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

ERIE COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

NN, INC., RICHARD D. HOLDER, THOMAS C. BURWELL, JR., ROBERT E. BRUNNER, WILLIAM DRIES, DAVID K. FLOYD, DAVID L. PUGH, STEVEN T. WARSHAW, J.P. MORGAN SECURITIES LLC, ROBERT W. BAIRD & CO. INCORPORATED, KEYBANC CAPITAL MARKETS INC., SUNTRUST ROBINSON HUMPHREY, INC., LAKE STREET CAPITAL MARKETS, LLC, STEPHENS INC., WILLIAM BLAIR & COMPANY, L.L.C., CJS SECURITIES, INC., and REGIONS SECURITIES LLC,

Defendants.

Index No. 656462/2019

(Borrok, J.)

Part 53

Motion Sequence No. 6

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION AND AWARD OF ATTORNEYS' FEES AND EXPENSES TO PLAINTIFF'S COUNSEL AND SERVICE AWARD TO PLAINTIFF

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1
FACTUAL AND PROCEDURAL BACKGROUND.. 5
ARGUMENT 5
I. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND MERITS FINAL APPROVAL.. 5
A. *Colt* Factor One: The Likelihood Plaintiff Will Succeed on the Merits Strongly Supports Final Approval 6
B. *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 8
C. *Colt* Factor Five: The Complexity and Nature of the Issues of Law and Fact Further Support Final Approval 9
II. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE 10
III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED 11
A. The Proposed Settlement Class Easily Satisfies CPLR §901 11
B. The CPLR §902 Discretionary Factors Also Support Class Certification.. 13
IV. THE COURT SHOULD AWARD ATTORNEYS' FEES EQUAL TO 33 AND 1/3% OF THE SETTLEMENT AMOUNT AND EXPENSES 14
A. The Requested Fee Is Reasonable Under the Percentage Method.. 14
B. The 33 and 1/3% Fee Request Is Reasonable Under the Lodestar Method.. 18
C. Plaintiff's Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of This Action 20
D. Service Award to Plaintiff 21
V. CONCLUSION.. 22

TABLE OF AUTHORITIES

Page(s)

Cases

Akerman v. Oryx Commc'ns Inc.,
810 F.2d 336 (2d Cir. 1987)....6

Anixter v. Home-Stake Prod. Co.,
77 F.3d 1215 (10th Cir. 1996)....8

Athale v. Sinotech Energy Ltd.,
No. 11 CIV. 05831 (AJN), 2013 WL 11310686 (S.D.N.Y. Sept. 4, 2013)....19

Blum v. Stenson,
465 U.S. 886 (1984) (Brennan, J., concurring)....17

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)....14

Borden v. 400 E. 55th St. Assocs., L.P.,
24 N.Y.3d 382 (2014)....11

Caesar v. Chemical Bank,
118 Misc. 2d 118 (N.Y. Sup. Ct. 1983), *aff'd*, 106 A.D.2d 353 (N.Y. App. Div. 1st Dep't 1984)....12

Charles v. Avis Budget Car Rental, LLC,
No. 152627/2016, 2017 WL 6539280 (N.Y. Sup. Ct. Dec. 21, 2017)....15

Chester Cty. Emp.s Ret. Fund v. Alnylam Pharmaceuticals, Inc.,
No. 655272/2019, NYSCEF No. 157 (Sup. Ct. N.Y. Cty. Apr. 12, 2022)....15

Chimenti v. Am. Express Co.,
97 A.D.2d 351 (N.Y. App. Div. 1st Dep't 1983)....14

City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.,
12 Civ. 0256 (LAK) (AJP), 2017 WL 3608298 (S.D.N.Y. Aug. 22, 2017)....13

City Trading Fund v. Nye,
72 N.Y.S.3d 371 (N.Y. Sup. Ct. 2018)....9

Clemons v. A.C.I. Found., Ltd.,
No. 154573/2015, 2017 WL 1968654 (N.Y. Sup. Ct. May 12, 2017)....15

D'Amato v. Deutsche Bank,
236 F.3d 78 (2d Cir. 2001)....9

Downing v. First Lenox Terrace Assocs., LLC,
No. 100725/2010, 2020 WL 6469307 (N.Y. Sup. Ct. July 01, 2020) 21

Fernandez v. Legends Hosp.,
No. 152208/2014, 2015 WL 3932897 (N.Y. Sup. Ct. Jun. 22, 2015) 15, 19

Fiala v. Metro. Life Ins. Co.,
899 N.Y.S. 2d 531 (N.Y. Sup. Ct.2010) 5, 16

Gordon v. Verizon Commc'ns, Inc.,
148 A.D.3d 146 (N.Y. App. Div. 1st Dep't 2017)..5, 8, 9

Hayes v. Harmony Gold Mining Co.,
509 F. App'x 21 (2d Cir. 2013) 15

Hicks v. Stanley,
No. 01 Civ. 10071(RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005)..................................7

In re Advanced Battery Techs. Secs. Litig.,
298 F.R.D. 171 (S.D.N.Y. 2014) 10

In re Alstom SA Sec. Litig.,
253 F.R.D. 266 (S.D.N.Y. 2008) 12

In re Altice USA, Inc. Securities Litigation,
No. 711788/2018, NYSCEF No. 161 (Sup. Ct. Queens Cty. Feb. 24, 2022).........................15

In re AOL Time Warner, Inc. Secs. & ERISA Litig.,
No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236 (S.D.N.Y. Apr. 6,
2006) 9

In re BHP Billiton Secs. Litig.,
No. 1:16-cv-01445, 2019 WL 1577313 (S.D.N.Y. Apr. 10, 2019) 19

In re BioScrip, Inc. Secs. Litig.
273 F. Supp. 3d 474 (S.D.N.Y. 2017)..19

In re BISYS Secs. Litig.,
No. 04 Civ. 3840, 2007 WL 2049726 (S.D.N.Y. July 16, 2007) 19

In re China MediaExpress Holdings, Inc.,
No. 11-CV-0804, 2015 WL 13639423 (S.D.N.Y. Sept. 18, 2015)...15

In re Colt Indus. S'holder Litig.,
155 A.D.2d 154 (N.Y. App. Div. 1st Dep't 1990)...5, 6

