UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WASHTENAW COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WALGREEN CO. et al., Defendants.	Civil Action No. 1:15-cv-3187 Honorable Sharon Johnson Coleman

CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

Court-appointed Class Representative Industriens Pensionsforsikring A/S, on behalf of itself and the Class, respectfully moves this Court for entry of: (i) a Judgment approving the proposed settlement of this Action on the terms set forth in the Stipulation and Agreement of Settlement dated June 23, 2022 (Doc. 505) ("Stipulation"); and (ii) an Order approving the proposed plan for allocating the net proceeds of the Settlement to the Class.[1]

This Motion is made pursuant to Rule 23 of the Federal Rules of Civil Procedure and is supported by the following documents filed herewith: (i) the Memorandum of Law, (ii) the Joint Declaration, (iii) the Declaration of Jan Østergaard on behalf of Industriens Pensionsforsikring A/S, (iv) the Declaration of Eric Schachter on behalf of the Court-authorized Claims Administrator A.B. Data, Ltd.; and (v) the Stipulation, as well as all other papers and proceedings herein.

Dated: September 2, 2022

Respectfully submitted,

KESSLER TOPAZ
MELTZER & CHECK, LLP

/s/ Andrew L. Zivitz

Andrew L. Zivitz (*Pro Hac Vice*)
David Kessler (*Pro Hac Vice*)
Johnston de F. Whitman (*Pro Hac Vice*)
David A. Bocian (*Pro Hac Vice*)
Michelle M. Newcomer (*Pro Hac Vice*)
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
azivitz@ktmc.com
dkessler@ktmc.com
jwhitman@ktmc.com
dbocian@ktmc.com
mnewcomer@ktmc.com

Class Counsel for the Class

[1] Capitalized terms have the meanings set forth in the Stipulation or in the Joint Declaration of David Kessler and Andrew L. Zivitz in Support of (I) Class Representative's Motion for Final Approval of Settlement and Plan of Allocation; and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Joint Declaration") filed herewith.

ROBBINS GELLER RUDMAN & DOWD LLP
James E. Barz (No. 6255605)
Frank A. Richter (No. 631001)
200 South Wacker Drive, 31st Floor
Chicago, IL 60606
Telephone: (312) 674-4674
Facsimile: (312) 674-4676
jbarz@rgrdlaw.com
frichter@rgrdlaw.com

Liaison Counsel for the Class

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

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Court-appointed Class Representative Industriens Pensionsforsikring A/S, on behalf of itself and the Class, respectfully submits this memorandum of law in support of its motion, pursuant to Federal Rule of Civil Procedure ("Rule") 23, for: (i) final approval of the proposed settlement of this Action on the terms set forth in the Stipulation and Agreement of Settlement dated June 23, 2022 (Doc. 505) ("Stipulation"); and (ii) approval of the proposed plan for allocating the net proceeds of the Settlement to the Class ("Plan of Allocation" or "Plan").[1]

I. PRELIMINARY STATEMENT

Subject to Court approval, Class Representative has agreed to settle all claims asserted in the Action against Defendants in exchange for a $105,000,000 cash payment, plus interest accruing in escrow. As detailed in the Joint Declaration and summarized below, the Settlement: (i) is the culmination of more than seven years of highly contentious and vigorous litigation efforts; (ii) is the product of extensive settlement negotiations under the guidance of experienced class-action mediators and, ultimately, the Parties' acceptance of a mediator's recommendation to resolve the Action for the Settlement Amount; and (iii) represents a significant percentage of the Class's estimated damages. Notably, this $105 million Settlement ranks as one of the top ten largest securities class action recoveries in the Seventh Circuit. Class Representative respectfully submits that the Settlement provides an excellent result for the Class and readily satisfies the standards for final approval under Rule 23(e)(2).

[1] Unless otherwise defined, all capitalized terms have the meanings set forth in the Stipulation or in the Joint Declaration of David Kessler and Andrew L. Zivitz in Support of (I) Class Representative's Motion for Final Approval of Settlement and Plan of Allocation; and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses ("Joint Declaration" or "Joint Decl.") filed herewith. The Joint Declaration is an integral part of this submission and, for the sake of brevity herein, Class Representative respectfully refers the Court to it for a detailed description of, *inter alia*: the claims asserted (¶¶ 15-17), the procedural history of the Action (¶¶ 18-112), the Settlement negotiations (¶¶ 113-118), the risks of continued litigation (¶¶ 119-132), the notice campaign (¶¶ 133-138), and the Plan of Allocation (¶¶ 139-145). Citations to "¶ __" herein refer to paragraphs in the Joint Declaration. All internal citations, quotation marks, and footnotes have been omitted and emphasis has been added unless otherwise indicated.

As the Court is aware, at the time of settlement, the Parties were at a highly advanced stage of litigation—fact and expert discovery had concluded and summary judgment motions had been briefed and decided. As such, Class Representative and Class Counsel had a well-developed understanding of the strengths and weaknesses of their claims. While Class Representative believes the Class's claims are meritorious and supported by evidence developed during discovery, it also recognized that there were substantial risks to obtaining a larger recovery for the Class through further litigation. Indeed, when the Settlement was reached, the Parties were preparing their respective *Daubert* motions to exclude or limit expert testimony. An adverse ruling for Class Representative on any of Defendants' *Daubert* motions could have significantly narrowed the evidence Class Representative could have presented at trial on behalf of the Class, potentially leading to the disposition of this seven+ year litigation altogether without any recovery.

Even if successful on these anticipated *Daubert* challenges, Class Representative still faced substantial risks at trial. Indeed, at the time of settlement, *only two* sets of statements and *one* corrective disclosure remained in the case, making this a high-risk case to bring before a jury. ¶¶ 111, 149, 202. Defendants were prepared to present significant arguments, supported by their four experts, that Class Representative could not establish either liability or damages with respect to the remaining statements. *See* ¶¶ 122-129. The Settlement avoids the risk of an adverse finding for the Class by a jury—as well as the delay and expense of continued litigation—while providing a substantial (and certain) near-term benefit to the Class. Moreover, the Settlement is not "claims-made." Rather, all Settlement proceeds, after deducting Court-approved fees and costs, will be distributed to Class Members who submit Claims accepted by the Court for payment.

In June, the Court preliminarily approved the Settlement, finding it likely that the Court could approve the Settlement at final approval. Doc. 510, ¶ 1. The Settlement has the full support

of the sophisticated, institutional investor Class Representative (*see* Declaration of Jan Østergaard filed herewith), and the reaction of the Class to date has been positive. While the deadline for objections has not yet passed, following an extensive notice campaign that included mailed notice as well as publication of a summary notice online and in high-circulation media, there have been no objections to the Settlement or the Plan of Allocation. ¶¶ 13, 138, 145.

Given the foregoing considerations and the factors addressed below, Class Representative and Class Counsel respectfully submit that: (i) the Settlement meets the standards for final approval under Rule 23, and is a fair, reasonable, and adequate result for the Class; and (ii) the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund to Class Members who submit valid Claims based on losses they suffered as a result of the alleged fraud.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e)(2) requires judicial approval of any class action settlement. Courts in this Circuit "naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also Equal Emp. Opportunity Comm'n v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985). "Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources." *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 2016 WL 772785, at *6 (N.D. Ill. Feb. 29, 2016).

Under Rule 23(e)(2), the Court should approve a proposed class action settlement if it finds it "fair, reasonable, and adequate." This determination involves considering whether: "(A) the class representative[] and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account:

[among other things,] (i) the costs, risks, and delay of trial and appeal . . .; and (D) the proposal treats class members equitably relative to each other." *Id*.

Further, consistent with this guidance, the Seventh Circuit has identified the following six additional factors for courts to consider in deciding whether to approve a class action settlement:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863 (7th Cir. 2014); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).[2] The approval proceedings should not be transformed into an abbreviated trial on the merits. *See, e.g.*, *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Tr. Co. of Chi.*, 834 F.2d 677, 684 (7th Cir. 1987).

As noted above, after considering the Rule 23(e)(2) factors at the preliminary approval stage, the Court found the Settlement to be fair, reasonable, and adequate, subject to further consideration at the Settlement Hearing. Doc. 510, ¶ 1. The Court's conclusion on preliminary approval applies even more in light of the record before the Court now. Accordingly, as discussed below, the Settlement is fair, reasonable, adequate, and warrants final approval under the Rule 23(e)(2) factors and Seventh Circuit law.

[2] The Advisory Committee Notes to the 2018 amendments to Rule 23 explain that the four Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23 Advisory Committee Notes to 2018 Amendments, Subdivision (e)(2). Accordingly, Class Representative discusses below the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four Rule 23(e)(2) factors, but also discusses the application of the non-duplicative factors articulated by the Seventh Circuit in *Wong*.

A. Class Representative and Class Counsel Have Adequately Represented the Class

In determining whether to approve a class action settlement, the Court should first consider whether Class Representative and Class Counsel "have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). This factor weighs in favor of approving the Settlement.

In its March 2018 Class Certification Order, the Court found Class Representative satisfied Rule 23(a)(4)'s adequacy requirement.[3] Since that time, Class Representative has continued to represent the Class adequately in its vigorous prosecution of the Action. During the course of this Action, Class Representative has, *inter alia*, communicated regularly with Class Counsel about case developments and litigation strategy, reviewed pleadings and briefs, gathered and reviewed documents and information in response to Defendants' discovery requests, prepared and sat for a deposition, and participated in settlement negotiations. *See* Østergaard Decl., ¶ 4. In addition, Class Representative—whose claims are based on a common course of alleged wrongdoing by Defendants and are typical of other Class Members—has no interests antagonistic to the Class.[4]

Likewise, Class Representative retained counsel highly experienced in securities litigation. ¶¶ 226-231; *see also* Kessler Topaz Fee and Expense Decl., Ex. C (resume). Class Counsel has vigorously pursued the claims on behalf of the Class for *over seven years*, and negotiated a favorable Settlement through hard-fought negotiations and formal mediation. ¶¶ 6-8; *see also Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379, at *4 (N.D. Ill. May 14, 2019) (Rule 23(e)(2)(A) met where "plaintiffs participated in the case diligently" and "class counsel

[3] *See* Doc. 133 at 11 ("[T]his Court perceives no evidence presently before it capable of establishing that Industriens does not satisfy the typicality or adequacy requirements.").

[4] *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.").

fought hard throughout the litigation and pursued mediation when it appeared to be an advisable and feasible alternative").

