and through their counsel of record, entered into a Stipulation and Agreement of Settlement (the “Stipulation”) in the above-titled litigation (the “Action”);

B. Pursuant to the Order Preliminarily Approving Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, dated August 1, 2022, as amended by Order dated August 15, 2022 (the “Notice Order”), the Court scheduled a hearing for December 1, 2022 (the “Settlement Hearing”) for the following purposes: (i) to determine whether the Court should grant final certification of the Action as a class action for purposes of the Settlement and confirm its appointment of Lead Plaintiff and Labaton Sucharow LLP (“Lead Counsel”) as Class Representatives and Class Counsel, respectively; (ii) to determine whether the Settlement should be approved as fair, reasonable, adequate, and in the best interests of the Settlement Class; (iii) to determine whether a Judgment, substantially in the form attached

as Exhibit B to the Stipulation, should be entered dismissing and releasing the Plaintiff's Released Claims and Defendants' Released Claims (as those terms are defined in the Stipulation) with prejudice; (iv) to determine whether the Plan of Allocation for distribution of the Net Settlement Fund is reasonable and should be approved; (v) to rule upon Lead Counsel's application for an award of attorneys' fees and payment of expenses (which may include a service award to Lead Plaintiff in connection with its representation of the Settlement Class); (vi) to consider any objections or exclusion requests; and (vii) to consider any other matters that may properly be brought before the Court in connection with the Settlement, as the Court may deem appropriate;

C. The Court ordered that the Notice of Pendency of Class Action, Proposed Settlement, and Motion for Attorneys' Fees and Expenses (the "Notice") and a Proof of Claim and Release form ("Claim Form"), substantially in the forms annexed to the Notice Order as Exhibits 1 and 2, respectively, be mailed, by first-class mail, postage prepaid, no later than ten (10) business days after the date of entry of the Notice Order ("Notice Date") to all potential Settlement Class Members who could be identified through reasonable effort, and that a Summary Notice of Pendency of Class Action, Proposed Settlement, and Motion for Attorneys' Fees and Expenses (the "Summary Notice"), substantially in the form attached to the Notice Order as Exhibit 3, be published in *The Wall Street Journal* and transmitted over *PR Newswire* within fourteen (14) calendar days of the Notice Date;

D. The Court ordered that the Notice, the Summary Notice, and the Claim Form, and any updates after dissemination, shall also be placed on the website created for the Settlement;

E. The Notice and the Summary Notice advised potential Settlement Class Members of the date, time, place, and purpose of the Settlement Hearing. The Notice further advised that

any objections to the Settlement were required to be filed with the Court and served on counsel for the Parties such that they were received by November 10, 2022;

F. The provisions of the Notice Order as to notice were complied with;

G. The Settlement Hearing was duly held before this Court on December 1, 2022, at which time all interested Persons were afforded the opportunity to be heard; and

H. The Court has reviewed and considered the Stipulation, all papers filed and proceedings held in connection with the Settlement, the record in the Action, and good cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. **Jurisdiction.** The Court has jurisdiction over the subject matter of the Action and all matters relating to the Settlement, as well as personal jurisdiction over all of the Parties and each of the Settlement Class Members.

2. **Incorporation of Settlement Documents.** This Judgment incorporates by reference and makes a part hereof: (i) the Stipulation filed with the Court on April 13, 2022; and (ii) the Notice, which was filed with the Court on October 27, 2022, as though fully set forth herein. Capitalized terms not defined in this Judgment shall have the meaning set forth in the Stipulation.

3. **Notice.** The Court finds that the mailing and publication of the Notice, Summary Notice, and Claim Form: (i) complied with the Notice Order; (ii) constituted the best notice practicable under the circumstances; (iii) constituted notice that was reasonably calculated to apprise Settlement Class Members of the effect of the Settlement, the Judgment, the proposed Plan of Allocation, Lead Counsel's request for an award of attorneys' fees and payment of litigation expenses incurred in connection with the prosecution of the Action, Settlement Class Members' right to object or seek exclusion from the Settlement Class, and their right to appear at the

Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all Persons entitled to receive notice of the proposed Settlement; and (v) satisfied the notice requirements of § 904 of the New York Civil Practice Law and Rules (“CPLR”), the Due Process Clause of the United States Constitution, and Section 27 of the Securities Act of 1933, 15 U.S.C. §77z-1(a)(7), and the rules of this Court.