In re Deutsche Bank AG Sec. Litig.,
328 F.R.D. 71 (S.D.N.Y. 2018) 12

In re Everquote, Inc. Secs. Litig.,
No. 651177/2019, NYSCEF No. 132 (Sup. Ct. N.Y. Cty. June 11, 2020) 15

In re Facebook, Inc. IPO Sec. & Derivative Litig.,
No. MDL 12-2389, 2015 WL 6971424 (S.D.N.Y. Nov. 9, 2015), *aff'd sub nom. In re Facebook, Inc.*, 674 F. App'x 37 (2d Cir. 2016) 19

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
574 F.3d 29 (2d Cir. 2009) 13

In re Flag Telecom Holdings, Ltd. Sec. Litig.,
No. 02-cv- 3400, 2010 WL 4537550 (S.D.N.Y. Nov. 8, 2010) 20

In re Gilat Satellite Networks, Ltd.,
No. CV-02-1510, 2007 WL 1191048 (E.D.N.Y. Apr. 19, 2007) 9

In re KeySpan Corp. Sec. Litig.,
No. 01 CV 5852(ARR), 2005 WL 3093399 (E.D.N.Y. Sept. 30, 2005) 19

In re Merrill Lynch & Co. Res. Reports Sec. Litig.,
No. 02 MDL 1484(JFK), 2007 WL 313474 (S.D.N.Y. Feb. 1, 2007) 7

In re MF Glob. Holdings Ltd. Inv. Litig.,
310 F.R.D. 230 (S.D.N.Y. 2015) 13

In re Netshoes Secs. Litig.,
No. 157435/2018, NYSCEF No. 141 (Sup. Ct. N.Y. Cty. Dec. 10, 2020) 10

In re PPDAI Grp. Inc. Sec. Litig.,
No. 1:18-cv-06716-TAM, ECF No. 83-3 (E.D.N.Y. Jan. 21, 2022) 15

In re Telik, Inc. Secs. Litig.,
576 F. Supp. 2d 570 (S.D.N.Y. 2008) 19

In re Warner Commc'ns Sec. Litig.,
618 F. Supp. 735 (S.D.N.Y. 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986) 6

In re WorldCom, Inc. Secs. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005) 10

Kudinov v. Kel-Tech Constr. Inc.,
65 A.D.3d 481 (N.Y. App. Div. 1st Dep't 2009) 14

Landmen Partners Inc. v. Blackstone Grp. L.P.,
No. 08-cv-03601, 2013 WL 11330936 (S.D.N.Y. Dec. 18, 2013) 15

Lopez v. Dinex Grp., LLC,
2015 WL 5882842 (N.Y. Sup. Ct. Oct. 6, 2015) 15, 19, 20, 21

Luis v. Diskal Inc.,
No. 708875/2020, 2021 WL 7287562 (N.Y. Sup. Ct. Nov. 05, 2021) 19

Maley v. Del Glob. Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002) 11

Matheson v. T-Bone Rest., LLC,
No. 09 Civ. 4214 DAB, 2011 WL 6268216 (S.D.N.Y. Dec. 13, 2011) 22

Matter of Xerox Corp. Consol. S'holder Litig.,
65 Misc. 3d 1201(A), 2019 N.Y. Slip Op. 51467(U), (N.Y. Sup. Ct. 2019) 13

Missouri v. Jenkins,
491 U.S. 274 (1989) 17

Moran v. JLJ IV Enterprises, Inc.,
No. 651136/2019, 2021 WL 4991395 (N.Y. Sup. Ct. Oct. 27, 2021) 21

Nawrocki v. Proto Constr. & Dev. Corp.,
No. 104229/2007, 2010 WL 1531428 (N.Y. Sup. Ct. April 7, 2010) 14

Ousmane v. City of New York,
No. 402648/2004, 2009 WL 722294 (N.Y. Sup. Ct. Mar. 17, 2009) 18

Pressner v. MortgageIT Holdings, Inc.,
No. 602472/2006, 2007 WL 1794935 (N.Y. Sup. Ct. May 29, 2007) 8

Pruitt v. Rockefeller Ctr. Props., Inc.,
167 A.D.2d 14 (N.Y. App. Div. 1st Dep't 1991) 11, 12

Ret. Fund v. J.P. Morgan Chase & Co.,
301 F.R.D. 116 (S.D.N.Y. 2014) 11

Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.,
277 F.R.D. 97 (S.D.N.Y. 2011) 11

Robbins v. Koger Props., Inc.,
116 F.3d 1441 (11th Cir. 1997) 7

Ryan v. Volume Servs. Am.,
No. 652970/2012, 2013 WL 12147011 (N.Y. Sup. Ct. Mar. 7, 2013) 15

Stecko v. RLI Ins. Co.,
121 A.D.3d 542 (N.Y. App. Div. 1st Dep't 2014) 11

Sykes v. Mel S. Harris & Assocs. LLC,
780 F.3d 70 (2d Cir. 2015) 12

Taft v. Ackermans,
No. 02 CIV. 7951 (PKL), 2007 WL 414493 (S.D.N.Y. Jan. 31, 2007) 19

Wallace v. Intralinks,
302 F.R.D. 310 (S.D.N.Y. 2014) 12

Yi Xiang v. Inovalon Holdings, Inc.,
327 F.R.D. 510 (S.D.N.Y. 2018) 13

Statutes, Rules & Regulations

New York Civil Practice Laws and Rules
CPLR 901....................14
CPLR §901....................11
CPLR §901(1)....................12
CPLR §901(2)....................12
CPLR §901....................11, 14
CPLR §902....................11, 13, 14
CPLR §902(1)....................13
CPLR §902(2)....................13
CPLR §902(3)....................13
CPLR §902(4)....................14
CPLR §902(5)....................13
CPLR §908....................5
CPLR §909....................15

Pursuant to Civil Practice Law and Rules ("CPLR") Article 9, Plaintiff Erie County Employees' Retirement System ("Erie County" or "Plaintiff"), on behalf of itself and the Settlement Class, respectfully submits this memorandum of law in support of its motion for: (1) final approval of the proposed $9,500,000 settlement (the "Settlement") of this securities class action (the "Action"); (2) approval of the proposed Plan of Allocation; and (3) an award of attorneys' fees and expenses to Plaintiff's Counsel and a service award to Plaintiff for representing the Settlement Class.