B. The Settlement Was Negotiated at Arm's Length with the Assistance of an Experienced Mediator

The Court should next consider whether the settlement was "negotiated at arm's-length." *See* Rule 23(e)(2)(B). This includes considering related circumstances including: (i) "the opinion of competent counsel"; (ii) "stage of the proceedings and the amount of discovery completed"; and (iii) the involvement of a mediator. *Wong*, 773 F.3d at 863-64. These considerations support approving the Settlement. *See id.* at 863-64.

In this Circuit, "a settlement proposal arrived at after arms-length negotiations by fully informed, experienced and competent counsel may be properly presumed to be fair and adequate." *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001). This presumption is further supported when a neutral mediator is involved. *See Todd v. STAAR Surgical Co.*, 2017 WL 4877417, at *2 (C.D. Cal. Oct. 24, 2017) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."). Here, the Parties reached the Settlement only after protracted arm's-length negotiations with the assistance of two private mediators. ¶¶ 113-114. The Parties' second round of negotiations—occurring several years after the first round, and following the conclusion of fact and expert discovery and while summary judgment motions were pending—included a formal mediation on November 17, 2021, with the Honorable Layn R. Phillips (Ret.), preceded by the exchange of detailed mediation statements and replies which addressed the Court's Summary Judgment Order. ¶ 114. Although the Parties were unable to reach a settlement at the mediation, they continued to engage in negotiations during the next six months with Judge Phillips' assistance. ¶ 115. These negotiations culminated in a mediator's recommendation to settle the Action for $105 million, which the Parties accepted on

May 19, 2022. *Id.*; *see also In re Mex. Money Transfer Litig. (W. Union & Orlandi Valuta)*, 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) ("The court places significant weight on the unanimously strong endorsement of these settlements by [Settling] Plaintiffs' well respected attorneys.").

Moreover, at the time of settlement, the knowledge of Class Representative and Class Counsel, and the proceedings themselves, had reached a stage where they could make a well-founded evaluation of the claims and propriety of settlement. Prior to settlement, Class Counsel had: (i) conducted a comprehensive investigation into the alleged fraud (¶¶ 7, 22, 150) and drafted two detailed amended complaints based on that investigation (¶¶ 23, 62); (ii) opposed two rounds of motions to dismiss (¶¶ 25, 64-65); (iii) completed comprehensive fact and expert discovery, including taking or defending 35 depositions, reviewing more than 1.1 million pages of documents produced by Defendants and various non-parties, and litigating numerous discovery-related motions (¶¶ 47-54, 71-72, 75, 80-84, 86, 150); (iv) exchanged opening, rebuttal, and reply reports for eight merits experts (¶ 150); (v) successfully moved for class certification (¶¶ 43-46); (vi) conducted an extensive Class-notice program (¶¶ 76-79); (vii) moved for partial summary judgment (¶ 105); (viii) opposed Defendants' motion for summary judgment and subsequent motion for reconsideration (¶¶ 102-103, 110); and (ix) substantially prepared *Daubert* motions to limit or exclude expert testimony (¶ 112).[5] Additionally, the Parties' settlement negotiations, including facts and arguments set forth in their respective mediation submissions, further informed the Parties of the strength of each side's arguments. ¶ 114.[6]

[5] The Joint Declaration provides additional detail on Plaintiff's Counsel's efforts over the course of this Action, including a breakdown undertaken each year of the litigation. ¶¶ 155-225.

[6] *See Kleen Prods. LLC v. Int'l Paper Co.*, 2017 WL 5247928, at *3 (N.D. Ill. Oct. 17, 2017) (noting in approving class action settlement that "case was in an advanced stage with trial near, and the record exceptionally well-developed" where litigation had been pending seven years, discovery was extensive, the class had been certified, and summary judgment motions were fully briefed).

C. The Settlement Provides the Class Adequate Relief, Considering the Costs, Risks, and Delay of Litigation and Other Relevant Factors

The Court should next consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," as well as other relevant factors. Fed R. Civ. P. 23(e)(2)(C). Rule 23(e)(2)(C) encompasses two of the factors traditionally considered by the Seventh Circuit when evaluating a proposed class action settlement: (i) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; and (ii) the complexity, length, and expense of further litigation. *See Wong*, 773 F.3d at 863-64. As discussed below, these factors strongly support approving the Settlement.

1. The Strength of Class Representative's Case Compared to the Amount of Settlement

When deciding whether to approve a proposed class action settlement under Seventh Circuit precedent, the primary consideration is "the strength of the plaintiff's case on the merits balanced against the amount offered in settlement." *Snyder*, 2019 WL 2103379, at *6 (quoting *Wong*, 773 F.3d at 864). Under this factor, courts consider whether the settlement is reasonable in light of the risks of continued litigation. *See In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 959, 961, 963-64 (N.D. Ill. 2011); *see also Sears*, 2016 WL 772785, at *7 (approval does not require a settlement be "the best possible deal for plaintiffs" or that "the class has received the same benefit from the settlement as they would have recovered from a trial"); *Great Neck Cap. Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 409-10 (E.D. Wis. 2002) ("The mere possibility that the class might receive more if the case were fully litigated is not a good reason for disapproving the settlement. . . . If the case were fully litigated there is also a possibility that plaintiffs could receive less.").

By any measure, the $105 million Settlement is a favorable result for the Class—providing a near-term, cash benefit to the Class, and eliminating the substantial risk that the Class could

recover less from Defendants, or nothing at all, if this Action proceeded to trial. As noted above, Defendants have denied their culpability throughout the Action, and would vigorously assert strong defenses to all of Class Representative's claims at trial.[7] These defenses, if accepted by a jury, could have foreclosed any recovery for the Class. And, even if Class Representative prevailed at trial, Defendants likely would have appealed that verdict, creating further risk (and delay).[8]

The Settlement Amount also represents a significant percentage (i.e., approximately 9.5%) of the Class's maximum damages (i.e., approximately $1.1 billion) as estimated by Class Representative's damages expert. ¶ 149. Indeed, this recovery is consistent with, or larger than, damage percentages recovered in numerous other securities class action settlements within the Seventh Circuit.[9] "The adequacy of this amount is reinforced by the fact that the amount was originally recommended by Judge Phillips, an objective and informed third-party during the mediation process." *Roberti v. OSI Sys., Inc.*, 2015 WL 8329916, at *4 (C.D. Cal. Dec. 8, 2015).

2. The Complexity, Length, and Expense of Further Litigation

In determining the fairness of a settlement, courts also consider the likely "complexity, length, and expense of further litigation." *Wong*, 773 F.3d at 863. Courts routinely recognize that

[7] The specifics risks of continued litigation are detailed in the Joint Declaration at ¶¶ 119-132.

[8] There is a real risk that even a successful trial verdict could be overturned on appeal. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015) (reversing and remanding $2.46 billion jury verdict after 13 years of litigation); *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605, at *1 (S.D. Fla. Apr. 25, 2011) (overturning estimated $42 million jury verdict in favor of class and granting judgment as a matter of law to defendants), *aff'd on other grounds sub nom. Hubbard v. BankAtlantic Bancorp, Inc. Sec. Litig.*, 688 F.3d 713 (11th Cir. 2012); *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 16, 2009) (granting summary judgment to defendants after eight years of litigation), *aff'd*, 627 F.3d 376 (9th Cir. 2010); *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing $81 million jury verdict after 19-day trial and dismissing case with prejudice).

[9] *See, e.g.*, *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171, at *5 (N.D. Ind. Sept. 18, 2020) (approving settlement recovering roughly 8% of maximum possible damages); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 583 (N.D. Ill. 2011) (approving settlement representing 10% of estimated class damages, and noting courts have approved class settlements below this percentage); *Goldsmith v. Tech. Sols. Co.*, 1995 WL 17009594, at *5 (N.D. Ill. Oct. 10, 1995) (approving settlement representing 6.1% of estimated class damages).

securities class actions involve complex factual and legal issues, and that continued litigation is lengthy and expensive. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) ("Securities fraud litigation is long, complex and uncertain."); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("[I]t is beyond cavil that continued litigation in this multi-district securities class action would be complex, lengthy, and expensive, with no guarantee of recovery by the class members.").

There is no doubt that this securities class action involves complex factual and legal issues. Perhaps the best example of the complexity of the issues here is the mountain of evidence and briefing submitted to the Court in connection with summary judgment (approximately 1,040 total pages and approximately 870 appendices and exhibits). ¶ 150. Further, the expense of litigating this Action for seven+ years exceeded $2 million without any trial related expenses. A trial would have increased those expenses considerably, requiring a full trial team to move to Chicago to work around the clock for many weeks and possibly months. Any trial verdict in the Class's favor likely would have been appealed and, even with a verdict at trial affirmed on appeal, the Class would face a potentially complex, lengthy, and contested claims process. ¶ 131.[10] *See Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011) ("Considering these risks, expenses and delays, an immediate and certain recovery for class members . . . favors settlement of this action."), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012).

[10] In similar actions tried to a jury verdict, the time from verdict to final judgment has taken as long as *seven* years. *See, e.g.*, Verdict Form, *Jaffe Pension Plan v. Household Int'l., Inc.*, No. 1:02-cv-05893 (N.D. Ill. May 7, 2009), ECF No. 1611 & Final Judgment and Order of Dismissal With Prejudice, *id.* (N.D. Ill. Nov. 10, 2016), ECF No. 2267; Verdict Form, *In re Vivendi Universal, S.A. Sec. Litig.*, Civ. No. 02-5571 (RJH/HBP) (S.D.N.Y. Feb. 2, 2010), ECF No. 998 & Final Judgment, *id.* (S.D.N.Y. May 9, 2017), ECF No. 1317.

3. The Remaining Rule 23(e)(2) Factors Support Final Approval

Rule 23(e)(2) also instructs courts to consider: (i) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims; (ii) the terms of any proposed award of attorney's fees, including the timing of payment; (iii) any other agreement made in connection with the proposed settlement; and (iv) whether class members are treated equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv) & (e)(2)(D). These factors also support final approval of the Settlement.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Settlement to eligible claimants are well-established, effective methods that have been widely used in securities class action litigation. Here, the proceeds of the Settlement will be distributed to Class Members who submit eligible Claims to the Claims Administrator, A.B. Data, Ltd. ("A.B. Data"). A.B. Data will review and process Claims under Class Counsel's supervision, provide Claimants with an opportunity to cure any deficiencies in their Claims or request Court review of the denial of their Claims, and then mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund (as calculated under the Plan of Allocation) upon approval of the Court. Importantly, none of the Settlement proceeds will revert to Defendants. *See* Stip., ¶ 13.