4. **Class Certification for Purposes of the Settlement.** The Court hereby affirms its determinations in the Notice Order and finally certifies, for purposes of the Settlement only, pursuant to CPLR §§ 901 and 902, the Settlement Class of: all persons and entities that purchased or otherwise acquired Benefitfocus publicly traded common stock pursuant and/or traceable to the Offering Documents issued in connection with the March 1, 2019 SPO and/or who subsequently purchased or otherwise acquired Benefitfocus publicly traded common stock during the Class Period, and who were damaged thereby. Excluded from the Settlement Class are: (i) Defendants; (ii) the Individual Defendants’ immediate family members; (iii) the officers, directors, and affiliates of Benefitfocus; (iv) the Selling Stockholder Defendants and the Underwriter Defendants at all relevant times; (v) any entity in which a Defendant has or had a majority ownership interest; and (vi) the legal representatives, heirs, successors or assigns of any excluded person or entity. No one has sought exclusion from the Settlement Class.

5. Pursuant to CPLR §§ 901 and 902, and for purposes of the Settlement only, the Court hereby re-affirms its determinations in the Notice Order and finally certifies City of Pittsburgh Comprehensive Municipal Pension Trust Fund as Class Representative for the Settlement Class; and finally appoints the law firm of Labaton Sucharow LLP as Class Counsel for the Settlement Class.

6. **Objections.** There have been no objections to the Settlement.

7. **Final Settlement Approval and Dismissal of Claims.** Pursuant to, and in accordance with, CPLR § 908, the Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects, and finds that the Settlement is fair, reasonable, adequate, and in the best interest of the Settlement Class. This Court further finds that the Settlement set forth in the Stipulation is the result of good faith, arm's-length negotiations between experienced counsel representing the interests of Lead Plaintiff, the Settlement Class, and Defendants. The extent of support by the Settlement Class, the judgment of Lead Counsel, and the complex nature of the legal and factual issues in the Action further support approval of the Settlement. The Parties are directed to implement, perform, and consummate the Settlement in accordance with the terms and provisions of the Stipulation.

8. The Amended Class Action Complaint for Violations of the Securities Act of 1933 (the "Amended Complaint"), filed on April 23, 2021, is dismissed in its entirety, with prejudice, and without costs to any Party, except as otherwise provided in the Stipulation.

9. **Releases.** The Releases set forth in Paragraphs 4 and 5 of the Stipulation, together with the definitions contained in Paragraph 1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. Accordingly, this Court orders that:

(a) Upon the Effective Date of the Settlement, Lead Plaintiff and each and every other Settlement Class Member, on behalf of themselves and each of their respective Plaintiff Releasers, in their capacities as such, shall be deemed to have fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, discharged, and dismissed with prejudice, and without costs, each and every one of the Plaintiff's Released Claims against each and every one of the Defendant Releasees and shall forever be barred and enjoined from directly or indirectly commencing, instituting, participating in, prosecuting, or continuing to prosecute any

action or other proceeding in any court of law or equity, arbitration tribunal, administrative forum, or any other forum, asserting any or all of the Plaintiff's Released Claims against the Defendant Releasees.

(b) Upon the Effective Date of the Settlement, Defendant Releasors, on behalf of themselves and each of their respective legal representatives, heirs, executors, trustees, administrators, predecessors, successors, and assigns, in their capacities as such, shall be deemed to have fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, discharged, and dismissed with prejudice, and without costs, each and every one of the Defendants' Released Claims against each and every one of the Plaintiff Releasees and shall forever be barred and enjoined from commencing, instituting, prosecuting, or continuing to prosecute any or all of the Defendants' Released Claims against any and all of the Plaintiff Releasees.

10. Notwithstanding Paragraph 9 above, nothing in this Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Stipulation or this Judgment.

11. Each Settlement Class Member, whether or not such Settlement Class Member executes and delivers a Claim Form, is bound by this Judgment, including, without limitation, the release of claims as set forth herein and in the Stipulation.

12. **Complete Bar Order.**

(a) Any and all Persons are permanently barred, enjoined, and restrained, to the fullest extent permitted by applicable law, from commencing, prosecuting, or asserting any and all claims for indemnity or contribution against any Defendant Releasee (or any other claim against any Defendant Releasee where the alleged injury to such Person is that Person's actual or threatened liability to the Settlement Class or a Settlement Class Member in the Action), based upon, arising out of, or related to the Plaintiff's Released Claims, whether arising under state,

federal, or foreign law, as claims, cross-claims, counterclaims, or third-party claims, whether asserted in the Action, in this Court, in any federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere. However, with respect to any judgment that the Settlement Class or a Settlement Class Member may obtain against such Person based upon, arising out of, or relating to any Plaintiff's Released Claims belonging to the Settlement Class or a Settlement Class Member, that Person shall be entitled to a credit of the greater of (i) an amount that corresponds to the percentage of responsibility of the Defendant Releasees for the loss to the Settlement Class or the Settlement Class Member for common damages, or (ii) the amount paid by or on behalf of the Defendant Releasees to the Settlement Class or the Settlement Class Member for common damages;