The terms of the Settlement are set forth in the Stipulation of Settlement (the "Stipulation"), which was filed with the Court on July 25, 2022. NYSCEF No. 116.[1]

PRELIMINARY STATEMENT

After over two and a half years of hard-fought litigation, the Parties have agreed to a $9.5 million, all-cash settlement for the benefit of the Settlement Class in this Action. Plaintiff and Plaintiff's Counsel respectfully submit that, as detailed below and in the accompanying Affirmation of Deborah Clark-Weintraub ("Weintraub Aff."), the Settlement represents an excellent result for the Settlement Class and should be finally approved.

The Settlement was reached after arm's-length negotiations that were held under the auspices of a highly respected and experienced mediator, Gregory P. Lindstrom, Esq. of Phillips ADR. Through their active litigation of Plaintiff's claims and Defendants' defenses, including significant motion practice in this Court, an appeal in the First Department, complete merits discovery, and consultation with experts, and their candid exchange of views in the mediation

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation and the Affirmation of Deborah Clark-Weintraub in Support of Plaintiff's Motion for Final Approval of the Settlement and Plan of Allocation, and Award of Attorneys' Fees and Expenses to Plaintiff's Counsel and Service Award to Plaintiff ("Weintraub Aff."), submitted herewith.

process, the Parties and their experienced counsel were fully informed of the strengths and weaknesses of the case at the time of Settlement. Indeed, the issues of liability, negative loss causation and damages in the Action were and, absent settlement, would have continued to be, hotly contested. Defendants strenuously denied that Plaintiff could prove that any of the challenged statements from the Registration Statement and Prospectus (the "Offering Documents") were materially false or misleading. Defendants also vigorously disputed whether any of the losses suffered by the Settlement Class could be attributed to the alleged untrue and misleading statements complained of in the Amended Complaint.

Despite those risks, the Settlement achieved by Plaintiff and Plaintiff's Counsel represents an excellent recovery as a percentage of the available damages, relative to similar cases, and in absolute terms. The proposed Settlement of $9,500,000 obtained here represents approximately 10% of the maximum theoretically recoverable statutory damages of $93 million and 20% of Plaintiff's expert's best estimate of reasonably recoverable damages of $47.6 million. Weintraub Aff., ¶4. In contrast, the median Securities Act settlement from 2012 through 2021 was $8.9 million and, during the same period, the median recovery in such settlements was 5.2% and 4.2% of estimated losses where total investor losses are between $20 million to $49 million and $50 million to $99 million, respectively. *Id*.

Thus, the $9,500,000 cash Settlement provides a certain, immediate, and substantial cash recovery for the Settlement Class, while eliminating the many risks of continued litigation, which could result in a lower recovery or no recovery at all. In light of those potential obstacles, and the substantial time and expense that continued litigation would require, Plaintiff and Plaintiff's Counsel believe that the Settlement is an outstanding result for the Settlement Class and warrants final approval.

Plaintiff also respectfully requests that the Court approve the proposed Plan of Allocation of the Settlement proceeds. The Plan of Allocation governs how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. The Plan of Allocation was prepared with the assistance of Plaintiff's expert Scott D. Hakala of ValueScope, Inc., and is similar to plans approved in other securities class action cases. It provides for the *pro rata* distribution of Settlement proceeds based on the statutory damages formula under the Securities Act and each Class Member's recognized loss. Plaintiff and Plaintiff's Counsel respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Settlement proceeds to eligible Class Members and also warrants the Court's approval.

Confirming the fairness of the proposed Settlement and Plan of Allocation is the fact that, to date,[2] Settlement Class Members have reacted positively to it. As of the date of this filing, there have been no objections to the Settlement or the proposed Plan of Allocation following the mailing of 7,839 copies of the Notice to potential Settlement Class Members and nominees beginning on September 16, 2022, and the publication of Summary Notice on September 26, 2022. *See* Affirmation of Justin R. Hughes Regarding Notice Dissemination, Publication, and Requests for Exclusion received to Date ("Hughes Aff."), ¶¶6, 10, 11, 16.

Plaintiff's Counsel also respectfully requests that the Court approve its request for an attorneys' fee award of 33 and 1/3% of the Settlement Amount. As discussed herein, the requested fee is well within the range of percentage-based fees awarded in securities class actions and fully merited by a review of all relevant factors. As detailed below and in the accompanying Affirmation of Deborah Clark-Weintraub, Plaintiff's Counsel vigorously investigated and

---

[2] As the deadline for objections and exclusions had not yet passed, if any timely objections are subsequently received by the deadline of November 15, 2022, Plaintiff's Counsel will address them in the reply brief due on November 23, 2022.

prosecuted this Action on behalf of the Class and overcame repeated attempts by Defendants to dismiss the Action. To obtain this outstanding result, Plaintiff's Counsel and their paraprofessionals spent 3,352.4 hours prosecuting this Action, resulting in a lodestar of $2,862,147.75. The requested fee award would result in a modest multiplier of 1.10. By contrast, courts routinely award higher multipliers of counsel's lodestar following the successful resolution of a securities class action case. *Infra*, §IV.B.

Further, Plaintiff's Counsel also seeks reimbursement of $170,217.76 in costs incurred that were reasonably necessary to prosecute the action. As further set forth below, the costs were for customary expenses including experts, court reporters, electronic discovery, legal research, mediation, travel and filing and witness related fees. Courts regularly approve similar requests for reimbursement. *Infra*, §IV.D. Significantly, Plaintiff's Counsel's fee and expense request also has the full support of Plaintiff. *See* Erie County Aff., ¶8.[3] In addition, although the Notice and Summary Notice informed Class Members of the potential amount of fees and reimbursement that Plaintiff's Counsel would seek, to date, no objections to Plaintiff's Counsel's fee and expense request have been received.

Also, Plaintiff respectfully requests a service award in the amount of $15,000 for the time and expense it has devoted to prosecuting this Action. Without Plaintiff's work, the Settlement Class would not have received this outstanding recovery. Again, the notice program informed Class Members that Plaintiff would seek a service award in this amount and there has been no objection to date.

---

[3] "Erie County Aff." refers to the Affirmation of Dr. Kyle Foust on behalf of Erie County Employees' Retirement System in Support of Motions for: (1) Final Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award, dated November 1, 2022, submitted herewith.