Second, the relief provided by the Settlement remains adequate when considering the terms of the proposed award of attorneys' fees and expenses, including the timing of any such payments. As discussed in the Fee and Expense Memorandum, the 27.5% fee request, made with the approval of Class Representative and to be paid only upon the Court's approval, is reasonable in light of Plaintiff's Counsel's substantial efforts over the past seven+ years and the risks in the litigation.[11]

[11] Class Counsel also seeks payment from the Settlement Fund of Plaintiff's Counsel's Litigation Expenses in the total amount of $2,250,420.62 and Class Representative's costs in the amount of $32,960. ¶ 243.

Indeed, if awarded, a 27.5% fee will still result in a *negative* multiplier of 0.976 on Plaintiff's Counsel's lodestar, representing less than full compensation for the time expended on the Action. Additionally, a 27.5% fee is fully supported by Seventh Circuit case law. *See, e.g.*, *Swift v. Direct Buy, Inc.*, 2013 WL 5770633, at *8 (N.D. Ind. Oct. 24, 2013) ("[P]ayment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action."). Further, approval of attorneys' fees is entirely separate from approval of the Settlement, and neither Class Representative nor Class Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to fees. *See* Stip., ¶ 16.[12]

Third, Rule 23 asks courts to consider the fairness of the proposed settlement in light of "any agreement required to be identified under Rule 23(e)(3)." Rule 23(e)(2)(C)(iv). As previously disclosed, the only such agreement here (other than the Stipulation and preceding Term Sheet) is the Parties' confidential Supplemental Agreement, which set forth the conditions under which Walgreens could terminate the Settlement based on requests for exclusion but *only in the event* that the Court allowed a second opportunity to request exclusion from the Class. The Court did not permit Class Members to request exclusion in connection with the Settlement proceedings (Doc. 510, ¶ 11) and, accordingly, the Supplement Agreement is moot.

Lastly, as discussed below in Section III, under the Plan of Allocation, Authorized Claimants will receive their *pro rata* share of the Net Settlement Fund based on their transactions

[12] Pursuant to the Stipulation, attorneys' fees will be paid upon issuance of the award. Stip., ¶ 16. This timing is reasonable and consistent with common practice in class action cases. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (noting "quick-pay" provisions "have generally been approved by other federal courts" and finding objection to such provision "border[ed] on frivolous" as there was "no reason to buck" the trend of other federal courts approving such provisions); *see also Wong v. Accretive Health, Inc.*, 2014 WL 7717579, at *1 (N.D. Ill. Apr. 30, 2014) (Coleman, J.) ("The awarded attorneys' fees and expenses, and interest earned thereon, shall be paid to Lead Counsel from the Settlement Fund *immediately* after the date this Order is executed . . . .").

in Walgreens common stock. Class Representative will receive precisely the same level of *pro rata* recovery (based on its Recognized Claims as calculated under the Plan) as all other Class Members. Accordingly, the Settlement treats Class Members equitably relative to one another.

D. The Reaction of the Class to Date

Two related final approval factors not included in Rule 23(e)(2) that courts in the Seventh Circuit consider when assessing a proposed settlement are "the amount of opposition to the settlement" and "the reaction of members of the class to the settlement." *See Wong*, 773 F.3d at 863. The deadline for Class Members to object to the Settlement is September 16, 2022. As of the date of this filing, the Settlement has received no objections. ¶¶ 13, 138. Class Representative will address objections, if any, in their reply submission to be filed on September 30, 2022.

In sum, all of the factors to be considered under Rule 23(e)(2) and Seventh Circuit case law support approving the Settlement as fair, reasonable, and adequate.

III. THE COURT SHOULD APPROVE THE PLAN OF ALLOCATION

A plan for allocating settlement proceeds under Rule 23 is evaluated under the same standard of review applicable to the settlement as a whole—the plan must be "fair, reasonable and adequate." *Retsky*, 2001 WL 1568856, at *3. Further, "[w]hen formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis in order to be fair and reasonable." *Zimmer*, 2020 WL 5627171, at *6. Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012).

Here, the Plan was developed by Class Counsel in consultation with Class Representative's damages expert, Chad Coffman, CFA, and his team at Global Economics Group, LLC. ¶ 141. The Plan is designed to distribute the Net Settlement Fund equitably to Class Members who timely submit valid Claims demonstrating they suffered economic losses as a result of Defendants'

alleged violations of the federal securities laws set forth in the FACC and sustained by the Court in subsequent orders, as opposed to economic losses caused by market or industry factors, or Walgreens-specific factors unrelated to the alleged fraud. *Id*.

The Plan is based upon the estimated amount of artificial inflation in the price of Walgreens common stock over the course of the Class Period, as Mr. Coffman calculated in his merits expert reports. ¶ 141. To have a loss, a Claimant must have purchased/acquired Walgreens common stock during the Class Period and held such stock through the alleged corrective disclosure on August 6, 2014. ¶ 142. Further, a Claimant's loss will depend upon several factors, including the date(s) when the Claimant purchased/acquired shares of Walgreens common stock during the Class Period, whether such shares were sold and, if so, when and at what price, taking into account the PSLRA's statutory limitation on recoverable damages. *Id*. Authorized Claimants will recover their proportional "pro rata" amount of the Net Settlement Fund based on their calculated loss. *See T.K. Through LeShore v. Bytedance Tech. Co., Ltd.*, 2022 WL 888943, at *16 (N.D. Ill. Mar. 25, 2022) ("[Pro rata] distribution plans indicate equitable treatment of class members relative to each other."). Accordingly, Class Representative's trading activity is treated no differently than that of any Class Member who files a timely and valid Claim.

The Plan will result in a fair and equitable distribution of the Settlement proceeds among Class Members who suffered losses as a result of the conduct alleged in the Action. To date, there have been no objections. ¶ 145. For all of the foregoing reasons, the Plan should be approved.

IV. NOTICE SATISFIED RULE 23, DUE PROCESS, AND THE PSLRA

Class Representative has provided the Class with adequate notice of the Settlement. Here, notice satisfies both: (i) Rule 23, as it was "the best notice . . . practicable under the circumstances" and directed "in a reasonable manner to all class members who would be bound by the" Settlement,

Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974); and (ii) due process, as it was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Collectively, the notices also provide all of the information specifically required by Rule 23 and the PSLRA. *See* Doc. 504-1 at 18-19; *see also* Schachter Decl., Exs. A-C.

In accordance with the Preliminary Approval Order, A.B. Data has mailed 278,052 Postcard Notices and 4,749 Notice Packets to potential Class Members and nominees. *See* Schachter Decl., ¶ 9. A.B. Data also caused the Summary Settlement Notice to be published in *Investor's Business Daily* and transmitted over *PR Newswire*, and updated the case website to provide information about the Settlement as well as downloadable copies of the Settlement Notice, Claim Form, and other relevant documents. *Id*., ¶¶ 11-13. Defendants also issued CAFA notice. ¶ 136 n.18.

In sum, the notice campaign utilized here provides sufficient information for Class Members to make informed decisions regarding the Settlement, fairly apprises them of their rights with respect to the Settlement, represents the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, Rule 23, the PSLRA, and due process. Comparable notice programs are routinely approved by Courts in this Circuit. *See, e.g*., *Zimmer*, 2020 WL 5627171, at *6 (approving similar notice program); *Beezley v. Fenix Parts, Inc.*, 2020 WL 4581733, at *2 (N.D. Ill. Aug. 7, 2020) (same).

V. CONCLUSION

For the reasons herein and in the Joint Declaration, Class Representative respectfully requests that the Court grant final approval of the Settlement and approve the Plan of Allocation.

Dated: September 2, 2022

Respectfully submitted,

KESSLER TOPAZ
MELTZER & CHECK, LLP

/s/ Andrew L. Zivitz
David Kessler (*Pro Hac Vice*)
Andrew L. Zivitz (*Pro Hac Vice*)
Johnston de F. Whitman (*Pro Hac Vice*)
David A. Bocian (*Pro Hac Vice*)
Michelle M. Newcomer (*Pro Hac Vice*)
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
dkessler@ktmc.com
azivitz@ktmc.com
jwhitman@ktmc.com
dbocian@ktmc.com
mnewcomer@ktmc.com

Class Counsel for the Class

ROBBINS GELLER RUDMAN
& DOWD LLP
James E. Barz (No. 6255605)
Frank A. Richter (No. 631001)
200 South Wacker Drive, 31st Floor
Chicago, IL 60606
Telephone: (312) 674-4674
Facsimile: (312) 674-4676
jbarz@rgrdlaw.com
frichter@rgrdlaw.com

Liaison Counsel for the Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WASHTENAW COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WALGREEN CO., et al., Defendants.	Civil Action No. 1:15-cv-3187 Honorable Sharon Johnson Coleman

DECLARATION OF ERIC SCHACHTER REGARDING: (A) MAILING OF POSTCARD NOTICE AND NOTICE PACKETS; (B) PUBLICATION OF SUMMARY SETTLEMENT NOTICE; AND (C) UPDATES TO CASE WEBSITE AND TOLL-FREE TELEPHONE HELPLINE

I, Eric Schachter, declare as follows:

1. I am a Vice President of A.B. Data, Ltd.'s Class Action Administration Company ("A.B. Data"), whose corporate office is located in Milwaukee, Wisconsin. Pursuant to the Court's Order Preliminarily Approving Settlement and Providing for Notice dated June 29, 2022 (Doc. 510) ("Preliminary Approval Order"), Class Counsel was authorized to retain A.B. Data as the Claims Administrator in connection with the Settlement of the above-captioned action ("Action").[1] I am over 21 years of age and am not a party to the Action. The following statements are based on my personal knowledge and information provided by other A.B. Data employees working under my supervision, and if called on to do so, I could and would testify competently thereto.

[1] Unless otherwise defined in this declaration, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement dated June 23, 2022 (Doc. 505).

DISSEMINATION OF THE POSTCARD NOTICE AND NOTICE PACKETS

2. Pursuant to the Preliminary Approval Order, A.B. Data was responsible for disseminating the Court-approved Postcard Notice to potential Class Members who were previously mailed a copy of the Class Notice (discussed below) and to any other potential Class Members identified through further reasonable efforts. A copy of the Postcard Notice is attached hereto as Exhibit A.