(b) Each and every Defendant Releasee is hereby permanently barred, enjoined, and restrained, to the fullest extent permitted by applicable law, from commencing, prosecuting, or asserting any and all claims for indemnity or contribution against any Person other than a Person whose liability to the Settlement Class has been extinguished by the Settlement (or any other claim against any such Person where the alleged injury to such Defendant Releasee is that Defendant Releasee's actual or threatened liability to the Settlement Class or a Settlement Class Member in the Action), based upon, arising out of, or related to the Plaintiff's Released Claims, whether arising under state, federal, or foreign law, as claims, cross claims, counterclaims, or third-party claims, whether asserted in the Action, in this Court, in any other federal or state court, or in any other court, arbitration proceeding, administrative agency, or other forum in the United States or elsewhere;

(c) Nothing in this Complete Bar Order shall prevent a putative Settlement Class Member who validly requested exclusion from the Settlement Class from pursuing any

Plaintiff's Released Claim against any Defendant Releasee. If any putative Settlement Class Member who validly requested exclusion from the Settlement Class pursues any such Plaintiff's Released Claim against any Defendant Releasee, nothing in this Complete Bar Order or in the Stipulation shall operate to preclude such Defendant Releasee from asserting any claim of any kind against such putative Settlement Class Member (or seeking contribution or indemnity from any Person, including any co-defendant in the Action, in respect of the claim of such putative Settlement Class Member who validly requests exclusion from the Settlement Class);

(d) Nothing in this Complete Bar Order shall release or alter the contractual rights, if any, under the terms of any written agreements between or among the Defendant Releasers; and

(e) Notwithstanding anything in this Paragraph, nothing in the Stipulation or in this Complete Bar Order shall operate to preclude the Defendant Releasers from asserting any claims against their own insurers.

13. **Binding Effect.** The terms of the Stipulation and of this Judgment shall be forever binding on and inure to the benefit of Defendants, Lead Plaintiff, all other members of the Settlement Class (regardless of whether or not any individual Settlement Class Member submits a Claim Form or seeks or obtains a distribution from the Net Settlement Fund), and the Released Parties, as well as their respective heirs, executors, trustees, administrators, predecessors, successors, and assigns, in their capacities as such.

14. **Rule 11 Findings.** The Court finds and concludes that during the course of the litigation, the Parties and their respective counsel have complied fully with the requirements of 22 New York Code, Rules and Regulations Part 130 and any other applicable law or rule similar to

Federal Rule of Civil Procedure 11 in connection with the commencement, maintenance, prosecution, defense, and settlement of the Action.

15. **Qualified Settlement Fund.** Pursuant to the Stipulation, the Settlement Fund will be treated as a Qualified Settlement Fund within the meaning of § 468B of the Internal Revenue Code of 1986, as amended, and Treasury Regulation § 1.468B-1.

16. **No Admissions.** Except as set forth in Paragraph 17 below, this Judgment, the Stipulation, and any discussion, negotiation, proceeding, or agreement relating to the Stipulation, the Settlement, and/or any matter arising in connection with settlement discussions or negotiations, proceedings, or agreements, shall not be offered or received against or to the prejudice of the Parties or their respective counsel, for any purpose other than in an action or any proceeding or motion to enforce the terms of the Stipulation or the Judgment, and in particular:

(a) do not constitute, and shall not be offered or received against or to the prejudice of Defendants as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants or any Defendant Releasee with respect to the truth of any allegation by Lead Plaintiff and the Settlement Class, the validity of any claim that has been or could have been asserted in the Action or in any litigation, including but not limited to the Plaintiff's Released Claims, the deficiency of any defense that has been or could have been asserted in this Action or in any other litigation, the entitlement of any investors who are not Settlement Class Members to any payment by or damages from the Defendants or Defendant Releasees, or of any liability, damages, negligence, fault or wrongdoing of Defendants or any Person whatsoever;

(b) do not constitute, and shall not be offered or received against or to the prejudice of Defendants as evidence of, or construed as, or deemed to be evidence of any

presumption, concession, or admission by Defendants or any Defendant Releasee of any fault, misrepresentation, or omission with respect to any statement or written document approved or made by Defendants or against or to the prejudice of Lead Plaintiff or any other member of the Settlement Class as evidence of any infirmity in the claims of Lead Plaintiff or the other members of the Settlement Class;