In sum, for the reasons set forth herein and in the accompanying Affirmation of Deborah Clark-Weintraub, Plaintiff and Plaintiff's Counsel respectfully request that the Court grant final approval of the Settlement and Plan of Allocation, and grant Plaintiff's Counsel's requested award of attorneys' fees and expenses and the requested service award to Plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff respectfully refers the Court to the accompanying Weintraub Affirmation for a detailed discussion of the background and procedural history of the Action, the extensive efforts undertaken by Plaintiff and Plaintiff's Counsel during the course of the Action, the risks of continued litigation, and the benefits of the Settlement. Weintraub Aff., ¶¶14-47, 49-52.

ARGUMENT

I. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND MERITS FINAL APPROVAL

CPLR §908 requires that any settlement of a class action must be approved by the Court. "[A]pproval is determined by the fairness of the settlement, its adequacy, its reasonableness and the best interests of the class members." *Fiala v. Metro. Life Ins. Co.*, 899 N.Y.S. 2d 531, 537 (N.Y. Sup. Ct.2010) (citing cases).[4] New York Courts have long evaluated whether a proposed class action settlement meets this standard by applying the five factors articulated by the First Department *In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (N.Y. App. Div. 1st Dep't 1990). *See Gordon v. Verizon Commc'ns, Inc.*, 148 A.D.3d 146, 156 (N.Y. App. Div. 1st Dep't 2017) (Review of class action settlement "must begin by examining the proposed settlement through the lens of each of the factors we have articulated in our longstanding standard in *Colt*."). Those factors are "the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact."

[4] Unless otherwise indicated, citations are omitted and emphasis is added.

Colt, 155 A.D.2d at 160. Each of these factors strongly favor final approval of the proposed Settlement.

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

As detailed in the Affirmation of Deborah Clark-Weintraub, while Plaintiff strongly believes in the strength of its case, Defendants adamantly deny any wrongdoing and a successful outcome was not assured had the litigation continued. Although the Action survived Defendants' motion to dismiss (and Defendants' appeal of that ruling), that motion tested the sufficiency of the factual allegations in the Amended Complaint, which were presumed to be true. Defendants consistently and vigorously denied that Plaintiff could prove that any of the challenged statements in the Offering Documents concerning NN's Mobile and Power Solutions business segments were materially untrue or misleading. Although Plaintiff believed it had adduced compelling evidence in discovery with respect to these issues, there was no guarantee that a jury would have accepted Plaintiff's view of the evidence.

In addition, the risk of establishing damages and overcoming Defendants' affirmative defense of "negative causation" was a primary concern and would have come down to an unpredictable "battle of the experts." *See In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (Approving settlement when "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."), *aff'd* 798 F.2d 35 (2d Cir. 1986). Negative causation refers to a Securities Act defendant's statutory right to attempt to show that all or a portion of the maximum possible damages under Section 11(e)'s statutory damages formula are not recoverable because they were not caused by the challenged statements and omissions. *Akerman v. Oryx Commc'ns Inc.*, 810

F.2d 336, 341 (2d Cir. 1987). Although Plaintiff's expert estimated that maximum theoretically recoverable statutory damages in the Action were $93 million, Plaintiff's expert estimated that reasonably recoverable damages in light of Defendants' anticipated negative causation arguments were significantly lower – $47 million or even less. Thus, the proposed $9.5 million Settlement here, which represents approximately 10% of the Settlement Class' estimated maximum statutory damages and 20% of estimated reasonably recoverable damages, is highly favorable compared to the recoveries in similar securities cases, which are typically below the percentages here. Weintraub Aff., ¶4; *see also In re Merrill Lynch & Co. Res. Reports Sec. Litig.*, No. 02 MDL 1484(JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigation"); *Hicks v. Stanley*, No. 01 Civ. 10071(RJH), 2005 WL 2757792, at *7 (S.D.N.Y. Oct. 24, 2005) (settlement representing 3.8% of plaintiff's damage calculation was "within the range of reasonableness"). Further, when viewed in absolute terms, the total settlement amount represents an above-average recovery as well compared to similar securities class actions. Weintraub Aff., ¶4.

The Settlement is also unquestionably better than another distinct possibility – little or no recovery for the Class. Defendants, of course, claimed that damages were zero, and the risk of no recovery for the class in complex cases of this type is very real. In numerous hard-fought lawsuits, plaintiffs and the class ultimately received no recovery – despite years of hard work and interim success – due to the discovery of facts unknown when the case started, changes in the law while the case was pending, or a decision of a judge, jury, or court of appeals after a full trial. *See*, *e.g.*, *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (overturning jury verdict of $81 million for plaintiffs against an accounting firm on loss causation and entering judgment for

defendants); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1235 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs on the basis of an intervening 1994 Supreme Court opinion).

In short, Plaintiff faced significant risks to succeeding on the merits of its claims. In contrast, the proposed Settlement provides Class Members with a certain, above-average recovery with respect to their estimated maximum and reasonably recoverable damages. Accordingly, this factor supports final approval of the proposed Settlement.

B. *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

The next three *Colt* factors – the judgment of counsel, the extent of support from the parties, and the presence of good faith bargaining – also strongly support granting final approval.

First, the Settlement has the support of all Parties, as evidenced in the Stipulation filed with the Court (NYSCEF No. 112) and Plaintiff's affirmation (Erie County Aff., ¶8), filed concurrently with this memorandum. Additionally, although the deadline for objections has not yet passed, there has been no objection to any aspect of the Settlement to date. A lack of objections is indicative of the class' approval of a proposed settlement. *See Gordon*, 148 A.D.3d at 157 (Holding that settlement with 3 objectors and 250 opt outs had "the overwhelming support" of the class.); *Pressner v. MortgageIT Holdings, Inc.*, No. 602472/2006, 2007 WL 1794935, at *2 (N.Y. Sup. Ct. May 29, 2007) (approving settlement "since there has been no objection to the propose[d] settlement").

Second, in reaching the Settlement, Plaintiff was advised by competent and highly experienced counsel in securities class action litigation who concluded that it was fair, reasonable, and adequate, particularly when contrasted against the aforementioned risks, costs, and

uncertainties of continued litigation. Weintraub Aff., ¶¶53-55, 75. Thus, this factor also weighs in favor of the proposed Settlement. *Gordon*, 148 A.D.3d at 157.