3. As reported in my previously-filed declaration dated July 15, 2020 (Doc. 348) ("Class Notice Decl."), A.B. Data conducted a notice campaign in connection with the Court's certification of the Class. Pursuant to the Court's December 18, 2019 Minute Entry granting the Parties' Joint Stipulated Motion to Approve Form and Manner of Class Notice (Doc. 303), A.B. Data mailed the Notice of Pendency of Class Action ("Class Notice") to potential Class Members and nominees beginning on January 21, 2020. Class Notice Decl., ¶¶ 3, 5. To identify potential Class Members (in addition to those contained in the data file provided by Walgreen's transfer agent (*id*. ¶ 3)), on January 21, 2020, A.B. Data mailed the Class Notice to the brokerage firms, banks, institutions, and other third-party nominees (collectively, "Nominees") contained in A.B. Data's proprietary database of the largest and most common Nominees ("Record Holder Mailing Database") (*id.* ¶ 4). In response to this mailing, A.B. Data received from Nominees: (i) the names and addresses of their customers who were potential Class Members, and (ii) requests for copies of the Class Notice, in bulk, to forward directly to their customers. *Id.* ¶¶ 7-8. A.B. Data also received additional names and addresses directly from potential Class Members. *Id.* ¶ 7.

4. Through this process, A.B. Data created a master mailing list of potential Class Members and Nominees ("Master Mailing List") for use in connection with the Class Notice mailing as well as any future notice mailings in the Action.

5. On July 28, 2022, A.B. Data caused the Postcard Notice to be sent by First-Class mail to the 146,630 potential Class Members contained on the Master Mailing List. A.B. Data also forwarded 129,895 Postcard Notices, in bulk, to the Nominees who requested copies of the Class Notice in bulk, to forward to their customers directly.

6. In addition, pursuant to the Preliminary Approval Order, A.B. Data was also responsible for disseminating a copy of the Notice of (I) Proposed Settlement; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses ("Settlement Notice") and Proof of Claim and Release Form ("Claim Form" and together with the Settlement Notice, the "Notice Packet") to the Nominees contained in A.B. Data's Record Holder Mailing Database. At the time of the initial mailing, the Record Holder Mailing Database contained 4,142 mailing records.[2] On July 28, 2022, A.B. Data caused the Notice Packet to be mailed by First-Class mail to the 4,142 addresses contained in the Record Holder Mailing Database. On August 9, 2022, a follow-up email (with the Notice Packet attached) was sent to the Nominees contained in the Record Holder Mailing Database. A copy of the Notice Packet is attached hereto as Exhibit B.

7. The Settlement Notice instructed Nominees who previously provided names and addresses to A.B. Data in connection with the Class Notice mailing, or had previously requested copies of the Class Notice in bulk, that they did not need to take any further action unless they had additional names and addresses to provide or needed a different number of Postcard Notices mailed to them. For Nominees who *did not* previously respond to the Class Notice, the Settlement Notice instructed that within seven (7) calendar days of receiving the Settlement Notice they must either: (i) send the Postcard Notice to all beneficial owners of such Walgreens common stock, or (ii) send

[2] While the Record Holder Mailing Database was substantially the same as the database used for the April 2020 Class Notice mailing, A.B. Data continuously updates its Record Holder Mailing Database with new addresses when they are received, and eliminates duplicates or obsolete addresses when identified (as Nominees merge or go out of business).

a list of the names and addresses of such beneficial owners to A.B. Data, in which event A.B. Data would promptly mail the Postcard Notice to such beneficial owners. *See* Settlement Notice (Ex. B), ¶¶ 65-66.

8. In response to requests received from Nominees and potential Class Members since the initial mailing, A.B. Data has mailed an additional 1,527 Postcard Notices and 607 Notice Packets by First-Class mail to potential Class Members and Nominees.

9. To date, a total of 278,052 Postcard Notices and 4,749 Notice Packets have been mailed to potential Class Members and Nominees.

10. In addition, to date, A.B. Data has re-mailed 2,245 Postcard Notices to persons whose original mailings were returned by the U.S. Postal Service ("USPS") as undeliverable and for whom updated addresses were provided by the USPS.

PUBLICATION OF THE SUMMARY SETTLEMENT NOTICE

11. In accordance with the Court's Preliminary Approval Order, A.B. Data caused the Court-approved Summary Notice of (I) Proposed Settlement; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses ("Summary Settlement Notice") to be published in *Investor's Business Daily* on August 8, 2022, and released via *PR Newswire* on August 11, 2022. Copies of the proofs of publication of the Summary Settlement Notice in *Investor's Business Daily* and over *PR Newswire* are attached hereto as Exhibits C and D, respectively.

UPDATES TO TOLL-FREE TELEPHONE HELPLINE AND CASE WEBSITE

12. In connection with the Class Notice mailing in January 2020, A.B. Data established, and currently maintains, a toll-free telephone number, 1-866-963-9976, and dedicated website, www.WalgreensSecuritiesLitigation.com, for the Action. In connection with the Settlement, A.B.

Data updated the pre-recorded information callers hear when calling the toll-free telephone number as well as the language on the website to provide information regarding the Settlement. Both the toll-free telephone number and website address are set forth in the Postcard Notice, Settlement Notice, Claim Form, and Summary Settlement Notice.

13. In accordance with the Court's Preliminary Approval Order, A.B. Data caused copies of the Settlement Notice and Claim Form to be posted on the website, along with copies of the Stipulation and Preliminary Approval Order. The website includes the important dates and deadlines in connection with the Settlement,[3] and provides Class Members with the ability to submit their Claim Form online. The website also includes a link to a document with detailed instructions for institutions submitting Claims electronically. A.B. Data will continue operating, maintaining and, as appropriate, updating the toll-free telephone

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of September 2022.

Eric Schachter

[3] As set forth in the Settlement Notice, because Class Members were previously provided the opportunity to request exclusion from the Class in connection with Class Notice, they were not permitted to request exclusion in connection with the Settlement proceedings. A.B. Data previously reported on the requests for exclusion received in the Class Notice Declaration. *See* Class Notice Decl., ¶ 13, Ex. D.

EXHIBIT A

THIS POSTCARD PROVIDES ONLY LIMITED INFORMATION ABOUT THE SETTLEMENT.

PLEASE VISIT WWW.WALGREENSSECURITIESLITIGATION.COM FOR MORE INFORMATION.

The parties in *Washtenaw County Employees' Retirement System v. Walgreen Co. et al.*, Civil Action No. 1:15-cv-3187 ("Action") have reached a proposed settlement of the claims against Walgreen Co. ("Walgreens"), Gregory D. Wasson, and Wade D. Miquelon (collectively, "Defendants"). If approved, the Settlement will resolve the Action in which Class Representative alleged that Defendants made materially false or misleading statements regarding Walgreens' projected business performance and pharmacy business during the Class Period. Defendants deny any liability or wrongdoing. You received this notice because you, or an investment account for which you serve as a custodian, may be a member of the following Class: All persons and entities who purchased or otherwise acquired Walgreens common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby.

Pursuant to the Settlement, Defendants have agreed to pay $105,000,000, which, after deducting any Court-awarded fees and expenses, notice and administration costs, and taxes, will be allocated among Class Members who submit valid claims, in exchange for the Settlement of the Action and the release of all claims asserted in the Action and related claims. **For additional information regarding the Settlement, please review the full Settlement Notice available at www.WalgreensSecuritiesLitigation.com. If you are a Class Member,** your *pro rata* share of the Settlement will depend on the number of valid claims submitted, and the number, size, and timing of your transactions in Walgreens common stock during the relevant time period. If all Class Members elect to participate in the Settlement, the estimated average recovery per eligible share of Walgreens common stock will be approximately $0.73 *before* deducting any Court-approved fees and expenses. Your actual share of the Settlement will be determined pursuant to the Plan of Allocation set forth in the full Settlement Notice, or other plan of allocation ordered by the Court.

To qualify for a payment from the Settlement, you must submit a valid Claim Form. The Claim Form can be found and submitted on the Settlement Website, or you can request that one be mailed to you. **Claim Forms must be postmarked (if mailed), or submitted online, by November 5, 2022.** If you want to object to any aspect of the Settlement or Class Counsel's motion for attorneys' fees and expenses, you must file and serve an objection by **September 16, 2022**. The full Settlement Notice provides the requirements for submitting a Claim Form or an objection. Because Class Members were previously provided the opportunity to request exclusion from the Class in connection with class certification, the Court is not permitting a second opportunity to request exclusion in connection with the Settlement proceedings.

The Court will hold a hearing on **October 7, 2022, at 10:30 a.m.**, to consider, among other things, whether to approve the Settlement and a request by the lawyers representing the Class for up to 27.5% of the Settlement Fund in attorneys' fees, plus litigation expenses of no more than $2.6 million (which equals a cost of approximately $0.22 per eligible share of Walgreens common stock). You may attend the hearing and ask to be heard by the Court, but you do not have to. **For more information, call 1-866-963-9976, send an email to info@WalgreensSecuritiesLitigation.com, or visit www.WalgreensSecuritiesLitigation.com.**

Walgreens Securities Litigation
Claims Administrator
P.O. Box 173092
Milwaukee, WI 53217

COURT-ORDERED LEGAL NOTICE

Washtenaw County Employees' Retirement System v. Walgreen Co. et al.,

Civil Action No. 1:15-cv-3187 (N.D. Ill.)

Your legal rights may be affected by this securities class action. You may be eligible for a cash payment from the Settlement. Please read this Postcard Notice carefully.

For more information, please visit www.WalgreensSecuritiesLitigation.com or call 1-866-963-9976.

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WASHTENAW COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WALGREEN CO. et al., Defendants.	Civil Action No. 1:15-cv-3187 Honorable Sharon Johnson Coleman

NOTICE OF (I) PROPOSED SETTLEMENT; (II) SETTLEMENT HEARING; AND (III) MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

TO: ALL PERSONS AND ENTITIES WHO PURCHASED OR OTHERWISE ACQUIRED WALGREEN CO. ("WALGREENS") COMMON STOCK BETWEEN APRIL 17, 2014 AND AUGUST 5, 2014, INCLUSIVE, AND WERE DAMAGED THEREBY.[1]

A Federal Court authorized this Notice. This is not a solicitation from a lawyer.