(c) do not constitute, and shall not be offered or received against or to the prejudice of Defendants as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants or any Defendant Releasee, Lead Plaintiff, any other member of the Settlement Class, or their respective counsel with respect to any liability, damages, negligence, fault, infirmity, or wrongdoing or in any way referred to for any other reason against or to the prejudice of any of the Defendants or any Defendant Releasee, Lead Plaintiff, other members of the Settlement Class, or their respective counsel, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation;

(d) do not constitute, and shall not be offered or received against or to the prejudice of Defendants as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants or any Defendant Releasee, Lead Plaintiff, or any other member of the Settlement Class, that the consideration to be given hereunder represents the amount that could be or would have been recovered after trial;

(e) do not constitute, and shall not be offered or received against or to the prejudice of Lead Plaintiff as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Lead Plaintiff, or any other member of the Settlement

Class that any of their claims are without merit or infirm or that damages recoverable under any of the complaints filed in the Action would not have exceeded the Settlement Amount; and

(f) do not constitute, and shall not be offered or received against or to the prejudice of Defendants as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants or any Defendant Releasee that class certification is appropriate in this Action or any other action, except for the purposes of this Settlement.

17. Notwithstanding the foregoing, the Parties and other Released Parties may file or refer to this Judgment, the Stipulation, and/or any Proof of Claim: (i) to effectuate the liability protections granted hereunder, including without limitation to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, injunction, statute of limitations, statute of repose, good-faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim; (ii) to enforce any applicable insurance policies and any agreements relating thereto; or (iii) to enforce the terms of the Stipulation and/or the Judgment. The Parties and other Released Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement.

18. As set forth in the Stipulation, Defendants, Defendants' Counsel, and Defendant Releasees shall have no responsibility for, interest in, or liability whatsoever with respect to the selection of the Claims Administrator, the administration of the Settlement, or the actions or decisions of the Claims Administrator and shall have no liability whatsoever to the Plaintiff Releasees in connection with such administration, including, but not limited to: (i) any act, omission, or determination by Lead Counsel or the Claims Administrator, or any of their respective designees or agents, in connection with the administration of the Settlement, Escrow Account, or

otherwise; (ii) the management, investment, or distribution of the Settlement Fund; (iii) the Plan of Allocation; (iv) the determination, administration, calculation, or payment of any claims asserted against the Settlement Fund; (v) any loss suffered by, or fluctuation in value of, the Settlement Fund; or (vi) the payment or withholding of any Taxes, expenses, and/or costs incurred in connection with the taxation of the Settlement Fund, distributions or other payments from the Escrow Account, or the filing of any Tax Returns (as defined in Paragraph 11(a) of the Stipulation). No Person, including Lead Plaintiff, Settlement Class Members, and Lead Counsel, shall have any claim of any kind against Defendants, Defendants' Counsel, or Defendant Releasees with respect to the matters set forth in this Paragraph.

19. No Person shall have any claim against the Defendant Releasees, the Plaintiff Releasees, or the Claims Administrator based on determinations or distributions made substantially in accordance with the Stipulation and the Settlement, the Plan of Allocation, and this Judgment or order(s) of this Court.

20. **Extensions of Time.** Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

21. **Separate Orders for Attorneys' Fees and Expenses and Plan of Allocation.** A separate order shall be entered regarding Lead Counsel's application for attorneys' fees and payment of expenses as allowed by the Court. A separate order shall be entered regarding the proposed Plan of Allocation for the Net Settlement Fund. Such orders, including any changes to the Plan of Allocation reflected therein, shall in no way disturb or affect this Judgment or the Settlement and shall be considered separate therefrom.

22. **Retention of Jurisdiction.** Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (i) the Parties for purposes of

the administration, interpretation, implementation, and enforcement of the Settlement; (ii) the implementation and administration of the Settlement; (iii) the allowance, disallowance, or adjustment of any Settlement Class Member's claim on equitable grounds; (iv) any motion for an award of attorneys' fees and/or litigation expenses by Lead Counsel in the Action that will be paid from the Settlement Fund; (v) any motion to approve the Plan of Allocation; and (vi) the Settlement Class Members for all matters relating to the Action.


23. **Termination.** If the Effective Date of the Settlement does not occur, or the Settlement is terminated as provided in the Stipulation, then this Judgment (other than Paragraph 16) and any orders of the Court relating to the Settlement, shall be vacated, rendered null and void, and be of no further force or effect, and without prejudice to any party, and each party shall be restored to his, her or its respective litigation positions as they existed prior to February 8, 2022, as provided for in the Stipulation.

24. **Entry of Final Judgment.** There is no just reason to delay the entry of this Judgment as a final judgment in this Action. Accordingly, the Clerk of the Court is expressly directed to immediately enter this final judgment in this Action.

IT IS SO ORDERED.

Dated: New York, New York

December 1, 2022


The Honorable Andrew Borrok