Third, the Parties bargained in good faith with the assistance of an independent mediator, to reach and then document the Settlement. "[N]egotiations are presumed to have been conducted at arm's length and in good faith where there is no evidence to the contrary." *Gordon*, 148 A.D.3d at 157. Here, there is no evidence to the contrary. Indeed, that the Settlement was reached following months of negotiation conducted under the auspices of an independent mediator strongly supports the presumption of good faith negotiations. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (Mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure."). Thus, this factor also supports final approval of the Settlement.

C. *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, also supports approval of the proposed Settlement.[5] Courts have repeatedly recognized the "notorious complexity" of securities class action litigation. *In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006). Courts also acknowledge that "[s]ecurities class actions are . . . expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007). This Action was no exception. Had the case continued, extensive expert testimony would have been necessary, Defendants would surely have filed motions for summary judgment, and if those motions were denied, the case would have been tried. Further,

[5] This factor is closely related to the first factor, Plaintiff's likelihood of success. *See, e.g.*, *City Trading Fund v. Nye*, 72 N.Y.S.3d 371, 393 (N.Y. Sup. Ct. 2018) (evaluating the first and fifth *Colt* factors together in granting final approval).

even in the event Plaintiff prevailed at trial, the judgment would undoubtedly have been subject to post-trial motions and appeals, which could have prolonged the case for years. In contrast, the Settlement eliminates all of these substantial risks and provides a certain, above average recovery to Class Members compared to similar cases.

* * *

In sum, each of the *Colt* factors supports a finding that the proposed Settlement is fair, reasonable, and adequate and should be granted final approval.

II. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

The proposed Plan of Allocation was set forth in full in the Notice sent to Class Members. *See* Hughes Aff., Ex. A, Notice at 4-6. The standard for approval of the Plan of Allocation in New York state courts is the same as that for a settlement, namely, it must be "fair" and "reasonable." *In re Netshoes Secs. Litig.*, No. 157435/2018, NYSCEF No. 141, at 4, 7 (Sup. Ct. N.Y. Cty. Dec. 10, 2020). *See also In re WorldCom, Inc. Secs. Litig.,* 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (the "'allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.'"); *see also In re Advanced Battery Techs. Secs. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) ("'When formulated by competent and experienced class counsel,' a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis.'"). Plaintiff's Counsel developed the plan of allocation in close consultation with their damages expert, using allocation methodologies routinely applied in securities cases of this type. *See* Weintraub Aff. ¶66. Specifically, the Plan of Allocation is based on the decline in value of NN's shares that occurred following the revelation of NN's earnings shortfalls on November 7, 2018 and March 13, 2019, which Plaintiff alleges disclosed the truth concerning the problems with NN and its Mobile and Power Solutions divisions (which, in turn, reduced the amount of artificial inflation in the stock price allegedly caused by the alleged misstatements and omissions at issue).

Id., ¶67. The Plan of Allocation will apply in the same manner to all Class Members and, therefore, will result in an equitable distribution of the proceeds among Class Members who submit valid claims. *Id.* The proposed Plan of Allocation will therefore result in a fair and equitable distribution of the Net Settlement Fund and should be approved. There have been no objections to the Plan of Allocation to date, further supporting approval. Hughes Aff., ¶16; *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002).

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

For purposes of the Settlement only, Plaintiff seeks final certification of the Settlement Class. Courts have recognized that Securities Act cases like this one are "especially amenable to class action resolution." *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, 277 F.R.D. 97, 101 (S.D.N.Y. 2011)*; see also Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 21 (N.Y. App. Div. 1st Dep't 1991) (same); *Ft. Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 130 (S.D.N.Y. 2014) (same).

This Court preliminarily certified the Settlement Class in the Preliminary Approval Order, NYSCEF No. 119, and nothing has changed to alter the appropriateness of that determination. Because the elements of CPLR §§901 and 902 are satisfied, the Court should grant final certification of the Settlement Class.

A. The Proposed Settlement Class Easily Satisfies CPLR §901

The Court may certify a class if CPLR §901's elements of numerosity, commonality, typicality, adequacy, and superiority are satisfied. Each of these elements are met here.

Numerosity: Given that the Class likely consists of thousands of investors who purchased the millions of shares of NN common stock sold in the SPO, it meets the low numerosity threshold. *See, e.g.*, *Borden v. 400 E. 55th St. Assocs., L.P.*, 24 N.Y.3d 382, 399 (2014) ("[T]he legislature contemplated classes involving as few as 18 members . . . ."); *Stecko v. RLI Ins. Co.*, 121 A.D.3d

542, 542 (N.Y. App. Div. 1st Dep't 2014) (affirming lower court's certification of class consisting of approximately 50 members); *Caesar v. Chemical Bank*, 118 Misc. 2d 118, 120-21 (N.Y. Sup. Ct. 1983), *aff'd*, 106 A.D.2d 353 (N.Y. App. Div. 1st Dep't 1984) (certifying class consisting of 39 members); *Wallace v. Intralinks*, 302 F.R.D. 310, 315 (S.D.N.Y. 2014) (finding numerosity where "defendant had millions of shares outstanding during the class period[.]"); *see also In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 275 (S.D.N.Y. 2008) ("'[T]he numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period.'"). As it would be impractical to proceed on the basis of joinder in these circumstances, CPLR §901(1)'s numerosity requirement is plainly satisfied.

Commonality: 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.'" *Sykes v. Mel S. Harris & Assocs. LLC,* 780 F.3d 70, 84 (2d Cir. 2015). Here, as each Settlement Class Member's case turns on a single set of alleged misstatements and omissions relating to NN and the Securities Act's statutory formula for determining losses, CPLR §901(2)'s commonality requirement is met. Further, when, as here, class member's 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.

Typicality: For the same reason that common questions of law or fact predominate over individual questions, Plaintiff's claims are also typical of those of the proposed Class members, as they all purchased pursuant to the same allegedly untrue and misleading SPO Offering Documents and, therefore, have identical claims based on the same misconduct by Defendants. *In re Deutsche Bank AG Sec. Litig.*, 328 F.R.D. 71, 80-81 (S.D.N.Y. 2018); *see also Pruitt,* 167 A.D.2d at 22

(Holding that plaintiff's Securities Act §§11 and 12 claims were typical because they "arise[] out of the same course of conduct as the class members' claims and [are] based on the same cause of action").