NOTICE OF SETTLEMENT: This Notice has been issued pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Northern District of Illinois ("Court"). Please be advised that the Court-appointed representative for the Class, Industriens Pensionsforsikring A/S ("Class Representative"), on behalf of itself and the Class, has reached a proposed settlement of the above-captioned action ("Action") with Walgreens, Gregory D. Wasson, and Wade D. Miquelon (collectively, "Defendants") for $105,000,000 in cash that, if approved, will resolve all claims in the Action ("Settlement"). The terms and provisions of the Settlement are contained in the Stipulation and Agreement of Settlement dated June 23, 2022 ("Stipulation").[2]

PLEASE READ THIS NOTICE CAREFULLY. This Notice explains important rights you may have, including the possible receipt of cash from the Settlement. If you are a member of the Class, your legal rights will be affected whether or not you act.

If you have questions about this Notice, the proposed Settlement, or your eligibility to participate in the Settlement, please DO NOT contact the Court, the Clerk's Office, Defendants, or Defendants' Counsel. All questions should be directed to the Claims Administrator or Class Counsel (*see* ¶ 69 below).

Additional information about the Settlement is available on the website for the Action, www.WalgreensSecuritiesLitigation.com.

1. **Description of the Action and the Class:** This Notice relates to a proposed Settlement of claims in a pending securities class action brought by Walgreens investors alleging, among other things, that Defendants violated the federal securities laws by making materially false or misleading statements regarding Walgreens' projected business performance and pharmacy business during the Class Period. A more detailed description of the Action is set forth in ¶¶ 11-27 below. The Settlement, if approved by the Court, will settle the claims of the Class, as defined in ¶ 28 below.

2. **Statement of the Class's Recovery:** Subject to Court approval, Class Representative, on behalf of itself and the Class, has agreed to settle the Action in exchange for a settlement payment of $105,000,000 in cash ("Settlement Amount") to be deposited into an escrow account. The Net Settlement Fund (*i.e.*, the Settlement Amount plus any and all interest earned thereon ("Settlement Fund") less: (i) any Taxes; (ii) any Settlement Notice and Administration Costs; (iii) any Litigation Expenses awarded by the Court; (iv)

[1] Please Note: You may have received the previously disseminated Class Notice in or around January 2020 that was directed to all persons and entities who purchased or otherwise acquired Walgreens common stock between March 25, 2014 and August 5, 2014, inclusive, and were damaged thereby. By operation of the Court's Memorandum Opinion and Order regarding summary judgment dated November 2, 2021, the class was modified to include all persons and entities who purchased or otherwise acquired Walgreens common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby.

[2] The Stipulation can be viewed at www.WalgreensSecuritiesLitigation.com. Capitalized terms used in this Notice that are not otherwise defined herein shall have the meanings ascribed to them in the Stipulation.

any attorneys' fees awarded by the Court; and (v) any other costs or fees approved by the Court) will be distributed in accordance with a plan of allocation approved by the Court, which will determine how the Net Settlement Fund shall be allocated among members of the Class. The proposed plan of allocation ("Plan of Allocation") is attached hereto as Appendix A.

3. **Estimate of Average Amount of Recovery Per Share:** Based on Class Representative's damages expert's estimate of the number of shares of Walgreens common stock purchased or otherwise acquired during the Class Period that may have been affected by the conduct at issue in the Action (excluding shares purchased or otherwise acquired by persons and entities excluded from the definition of the "Class" and those who excluded themselves from the Class in connection with Class Notice and are listed on Appendix 1 to the Stipulation), and assuming that all Class Members elect to participate in the Settlement, the estimated average recovery (before the deduction of any Court-approved fees, expenses, and costs as described herein) per eligible share of Walgreens common stock is approximately $0.73. **Class Members should note, however, that the foregoing average recovery per eligible share is only an estimate.** Some Class Members may recover more or less than this estimated amount depending on, among other factors: (i) when and the price at which they purchased/acquired shares of Walgreens common stock; (ii) whether they sold their shares of Walgreens common stock and, if so, when; (iii) the total number and value of valid Claims submitted to participate in the Settlement; (iv) the amount of Settlement Notice and Administration Costs; and (v) the amount of attorneys' fees and Litigation Expenses awarded by the Court. Distributions to Class Members will be made based on the Plan of Allocation attached hereto as Appendix A or such other plan of allocation as may be ordered by the Court.

4. **Average Amount of Damages Per Share:** The Parties do not agree on the average amount of damages per share of Walgreens common stock that would be recoverable if Class Representative was to prevail in the Action. Among other things, Defendants do not agree with the assertion that they violated the federal securities laws or that any damages were suffered by any members of the Class as a result of their conduct.

5. **Attorneys' Fees and Expenses Sought:** Class Counsel has not received any attorneys' fees for its representation of the Class in the Action, which has been pending for seven years (since 2015), and has advanced over $2 million in funds to pay expenses incurred to prosecute this Action with the expectation that if it was successful in recovering money for the Class, it would receive fees and be reimbursed for its expenses from the Settlement Fund, as is customary in this type of litigation. Class Counsel, Kessler Topaz Meltzer & Check, LLP, on behalf of itself and Court-appointed Liaison Counsel for the Class, Robbins Geller Rudman & Dowd LLP, will apply to the Court for an award of attorneys' fees in an amount not to exceed 27.5% of the Settlement Fund. If awarded, it is estimated that this fee would not cover the lodestar (hours spent multiplied by hourly rates) of Class Counsel and Liaison Counsel. In addition, Class Counsel will apply for payment of Litigation Expenses incurred by Class Counsel and Liaison Counsel in connection with the institution, prosecution, and resolution of the claims in the Action against Defendants, in an amount not to exceed $2.6 million, which amount may include a request for reimbursement of the reasonable costs and expenses incurred by Class Representative directly related to its representation of the Class in accordance with 15 U.S.C. §78u-4(a)(4). Any fees and expenses awarded by the Court will be paid from the Settlement Fund plus any interest earned at the same rate as earned by the Class on the Settlement Fund. Class Members are not personally liable for any such fees or expenses. The estimated average cost per eligible share of Walgreens common stock, if the Court approves Class Counsel's fee and expense application, is approximately $0.22 per share. **Please note that this amount is only an estimate**.

6. **Identification of Attorneys' Representatives:** Class Representative and the Class are represented by Andrew L. Zivitz, Esq. of Kessler Topaz Meltzer & Check, LLP, 280 King of Prussia Road, Radnor, PA 19087, 1-610-667-7706, info@ktmc.com, www.ktmc.com. Further information regarding the Action, the Settlement, and this Notice may be obtained by contacting the Claims Administrator at: *Walgreens Securities Litigation*, c/o A.B. Data, Ltd., P.O. Box 173092, Milwaukee, WI 53217; 1-866-963-9976; info@WalgreensSecuritiesLitigation.com; or by visiting the website for the Action, www.WalgreensSecuritiesLitigation.com.

7. **Reasons for the Settlement:** Class Representative's principal reason for entering into the Settlement is the immediate cash benefit for the Class without the risk or the delays and costs inherent in further litigation. Here, the Parties had concluded summary judgment and were briefing motions to exclude or limit expert testimony in anticipation of trial at the time the Settlement was reached. The benefit of the Settlement must be considered against the risk that a smaller recovery – or no recovery at all – might be achieved after motions to exclude or limit expert testimony were decided by the Court, at trial, or after the likely and lengthy appeals that would have followed a trial, including individual reliance challenges that necessarily would have followed any trial victory by the Class. Defendants, who deny all allegations of wrongdoing or liability whatsoever, are entering into the Settlement solely to eliminate the uncertainty, burden, and expense of further litigation.

YOUR LEGAL RIGHTS AND OPTIONS IN THE SETTLEMENT:	
SUBMIT A CLAIM FORM POSTMARKED (IF MAILED), OR ONLINE, NO LATER THAN NOVEMBER 5, 2022.	This is the only way to be eligible to receive a payment from the Settlement Fund. If you are a Class Member, you will be bound by the Settlement as approved by the Court and you will give up any Released Class Representative's Claims (defined in ¶ 37 below) that you have against Defendants and the other Defendants' Releasees (defined in ¶ 38 below), so it is in your interest to submit a Claim Form.
OBJECT TO THE SETTLEMENT BY SUBMITTING A WRITTEN OBJECTION SO THAT IT IS *RECEIVED* NO LATER THAN SEPTEMBER 16, 2022.	If you do not like the proposed Settlement, the proposed Plan of Allocation, and/or the requested attorneys' fees and Litigation Expenses, you may object by writing to the Court (as described in ¶¶ 58-59 below). In order to object, you must be a member of the Class.
GO TO A HEARING ON OCTOBER 7, 2022, AT 10:30 A.M., AND FILE A NOTICE OF INTENTION TO APPEAR SO THAT IT IS *RECEIVED* NO LATER THAN SEPTEMBER 16, 2022.	If you have filed a written objection and wish to appear at the hearing, you must also file a notice of intention to appear by September 16, 2022, which allows you to speak in Court, at the discretion of the Court, about the fairness of the Settlement, the Plan of Allocation, and/or the request for attorneys' fees and Litigation Expenses. If you submit a written objection, you may (but you do not have to) attend the hearing.
DO NOTHING.	If you are a member of the Class and you do not submit a valid Claim, you will not be eligible to receive any payment from the Settlement Fund. You will, however, remain a member of the Class, which means that you give up any right you may have to sue about the claims that are resolved by the Settlement and you will be bound by any judgments or orders entered by the Court in the Action. If you have not excluded yourself in connection with Class Notice, you may not do so now as the Court has found that a second exclusion opportunity is unnecessary in light of the broad notice campaign conducted in connection with Class Notice, as well as the fact that the statute of repose has since run, thereby prohibiting anyone who currently desires to exclude themselves from bringing their own claims at this time.

These rights and options – and the deadlines to exercise them – are further explained in this Notice. Please Note: The date and time of the Settlement Hearing – currently scheduled for October 7, 2022, at 10:30 a.m. – is subject to change without further notice to the Class. It is also within the Court's discretion to hold the hearing in person or by telephone or video conference. If you plan to attend the Settlement Hearing, you should check the website www.WalgreensSecuritiesLitigation.com or with Class Counsel as set forth above in ¶ 6 to confirm that no change to the date and/or time of the hearing has been made.

WHAT THIS NOTICE CONTAINS

WHAT IS THE PURPOSE OF THIS NOTICE?

8. The Court has directed the issuance of this Notice to inform potential Class Members about the proposed Settlement and their options in connection therewith before the Court rules on the proposed Settlement. Additionally, Class Members have the right to understand how this class action lawsuit may generally affect their legal rights. If the Court approves the Settlement and the Plan of Allocation (or some other plan of allocation), the Claims Administrator selected by Class Representative and approved by the Court will make payments pursuant to the Settlement after any objections and appeals are resolved.

9. The purpose of this Notice is to inform potential Class Members of the terms of the proposed Settlement, and of the hearing to be held by the Court to consider the fairness, reasonableness, and adequacy of the Settlement, the proposed Plan of Allocation, and the motion by Class Counsel for an award of attorneys' fees and Litigation Expenses ("Settlement Hearing"). *See* ¶¶ 56-57 below for details about the Settlement Hearing, including the date and location of the hearing.

10. The issuance of this Notice is not an expression of any opinion by the Court concerning the merits of any claim in the Action, and the Court still has to decide whether to approve the Settlement. If the Court approves the Settlement and a plan of allocation, then payments to Authorized Claimants will be made after any appeals are resolved and after the completion of all claims processing. Please be patient, as this process takes time.

WHAT IS THIS CASE ABOUT?

11. This is a securities class action against Defendants for alleged violations of the federal securities laws during the Class Period. Class Representative alleged that Defendants made materially false or misleading statements regarding Walgreens' projected business performance and pharmacy business during the Class Period. More specifically, Class Representative alleged that Defendants made false or misleading statements regarding the impact of generic drug price inflation and reimbursement pressures on Walgreens' pharmacy business. Class Representative alleged that when the relevant truth was revealed, Walgreens' stock price declined, causing damage to Walgreens' shareholders. Defendants deny all of the allegations of wrongdoing asserted in the Action and deny any liability whatsoever to any members of the Class.

12. The Action was commenced more than seven years ago, on April 10, 2015, with the filing of the initial complaint in the Court against Defendants, asserting violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), and Rule 10b-5, promulgated thereunder, 17 C.F.R. § 240.10b-5.

13. Pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4, as amended ("PSLRA"), notice to the public was issued setting forth the deadline by which putative class members could move the Court to be appointed to act as lead plaintiff(s). By Order dated June 16, 2015, the Court appointed Industriens Pensionsforsikring A/S to serve as Lead Plaintiff in the Action and approved Lead Plaintiff's selection of Kessler Topaz Meltzer & Check, LLP as Lead Counsel and Robbins Geller Rudman & Dowd LLP as Liaison Counsel.

14. On August 17, 2015, Lead Plaintiff filed the Consolidated Class Action Complaint for Violations of the Federal Securities Laws ("Consolidated Complaint"). Defendants moved to dismiss the Consolidated Complaint on October 16, 2015. Defendants' motions to dismiss were fully briefed, and by Memorandum Opinion and Order dated September 30, 2016, the Court granted in part and denied in part Defendants' motions. Thereafter, on November 4, 2016, Defendants filed their answers to the Consolidated Complaint, denying all surviving allegations and asserting certain defenses. Defendants filed amended answers on January 16, 2017.

15. Following the Court's ruling on Defendants' motions to dismiss, discovery commenced. Pursuant to the Order dated February 22, 2017, the Court bifurcated class certification and merits discovery, deferring all merits discovery pending class certification proceedings.

16. On April 21, 2017, Lead Plaintiff filed its motion for class certification, which Defendants opposed. The motion was fully briefed, and by Memorandum Opinion and Order dated March 29, 2018, the Court granted Lead Plaintiff's motion, certifying the class, appointing Lead Plaintiff Industriens Pensionsforsikring A/S as Class Representative, and appointing Kessler Topaz Meltzer & Check, LLP as Class Counsel.

17. Thereafter, the Parties engaged in extensive fact and expert discovery, including: (i) the production of more than 1.1 million pages of documents by Defendants and non-parties and 1,956 pages of documents by Class Representative and its investment advisor; (ii) 35 fact and expert depositions; (iii) the exchange of opening and rebuttal expert reports for a total of eight merits experts; and (iv) litigation of nine discovery-related motions. The Parties also served and responded to interrogatories and other written discovery requests, exchanged numerous letters, and held numerous conferences concerning discovery issues.

18. On December 21, 2018, Class Representative filed the First Amended Consolidated Complaint for Violations of the Federal Securities Laws ("Amended Consolidated Complaint"), which included both new allegations of false and misleading statements during the class period as well as amended allegations regarding certain statements that had been previously dismissed. Defendants moved to dismiss the Amended Consolidated Complaint on February 19, 2019. Defendants' motion to dismiss was fully briefed.

19. By Memorandum Opinion and Order dated September 23, 2019, the Court granted in part and denied in part Defendants' motion. Defendants filed their answers to the Amended Consolidated Complaint on October 28, 2019.

20. On December 5, 2019, Class Representative filed a joint stipulated motion to approve the form and manner of notice regarding the pendency of the Action as a class action. The Court granted the motion on December 18, 2019. Thereafter, the Notice of Pendency of Class Action ("Class Notice") was mailed to potential class members and a summary notice was published. The Class Notice and summary notice each informed potential class members that requests for exclusion from the class were to be submitted no later than April 20, 2020 (which deadline was subsequently extended to July 6, 2020 pursuant to General Orders issued in the District in response to the COVID-19 public emergency). Out of the tens of thousands of Class Notices distributed, a total of 75 timely requests for exclusion were received, as listed on Appendix 1 to the Stipulation.[3]

21. On March 5, 2021, Defendants filed their motion for summary judgment. Also on March 5, 2021, Class Representative filed a motion for partial summary judgment. Both motions were fully briefed.

22. By Memorandum Opinion and Order dated November 2, 2021, the Court granted in part and denied in part Defendants' summary judgment motion and denied Class Representative's motion for partial summary judgment in its entirety. As noted above, by operation of this ruling, the class was modified to consist of all persons and entities who purchased or otherwise acquired Walgreens common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby.[4]

23. Following the Court's ruling on the Parties' summary judgment motions, the Parties participated in a mediation session on November 17, 2021, with the assistance of the Honorable Layn R. Phillips of Phillips ADR ("Judge Phillips"). While the Parties made progress towards resolution, they were unable to settle the Action at the mediation session.

24. On November 18, 2021, Defendants filed a motion for partial reconsideration of the Court's ruling on summary judgment, or alternatively for an order certifying an interlocutory appeal. Defendants' motion was fully briefed, and by Memorandum Opinion and Order dated March 2, 2022, the Court granted Defendants' motion eliminating one of the three remaining alleged false and misleading statements in the Action.

25. With the assistance of Judge Phillips, the Parties continued settlement negotiations while also preparing to file motions to exclude or limit expert testimony in anticipation of trial. Following hard-fought, arm's-length negotiations, on May 19, 2022, the Parties accepted Judge Phillips' recommendation to resolve the Action for $105 million in cash. Thereafter, the Parties memorialized their agreement in principle to resolve the Action in a term sheet executed on May 25, 2022.

26. On June 23, 2022, the Parties entered into the Stipulation, which sets forth the specific terms and conditions of the Settlement. The Stipulation can be viewed at www.WalgreensSecuritiesLitigation.com.

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[3] Pursuant to its Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order") dated June 29, 2022, because Class Members' opportunity to exclude themselves was provided in connection with Class Notice and the statute of repose has run, thereby precluding Class Members from bringing any of the Released Claims now, the Court has exercised its discretion not to permit Class Members a second opportunity to exclude themselves from the Class in connection with the Settlement.

[4] The previously disseminated Class Notice noted that the class definition may be subject to change by the Court pursuant to Rule 23 of the Federal Rules of Civil Procedure.

27. On June 29, 2022, the Court preliminarily approved the Settlement, authorized notice of the Settlement to be provided to potential Class Members, and scheduled the Settlement Hearing to consider whether to grant final approval of the Settlement.

HOW DO I KNOW IF I AM AFFECTED BY THE SETTLEMENT? WHO IS INCLUDED IN THE CLASS?

28. If you are a member of the Class who has not previously sought exclusion from the Class in connection with Class Notice, you are subject to the Settlement. The Class, as certified by the Court pursuant to its Memorandum Opinion and Order dated March 29, 2018, and as modified by operation of the Court's Memorandum Opinion and Order regarding summary judgment dated November 2, 2021, consists of:

> **All persons and entities who purchased or otherwise acquired Walgreens common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby.**

Excluded from the Class are: (i) any Defendant in the Action; (ii) the officers and directors of Walgreens; (iii) members of the immediate families of the individual Defendants in the Action; (iv) any entity in which any Defendants has or had a controlling interest; and (v) the legal representative, heirs, successors, or assigns of any such excluded party. Also excluded from the Class are the persons and entities that submitted a request for exclusion in connection with Class Notice, as set forth on Appendix 1 to the Stipulation.

PLEASE NOTE: RECEIPT OF THIS NOTICE DOES NOT MEAN THAT YOU ARE A CLASS MEMBER OR THAT YOU WILL BE ENTITLED TO RECEIVE PROCEEDS FROM THE SETTLEMENT.

IF YOU WISH TO BE ELIGIBLE TO PARTICIPATE IN THE DISTRIBUTION OF PROCEEDS FROM THE SETTLEMENT, YOU ARE REQUIRED TO SUBMIT A CLAIM FORM AND THE REQUIRED SUPPORTING DOCUMENTATION POSTMARKED (IF MAILED), OR ONLINE, NO LATER THAN NOVEMBER 5, 2022. YOU CAN OBTAIN A CLAIM FORM AT WWW.WALGREENSSECURITIESLITIGATION.COM OR BY CALLING 1-866-963-9976.

WHAT ARE CLASS REPRESENTATIVE'S REASONS FOR THE SETTLEMENT?

29. The Settlement is the result of more than seven years of hard-fought litigation and extensive, arm's-length negotiations by the Parties and was reached as the Parties were preparing for trial. Class Representative believes that the claims asserted against Defendants have merit; however, it recognized the substantial risks it faced in successfully obtaining a favorable verdict for the Class at trial and through the likely appeals that would follow.

30. In particular, Class Representative recognized that Defendants had significant defenses to its claims. Throughout the Action, Defendants asserted that the statements at issue in the Action were not false or misleading at the time they were made and that Class Representative would be unable to establish that Defendants did not legitimately believe the truth of such statements. Relatedly, Defendants contended that they did not act with the required intent, or "scienter." Class Representative also faced challenges with respect to establishing that the stock price decline was attributable to the alleged false statements, and thus the actual damages a jury might award. Specifically, and among other arguments, Defendants argued that the price decline in Walgreens common stock on the alleged corrective disclosure date was caused by factors unrelated to the alleged fraud. Had the jury accepted any of Defendants' arguments or viewed the facts in favor of Defendants in whole or in part, or if the Seventh Circuit in subsequent proceedings accepted these arguments or theories, Class Representative's ability to obtain a recovery for the Class could have been reduced or eliminated. Further, even if completely or partly successful at trial, Class Representative would still have to prevail on the appeals that would likely follow. Thus, there were significant risks and delays attendant to the continued prosecution of the Action, including the risk of zero recovery.