Adequacy: Erie County has and will continue to fairly and adequately protect the interests of the Class. *Matter of Xerox Corp. Consol. S'holder Litig.*, 65 Misc. 3d 1201(A), 2019 N.Y. Slip Op. 51467(U), at *7-*8 (N.Y. Sup. Ct. 2019). This requirement is satisfied because Erie County has vigorously pursued the Class' claims and will continue to do so, its interests align with – and are not antagonistic to – the interests of other Class members, and it has selected Scott+Scott, experienced and qualified counsel, to conduct the Action. *See, e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig*., 574 F.3d 29, 35 (2d Cir. 2009); *Yi Xiang v. Inovalon Holdings, Inc.*, 327 F.R.D. 510, 524-26 (S.D.N.Y. 2018); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 12 Civ. 0256 (LAK) (AJP), 2017 WL 3608298, at *7 (S.D.N.Y. Aug. 22, 2017).

Superiority: Securities class 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 which follows in its wake.'" *In re MF Glob. Holdings Ltd. Inv. Litig.*, 310 F.R.D. 230, 239 (S.D.N.Y. 2015).

B. The CPLR §902 Discretionary Factors Also Support Class Certification

The applicable CPLR §902 factors similarly support class certification.[6] The factors enumerated in CPLR §902(1) (the interest of class members in controlling the prosecution and defense of separate actions), CPLR §902(2) (the impracticality or inefficiency of prosecuting or defending separate actions), and CPLR §902(5) (the difficulties likely to be encountered in the

---

[6] CPLR §902(3) – the extent and nature of any litigation concerning the controversy already commenced by or against members of the class – is not implicated here, because this Action is the sole litigation involving NN and the Class.

management of a class action) relate to commonality, typicality, and superiority, all of which, as discussed above, are readily satisfied. *See Nawrocki v. Proto Constr. & Dev. Corp.*, No. 104229/2007, 2010 WL 1531428, at *5 (N.Y. Sup. Ct. April 7, 2010) (describing the CPLR §902 factors as "considerations [that] are implicit in CPLR 901").

CPLR §902(4), the desirability or undesirability of concentrating the litigation in this forum, is also easily satisfied as (i) Defendants affirmatively solicited investors in New York County, (ii) Defendants appointed Computershare Trust Company, N.A. to act as their agent in New York to maintain a shareholder's register and to act as transfer agent, registrar, and paying agent for NN's shares, (iii) NN's common stock is traded on the Nasdaq, which is located in this County, and (iv) Defendant J.P. Morgan Securities LLC, the lead Underwriter Defendant, is headquartered in this County. Thus, it is appropriate for the Settlement Class' Securities Act claims to proceed together in this Court.[7]

In sum, all of the CPLR §§901 and 902 factors support the final certification of the Settlement Class.

IV. THE COURT SHOULD AWARD ATTORNEYS' FEES EQUAL TO 33 AND 1/3% OF THE SETTLEMENT AMOUNT AND EXPENSES

A. The Requested Fee Is Reasonable Under the Percentage Method

Courts have long recognized that attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). When awarding attorneys' fees out of a common fund, courts in New York favor the "percentage fee award," which "aligns the interests of class counsel

[7] While the §901 factors are considered "prerequisites to class certification," Courts consider the §902 factors to be "feasibility considerations." *Chimenti v. Am. Express Co.*, 97 A.D.2d 351, 352 (N.Y. App. Div. 1st Dep't 1983). Ultimately, "[w]hether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court." *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 481 (N.Y. App. Div. 1st Dep't 2009).

with those of the class." *Hayes v. Harmony Gold Mining Co.*, 509 F. App'x 21, 24 (2d Cir. 2013); *see also Clemons v. A.C.I. Found., Ltd.*, No. 154573/2015, 2017 WL 1968654, at * (N.Y. Sup. Ct. May 12, 2017) (quoting *Cox v. Microsoft Corp.*, 26 Misc. 3d 1220(A), 4 (N.Y. Sup. Ct. 2007)) ("Where a settlement establishes a common fund, the percentage method is often preferable because '[t]he lodestar method has the potential to lead to inefficiency and resistance to expeditious settlement because it gives attorneys an service to raise their fees by billing more hours.'"); *Fernandez v. Legends Hosp.*, No. 152208/2014, 2015 WL 3932897, at *5 (N.Y. Sup. Ct. Jun. 22, 2015) (holding that the preferable method for awarding attorneys' fees in a common fund class action settlement is the percentage method). The Court may then cross-check the requested fee award against Plaintiff's Counsel's lodestar. *Clemons*, 2017 WL 1968654, at *5; *Ryan v. Volume Servs. Am.*, No. 652970/2012, 2013 WL 12147011, at *4-*5 (N.Y. Sup. Ct. Mar. 7, 2013).

Plaintiff's Counsel, pursuant to CPLR §909, respectfully submits that their work fully merits a fee award of 33 and 1/3% of the Settlement Amount, or $3,166,666.67. Not only is such an award consistent with New York state and federal court practice,[8] but it is appropriate here given (i) the excellent results achieved by Plaintiff's Counsel in the face of substantial risk (*see supra*); (ii) the very modest multiplier on Plaintiff's Counsel's lodestar that such an award would