31. In light of these risks, the amount of the Settlement, and the immediacy of recovery to the Class, Class Representative and Class Counsel believe that the proposed Settlement is fair, reasonable, and adequate, and in the best interests of the Class. Class Representative and Class Counsel believe that the Settlement provides a favorable result for the Class, namely $105,000,000 in cash (less the various deductions described in this Notice), as compared to the risk that the claims in the Action would produce a smaller, or no, recovery after trial, and appeals, possibly years in the future.

32. Defendants have denied the claims asserted against them in the Action and deny having engaged in any wrongdoing or violation of law of any kind whatsoever. Defendants have agreed to the Settlement solely to eliminate the burden and expense of continued litigation, and the Settlement may not be construed as an admission of any wrongdoing by Defendants in this or any other action or proceeding.

WHAT MIGHT HAPPEN IF THERE WERE NO SETTLEMENT?

33. If there were no Settlement and Class Representative failed to establish any essential element of its claims against Defendants at trial, neither Class Representative nor the other members of the Class would recover anything from Defendants. Also, if Defendants were successful in proving any of their defenses at trial, or on appeal, the Class could recover substantially less than the amount provided by the Settlement, or nothing at all.

HOW ARE CLASS MEMBERS AFFECTED BY THE ACTION AND THE SETTLEMENT?

34. As a Class Member, you are represented by Class Representative and Class Counsel, unless you enter an appearance through counsel of your own choice and at your own expense. You are not required to retain your own counsel, but if you choose to do so, such counsel must file a notice of appearance on your behalf and must serve copies of their appearance on the attorneys listed in the section entitled, "When And Where Will The Court Decide Whether To Approve The Settlement?," on page 10 below.

35. If you are a Class Member and you wish to object to the Settlement, the Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses, and if you did not previously exclude yourself from the Class in connection with Class Notice (as listed on Appendix 1 to the Stipulation), you may present your objections by following the instructions in the section entitled, "When And Where Will The Court Decide Whether To Approve The Settlement?," on page 10 below.

36. If you are a Class Member, you will be bound by any orders issued by the Court. If the Settlement is approved, the Court will enter a judgment. The judgment will dismiss with prejudice the claims against Defendants and will provide that, upon the Effective Date of the Settlement, Class Representative and each of the other Class Members, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such, shall be deemed to have, and by operation of law and of the judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and every Released Class Representative's Claim (defined in ¶ 37 below) against Defendants and the other Defendants' Releasees (defined in ¶ 38 below), and shall forever be barred and enjoined from prosecuting any or all of the Released Class Representative's Claims against any of Defendants or the other Defendants' Releasees in any forum of any kind, whether or not such Class Member executes and delivers a Proof of Claim Form. This Release was separately bargained for and is an essential element of the Stipulation and the Settlement

37. "Released Class Representative's Claims" means all claims and causes of action of every nature and description, whether known or Unknown Claims, whether arising under federal, state, local, common, statutory, administrative, or foreign law, or any other law, rule, or regulation, at law or in equity, whether class or individual in nature, whether accrued or unaccrued, whether liquidated or unliquidated, whether matured or unmatured, that Class Representative or any other member of the Class (a) asserted in the Action or (b) could have asserted in any court or forum that arise out of or are based upon the same allegations, transactions, facts, matters or occurrences, representations, or omissions set forth in the complaints filed in the Action and that relate to the purchase or other acquisition of Walgreens common stock during the period from March 25, 2014 through August 5, 2014, inclusive. Released Class Representative's Claims do not include: (i) any claims relating to the enforcement of the Settlement; (ii) any claims asserted in *Cutler v. Wasson et al.*, No. 14-cv-10408 (N.D. Ill.); or (iii) any claims of the persons and entities who timely requested exclusion from the Class pursuant to the Notice of Pendency as set forth on Appendix 1 to the Stipulation.

38. "Defendants' Releasees" means (i) Defendants and Defendants' Counsel; (ii) the current and former parents, affiliates, subsidiaries, successors, predecessors, partners, members, shareholders, assigns, and assignees of each of the foregoing in (i); and (iii) the current and former officers, employees, directors, partners, Immediate Family members, heirs, trusts, trustees, executors, estates, administrators, beneficiaries, agents, affiliates, insurers, reinsurers, predecessors, successors, assigns, and advisors of each of the persons and entities listed in (i) and (ii), in their capacities as such.

39. "Unknown Claims" means any Released Class Representative's Claims which Class Representative or any other Class Member does not know or suspect to exist in their favor at the time of the release of any and all Released Claims, and any Released Defendants' Claims which any Defendant does not know or suspect to exist in their favor at the time of the release of any and all Released Claims, which, if known by any of them, might have materially affected their decision(s) with respect to the Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that, upon the Effective Date of the Settlement, Class Representative and Defendants shall expressly waive, and each of the other Class Members shall be deemed to have waived, and by operation of the judgment shall have expressly waived, any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, which is similar, comparable, or equivalent to California Civil Code § 1542, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.

Class Representative and Class Members may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but Class Representative shall expressly, fully, finally, and forever settle and release, and each Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled and released, any and all Released Claims, whether known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law, or rule, without regard to the subsequent discovery or existence of such additional or different facts. Class Representative and Defendants acknowledge, and each of the other Class Members shall be deemed by operation of law to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement.

40. The judgment will also provide that, upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such, shall be deemed to have, and by operation of law and of the judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and every Released Defendants' Claim (defined in ¶ 41 below) against Class Representative and the other Class Representative's Releasees (defined in ¶ 42 below), and shall forever be barred and enjoined from prosecuting any or all of the Released Defendants' Claims against Class Representative or any of Class Representative's Releasees in any forum of any kind. This Release was separately bargained for and is an essential element of the Stipulation and the Settlement. This Release shall not apply to any person or entity who previously submitted a timely request for exclusion from the Class in connection with the Class Notice as set forth on Appendix 1 to the Stipulation.

41. "Released Defendants' Claims" means all claims and causes of action of every nature and description, whether known or Unknown Claims, whether arising under federal, state, local, common, statutory, administrative, or foreign law, or any other law, rule, or regulation, at law or in equity, whether class or individual in nature, whether accrued or unaccrued, whether liquidated or unliquidated, whether matured or unmatured, that arise out of or relate in any way to the institution, prosecution, or settlement of the Released Class Representative's Claims against Defendants and the other Defendants' Releasees. Released Defendants' Claims do not include any claims relating to the enforcement of the Settlement.

42. "Class Representative's Releasees" means (i) Class Representative, its attorneys, and all other Class Members; (ii) the current and former parents, affiliates, subsidiaries, successors, predecessors, assigns, and assignees of each of the foregoing in (i); and (iii) the current and former officers, directors, Immediate Family members, heirs, trusts, trustees, executors, estates, administrators, beneficiaries, agents, affiliates, insurers, reinsurers, predecessors, successors, assigns, and advisors of each of the persons or entities listed in (i) and (ii), in their capacities as such.

HOW DO I PARTICIPATE IN THE SETTLEMENT? WHAT DO I NEED TO DO?

43. To be eligible for a payment from the proceeds of the Settlement, you must be a member of the Class and you must timely complete and return the Claim Form with adequate supporting documentation ***postmarked (if mailed), or submitted online at www.WalgreensSecuritiesLitigation.com, no later than November 5, 2022***. You can obtain a copy of the Claim Form on the website, www.WalgreensSecuritiesLitigation.com, or you may request that a Claim Form be mailed to you by calling the Claims Administrator toll-free at 1-866-963-9976, or by emailing the Claims Administrator at info@WalgreensSecuritiesLitigation.com. **Please retain all records of your ownership of and transactions in Walgreens common stock, as they may be needed to document your Claim.** If you previously requested exclusion from the Class in connection with Class Notice or do not submit a timely and valid Claim, you will not be eligible to share in the Net Settlement Fund.

HOW MUCH WILL MY PAYMENT BE?

44. At this time, it is not possible to make any determination as to how much any individual Class Member may receive from the Settlement.

45. Pursuant to the Settlement, Defendants shall pay or cause to be paid $105,000,000 in cash. The Settlement Amount will be deposited into an escrow account. The Settlement Amount, plus any interest earned thereon, is referred to as the "Settlement Fund." If the Settlement is approved by the Court and the Effective Date occurs, the Net Settlement Fund will be distributed to Class

Members who submit valid Claim Forms, in accordance with the proposed Plan of Allocation or such other plan of allocation as the Court may approve.

46. The Net Settlement Fund will not be distributed unless and until the Court has approved the Settlement and a plan of allocation and that decision is affirmed on appeal (if any) and/or the time for any petition for rehearing, appeal, or review, whether by certiorari or otherwise, has expired.

47. Neither Defendants nor any other person or entity that paid any portion of the Settlement Amount on their behalf are entitled to get back any portion of the Settlement Fund once the Court's order or judgment approving the Settlement becomes Final. Defendants and the other Defendants' Releasees shall not have any liability, obligation, or responsibility for the administration of the Settlement, the disbursement of the Net Settlement Fund, or the Plan of Allocation.

48. Unless the Court otherwise orders, any Class Member who fails to submit a Claim postmarked (if mailed), or online, on or before November 5, 2022, shall be fully and forever barred from receiving payments pursuant to the Settlement, but will in all other respects remain a Class Member and be subject to the provisions of the Stipulation, including the terms of any judgment entered and the Releases given. This means that each Class Member releases the Released Class Representative's Claims (defined in ¶ 37 above) against Defendants and the other Defendants' Releasees (defined in ¶ 38 above) and will be enjoined and prohibited from prosecuting any of the Released Class Representative's Claims against any of Defendants or the other Defendants' Releasees whether or not such Class Member submits a Claim Form.

49. Participants in and beneficiaries of any employee retirement and/or benefit plan ("Employee Plan") should NOT include any information relating to shares of Walgreens common stock purchased/acquired through an Employee Plan in any Claim they submit in this Action. They should include ONLY those eligible shares of Walgreens common stock purchased/acquired during the Class Period outside of an Employee Plan. Claims based on any Employee Plan(s)' purchases/acquisitions of eligible Walgreens common stock during the Class Period may be made by trustees of the Employee Plan(s).