---

[8] *In re Altice USA, Inc. Securities Litigation*, No. 711788/2018, NYSCEF No. 161, at 9 (Sup. Ct. Queens Cty. Feb. 24, 2022) (awarding 33 and 1/3% fee, plus expenses); *Chester Cty. Emp.s Ret. Fund v. Alnylam Pharmaceuticals, Inc.*, No. 655272/2019, NYSCEF No. 157, at 7 (Sup. Ct. N.Y. Cty. Apr. 12, 2022) (same); *Netshoes*, NYSCEF No. 141, at 7 (same); *In re Everquote, Inc. Secs. Litig.*, No. 651177/2019, NYSCEF No. 132, at *9 (Sup. Ct. N.Y. Cty. June 11, 2020) (same); *Fernandez*, 2015 WL 3932897, at *6-*7 (same); *Lopez v. Dinex Grp., LLC*, 2015 WL 5882842, at *5-*8 (N.Y. Sup. Ct. Oct. 6, 2015) (same); *Charles v. Avis Budget Car Rental, LLC*, No. 152627/2016, 2017 WL 6539280, at *4-*5 (N.Y. Sup. Ct. Dec. 21, 2017) (same); *In re PPDAI Grp. Inc. Sec. Litig.*, No. 1:18-cv-06716-TAM, ECF No. 83-3 (E.D.N.Y. Jan. 21, 2022) (same); *In re China MediaExpress Holdings, Inc.*, No. 11-CV-0804, 2015 WL 13639423, at *1 (S.D.N.Y. Sept. 18, 2015) (same); *Landmen Partners Inc. v. Blackstone Grp. L.P.*, No. 08-cv-03601, 2013 WL 11330936, at *3 (S.D.N.Y. Dec. 18, 2013) (same).

represent; (iii) the absence of any objections from any Settlement Class Member to date; and (iv) Plaintiff's full support of the requested award (*see* Erie County Aff., ¶8).

New York Courts apply the following factors 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 counsel for the plaintiff and defendants; (iv) the magnitude and complexity of the litigation and responsibility undertaken; (v) the amount recovered; (vi) the knowledge the court has of the case's history and the work done by counsel prior to trial; and (vii) what it would be reasonable for counsel to charge a victorious plaintiff. *Fiala*, 899 N.Y.S. 2d at 540. Each of these factors weigh heavily in favor of approval of the requested 33 and 1/3% fee.

- As noted above, there were many legal, factual, and practical obstacles to recovery in this Action. *See supra*, I.A; Weintraub Aff., ¶¶49-52. Unlike Defendants' counsel, Plaintiff's Counsel would have received no compensation or payment for its time or reimbursement of its expenses had the Action not been successfully resolved.
- Plaintiff's Counsel investigated, brought, and litigated this Action without the benefit of a prior court judgment against Defendants or relevant regulatory investigation or decision with respect to the merits of Plaintiff's claims.
- Plaintiff's Counsel are highly experienced in securities class action cases with a track record of success, and their high level of skill was an important factor in obtaining this outstanding Settlement in the face of the formidable opposition of highly skilled and effective counsel for Defendants.

- As noted above, securities class action cases are "notoriously complex," *supra, I.C*, and the magnitude of the case was significant with reasonably recoverable damages of tens of millions of dollars.
- The Settlement is an excellent result in light of Defendants' position that the Settlement Class' damages were zero, or at best, far less than the statutory maximum damages under Section 11(e). Moreover, as explained above, on an absolute and percentage basis, the recovery obtained is above average. *Supra, I.A*.
- As noted above, Plaintiff's Counsel's time invested in litigating the Action is substantial as the Action proceeded all the way through merits discovery before the Settlement was obtained.
- Finally, the Supreme Court recognizes that an appropriate 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 or greater. *See Blum v. Stenson*, 465 U.S. 886, 903 n.* (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). Given that the requested fee comports with such arrangements, this factor also supports the fee request.

In sum, Plaintiff's Counsel respectfully submits that its requested 33 and 1/3% fee request is strongly supported by a review of all relevant criteria and should be approved.

B. The 33 and 1/3% Fee Request Is Reasonable Under the Lodestar Method

Plaintiff's Counsel's "lodestar" demonstrates the reasonableness of the requested 33 and 1/3% fee. Under the lodestar method, "the court scrutinizes the hours billed in the case and multiplies that amount by a reasonable hourly rate." *Ousmane v. City of New York*, No. 402648/2004, 2009 WL 722294, at *9 (N.Y. Sup. Ct. Mar. 17, 2009).

Here, Plaintiff's Counsel devoted 3,352.4 hours to the investigation, litigation, and ultimate resolution of this Action over the course of over two years, producing a total lodestar of $2,862,147.75 when multiplied by Plaintiff's Counsel's current billing rates. *See* Affirmation of Daryl F. Scott Filed on Behalf of Scott+Scott Attorneys at Law LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Scott+Scott Aff.") (filed herewith), ¶4. As summarized above, this work included extensive investigatory, factual, and legal research, successfully briefing Defendants' motion to dismiss, successfully briefing and arguing Defendants' appeal from this Court's Decision and Order denying Defendants' motion to dismiss, drafting comprehensive requests for production to Defendants, reviewing approximately 34,000 documents produced by Defendants, deposing nine current and former officers and/or directors of NN and a representative of JPM, producing documents from Plaintiff's files responsive to Defendants' requests for production, defending the deposition of Plaintiff's representative, briefing class certification, interviewing and retaining testifying experts, and engaging in mediation with Defendants including drafting two mediation statements, conferring with the Mediator, and retaining and working with an expert to analyze causation and damages issues in connection with settlement negotiations. *See also* Weintraub Aff., ¶¶19-47.

The amount of attorneys' fees requested by Plaintiff's Counsel herein represents a very modest multiplier of 1.1 to Plaintiff's Counsel's aggregate lodestar, well below the typical range

of multipliers awarded in class actions in New York state and federal courts.[9] *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *10 (S.D.N.Y. Nov. 9, 2015), *aff'd sub nom. In re Facebook, Inc.*, 674 F. App'x 37 (2d Cir. 2016) (describing a multiplier of 1.02 as "reasonable"); *In re KeySpan Corp. Sec. Litig.*, No. 01 CV 5852(ARR), 2005 WL 3093399, at *17 (E.D.N.Y. Sept. 30, 2005) (finding multiplier of 1.14 "reasonable"); *Luis v. Diskal Inc.*, No. 708875/2020, 2021 WL 7287562, at *7 (N.Y. Sup. Ct. Nov. 05, 2021) (multiplier of 1.21 "falls within the range granted by courts"); *see also Taft v. Ackermans*, No. 02 CIV. 7951 (PKL), 2007 WL 414493, at *11 (S.D.N.Y. Jan. 31, 2007) (describing a multiplier of 1.44 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 of 1.39 "is at the lower range of comparable awards").

In fact, Courts routinely approve significantly higher multipliers. *See*, *e.g.*, *BioScrip*, 273 F. Supp. 3d at 497 (collecting cases for proposition that "[l]odestar multipliers of over 4 are routinely awarded"); *Fernandez*, 2015 WL 3932897, at *6 (awarding fees representing a 2.5 multiplier); *Lopez*, 2015 WL 5882842, at *7 (awarding fees representing a 3.15 multiplier); *In re BHP Billiton Secs. Litig.*, No. 1:16-cv-01445, 2019 WL 1577313, at *1 (S.D.N.Y. Apr. 10, 2019) (awarding fees representing a 2.7 multiplier); *In re BISYS Secs. Litig.*, No. 04 Civ. 3840, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding fees representing a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *In re Telik, Inc. Secs. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("In contingent litigation, lodestar multiples of over 4 are routinely awarded . . . ."); *see also Athale v. Sinotech Energy Ltd.*, No. 11

[9] In fact, Plaintiff's Counsel's multiplier is overstated because it does not account for "time that they will be required to spend administering the settlement going forward." *Fernandez*, 2015 WL 3932897, at *6.

CIV. 05831 (AJN), 2013 WL 11310686, at *8 (S.D.N.Y. Sept. 4, 2013) (listing examples of courts awarding lodestar multipliers of "between four and five"). Therefore, given the substantial time and effort Plaintiff's Counsel invested in prosecuting this Action, the lodestar crosscheck demonstrates that the requested fee is reasonable.

Finally, Plaintiff, who worked closely with Plaintiff's Counsel's in prosecuting the Action, fully supports the requested fee. Erie County Aff., ¶8. In addition, the Notice informed potential Settlement Class Members that Plaintiff's Counsel would seek an award of attorneys' fees of up to 33 and 1/3% of the Settlement Amount. *See* Hughes Aff., Ex. A, Notice at 7. So far, no objections to this amount have been received. *Id.*, ¶16. The lack of objection to the requested fee award from Class Members also supports approval of the requested fee award.

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

Plaintiff's Counsel's reasonable out-of-pocket expenses should be reimbursed. Here, Plaintiff's Counsel requests reimbursement of a total of $170,217.76 in litigation expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund. These expenses consist primarily of the costs of hiring experts, legal research, transportation to Erie, Pennsylvania to collect documents from Plaintiff and later defend the deposition of Plaintiff's representative, electronic discovery and database costs, costs of court reporting and videography, and mediating the Settlement Class' claims – all of which were critical to Plaintiff's success in achieving the Settlement. *See* Scott+Scott Aff., ¶5.

Such expenses are properly recovered by counsel in complex litigation such as the Action. *See, e.g., 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 to a class.").

The Notice informed potential Settlement Class Members that Plaintiff's Counsel would seek up to $175,000 in expenses. *See* Hughes Aff., Ex. A, Notice at 7. So far, no objections to this amount have been received. *Id.*, ¶16. The lack of objections to that higher amount (let alone the actual amount) supports the expenses request.

D. Service Award to Plaintiff

Finally, Plaintiff respectfully requests a service award of $15,000 for the time and effort it expended in connection with litigating this Action on behalf of the Settlement Class. As set forth in the Erie County Aff., Plaintiff (*inter alia*): (i) engaged in numerous telephonic conferences and other correspondence with Plaintiff's Counsel concerning the status and progress of the Action, (ii) reviewed pleadings, briefs, orders, and other documents filed in the Action, (iii) assisted in the collection and production of documents responsive to Defendants' document demands, which resulted in the ultimate production of 61 documents (totaling over 3,300 pages), (iv) prepared for and then sat for a deposition, (v) worked with Plaintiff's Counsel to prepare a declaration in support of class certification, and (v) conferring with Plaintiff's Counsel concerning mediation and settlement of this Action. *Id.*, ¶¶6-7. Without Plaintiff's efforts, it is possible that the Settlement Class would have received no recovery.

Further, the requested service award is directly in line with awards regularly granted by New York courts. *See, e.g.*, *Lopez*, 2015 WL 5882842, at *3-*4, *8 (awarding three class representatives $20,000, $20,000, and $10,000, respectively, in service awards); *Moran v. JLJ IV Enterprises, Inc.*, No. 651136/2019, 2021 WL 4991395, at *2 (N.Y. Sup. Ct. Oct. 27, 2021) (awarding four class representatives service awards of $15,000 each); *see also Downing v. First Lenox Terrace Assocs., LLC*, No. 100725/2010, 2020 WL 6469307, at *3 (N.Y. Sup. Ct. July 01,

2020) (awarding 13 plaintiffs service awards of $10,000 each); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214 DAB, 2011 WL 6268216, at *2 (S.D.N.Y. Dec. 13, 2011) (awarding $45,000 and $5,000 service awards to the two class representatives, respectively).

Lastly, the Notice informed potential Settlement Class Members that Plaintiff would seek a payment as high as $15,000 (*see* Hughes Aff., Ex. A at 7) and, to date, no objections to this request have been received. Therefore, Plaintiff respectfully requests that the Court grant it a service award of $15,000.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that this Court enter the proposed Judgement and Order Granting Final Approval of Class Action Settlement, which will be submitted with Plaintiff's Counsel's reply submission on November 23, 2022, approving the Settlement and the Plan of Allocation, and awarding attorneys' fees of 33 and 1/3% of the $9,500,000 recovery, plus expenses in the amount of $170,217.76, plus interest on both amounts at the same rate as earned by the Settlement Fund, and a service award of $15,000 to Plaintiff.

DATED: November 1, 2022

Respectfully submitted,

SCOTT+SCOTT ATTORNEYS AT LAW LLP

s/ Deborah Clark-Weintraub
Deborah Clark-Weintraub
Jeffrey P. Jacobson
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212/223-6444
Facsimile: 212/223-6334
dweintraub@scott-scott.com
jjacobson@scott-scott.com

Counsel for Plaintiff Erie County Employees' Retirement System

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:

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 6,871 words.

DATED: November 1, 2022

Respectfully submitted,

SCOTT+SCOTT ATTORNEYS AT LAW LLP

s/ Deborah Clark-Weintraub
Deborah Clark-Weintraub
Jeffrey P. Jacobson
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212/223-6444
Facsimile: 212/223-6334
dweintraub@scott-scott.com
jjacobson@scott-scott.com

Counsel for Plaintiff Erie County Employees' Retirement System