50. The Court has reserved jurisdiction to allow, disallow, or adjust on equitable grounds the Claim of any Class Member.

51. Each Claimant shall be deemed to have submitted to the jurisdiction of the Court with respect to their Claim Form.

52. Only Class Members or persons authorized to submit a Claim on their behalf will be eligible to share in the distribution of the Net Settlement Fund. Persons and entities that are excluded from the Class by definition or that previously excluded themselves from the Class in connection with Class Notice will not be eligible to receive a distribution from the Net Settlement Fund and should not submit Claim Forms.

53. **Appendix A to this Notice sets forth the Plan of Allocation for allocating the Net Settlement Fund among Authorized Claimants, as proposed by Class Representative in consultation with its damages expert. At the Settlement Hearing, Class Counsel will request the Court approve the Plan of Allocation. The Court may modify the Plan of Allocation, or approve a different plan of allocation, without further notice to the Class.**

WHAT PAYMENT ARE THE ATTORNEYS FOR THE CLASS SEEKING? HOW WILL THE LAWYERS BE PAID?

54. Class Counsel, on behalf of itself and Liaison Counsel, will apply to the Court for an award of attorneys' fees and payment of Litigation Expenses. Class Counsel's motion for attorneys' fees will not exceed 27.5% of the Settlement Fund and its motion for Litigation Expenses will not exceed $2.6 million in expenses incurred in connection with the prosecution and resolution of this Action. If awarded, it is estimated that this fee would not cover the lodestar (hours spent multiplied by hourly rates) of Class Counsel and Liaison Counsel. Class Counsel's motion for attorneys' fees and Litigation Expenses, which may include a request for reimbursement of the reasonable costs and expenses incurred by Class Representative directly related to its representation of the Class in accordance with 15 U.S.C. § 78u-4(a)(4), will be filed by September 2, 2022, and the Court will consider Class Counsel's motion at the Settlement Hearing. A copy of Class Counsel's motion for attorneys' fees and Litigation Expenses will be available for review at www.WalgreensSecuritiesLitigation.com once it is filed. Any award of attorneys' fees and payment of Litigation Expenses, including any reimbursement of costs and expenses to Class Representative, will be paid from the Settlement Fund, plus interest calculated at the same rate as earned by the Class on the Settlement Fund, prior to allocation and payment to Authorized Claimants. ***Class Members are not personally liable for any such attorneys' fees or expenses***.

WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT? DO I HAVE TO COME TO THE HEARING? MAY I SPEAK AT THE HEARING IF I DON'T LIKE THE SETTLEMENT?

55. **Class Members do not need to attend the Settlement Hearing. The Court will consider any submission made in accordance with the provisions below even if a Class Member does not attend the hearing.**

56. Please Note: The date and time of the Settlement Hearing may change without further written notice to the Class. In addition, the COVID-19 pandemic is a fluid situation that creates the possibility that the Court may decide to conduct the Settlement Hearing by video or telephonic conference, or otherwise allow Class Members to appear at the hearing by phone, without further written notice to the Class. **In order to determine whether the date and time of the Settlement Hearing have changed, or whether Class Members must or may participate by phone or video, it is important that you monitor the Court's docket and the website for the Action, www.WalgreensSecuritiesLitigation.com, before making any plans to attend the Settlement Hearing. Any updates regarding the Settlement Hearing, including any changes to the date or time of the hearing or updates regarding in-person or telephonic appearances at the hearing, will be posted to the website www.WalgreensSecuritiesLitigation.com. Also, if the Court requires or allows Class Members to participate in the Settlement Hearing by telephone, the phone number for accessing the telephonic conference will be posted to the website www.WalgreensSecuritiesLitigation.com.**

57. The Settlement Hearing will be held on **October 7, 2022, at 10:30 a.m.**, before the Honorable Sharon Johnson Coleman, United States District Judge for the Northern District of Illinois, in Courtroom 1241 of the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, IL 60604. The Court may approve the Settlement, the Plan of Allocation, Class Counsel's motion for attorneys' fees and Litigation Expenses, and/or any other matter related to the Settlement at or after the Settlement Hearing without further notice to the members of the Class.

58. Any Class Member may object to the Settlement, the Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses. Objections must be in writing. You must file any written objection, together with copies of all other papers and briefs supporting the objection, with the Clerk's Office at the United States District Court for the Northern District of Illinois at the address set forth below, as well as serve copies on Class Counsel and representative Defendants' Counsel at the addresses set forth below ***on or before September 16, 2022***.

Clerk's Office	**Class Counsel**	**Representative Defendants' Counsel**
United States District Court Northern District of Illinois Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Andrew L. Zivitz Kessler Topaz Meltzer & Check, LLP 280 King of Prussia Road Radnor, PA 19087	John M. Skakun III Sidley Austin LLP One South Dearborn Chicago, IL 60603

59. Any objection, filings, and other submissions by the objecting Class Member must: (a) identify the case name and docket number, *Washtenaw County Employees' Retirement System v. Walgreen Co. et al.*, Civil Action No. 1:15-cv-3187 (N.D. Ill.); (b) state the name, address, and telephone number of the person or entity objecting and be signed by the objector; (c) state with specificity the grounds for the Class Member's objection, including any legal and evidentiary support the Class Member wishes to bring to the Court's attention and whether the objection applies only to the objector, to a specific subset of the Class, or to the entire Class; and (d) include documents sufficient to prove membership in the Class, *including* the number of shares of Walgreens common stock that the objecting Class Member: (A) owned as of the opening of trading on April 17, 2014, and (B) purchased/acquired and/or sold during the Class Period, as well as the dates, number of shares, and prices of each such purchase/acquisition and sale. The objecting Class Member shall provide documentation establishing membership in the Class through copies of brokerage confirmation slips or brokerage account statements, or an authorized statement from the objector's broker containing the transactional and holding information found in a brokerage confirmation slip or account statement.

60. **You may not object to the Settlement, Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses if you excluded yourself from the Class in connection with the previously disseminated Class Notice and are listed on Appendix 1 to the Stipulation.**[5]

[5] As this Class was previously certified and, in connection therewith, Class Members had the opportunity to exclude themselves from the Class, the Court has exercised its discretion not to allow a second opportunity for exclusion in connection with the settlement proceedings.

61. You may submit an objection without having to appear at the Settlement Hearing. You may not, however, appear at the Settlement Hearing to present your objection unless (1) you first submit a written objection in accordance with the procedures described above, (2) you first submit your notice of appearance in accordance with the procedures described below, or (3) the Court orders otherwise.

62. If you wish to be heard orally at the hearing in opposition to the approval of the Settlement, the Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses, and if you timely submit a written objection as described above, you must also file a notice of appearance with the Clerk's Office and serve it on Class Counsel and representative Defendants' Counsel at the addresses set forth in ¶ 58 above so that it is ***received*** **on or before September 16, 2022**. Persons who intend to object and desire to present evidence at the Settlement Hearing must include in their written objection or notice of appearance the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the hearing. Such persons may be heard orally at the discretion of the Court.

63. You are not required to hire an attorney to represent you in making written objections or in appearing at the Settlement Hearing. However, if you decide to hire an attorney, it will be at your own expense, and that attorney must file a notice of appearance with the Court and serve it on Class Counsel and representative Defendants' Counsel at the addresses set forth in ¶ 58 above so that the notice is ***received*** **on or before September 16, 2022**.

64. **Unless the Court orders otherwise, any Class Member who does not object in the manner described above will be deemed to have waived any objection and shall be forever foreclosed from making any objection to the proposed Settlement, the proposed Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses. Class Members do not need to appear at the Settlement Hearing or take any other action to indicate their approval.**

WHAT IF I BOUGHT SHARES OF WALGREENS COMMON STOCK ON SOMEONE ELSE'S BEHALF?

65. **Please Note: If you previously provided the names and addresses of persons and entities on whose behalf you purchased or otherwise acquired Walgreens common stock between March 25, 2014 and August 5, 2014, in connection with the Class Notice, and (i) those names and addresses remain current and (ii) you have no additional names and addresses for potential Class Members to provide to the Claims Administrator, *you need do nothing further at this time*. The Claims Administrator will mail a Postcard Notice to the beneficial owners whose names and addresses were previously provided in connection with the Class Notice.** If you elected to mail the Class Notice directly to beneficial owners, you were advised that you must retain the mailing records for use in connection with any further notices that may be provided in the Action. If you elected this option, the Claims Administrator will forward the same number of Postcard Notices to you to send to the beneficial owners. If you require more copies of the Postcard Notice than you previously requested in connection with the Class Notice mailing, please contact the Claims Administrator, A.B. Data, Ltd., toll-free at 1-866-963-9976, and let them know how many additional Postcard Notices you require. You must mail the Postcard Notice to the beneficial owners within seven (7) calendar days of your receipt of the Postcard Notices.

66. If you have not already provided the names and addresses for persons and entities on whose behalf you purchased or otherwise acquired Walgreens common stock in connection with the Class Notice, then the Court has ordered that you must, WITHIN SEVEN (7) CALENDAR DAYS OF YOUR RECEIPT OF THIS NOTICE, either: (i) send the Postcard Notice to all beneficial owners of such Walgreens common stock, or (ii) send a list of the names and addresses of such beneficial owners to the Claims Administrator at *Walgreens Securities Litigation*, c/o A.B. Data, Ltd., P.O. Box 173092, Milwaukee, WI 53217, in which event the Claims Administrator shall promptly mail the Postcard Notice to such beneficial owners. **AS STATED ABOVE, IF YOU HAVE ALREADY PROVIDED THIS INFORMATION IN CONNECTION WITH THE CLASS NOTICE, UNLESS THAT INFORMATION HAS CHANGED (*E.G.*, BENEFICIAL OWNER HAS CHANGED ADDRESS), IT IS UNNECESSARY TO PROVIDE SUCH INFORMATION AGAIN.**

67. Upon full and timely compliance with these directions, nominees who mail the Postcard Notice to beneficial owners may seek reimbursement of their reasonable expenses actually incurred by providing the Claims Administrator with proper documentation supporting the expenses for which reimbursement is sought. Such properly documented expenses incurred by nominees in compliance with these directions shall be paid from the Settlement Fund, with any disputes as to the reasonableness or documentation of expenses incurred subject to review by the Court.

68. Copies of this Notice and the Claim Form may be obtained from the website for the Action, www.WalgreensSecuritiesLitigation.com, by calling the Claims Administrator toll-free at 1-866-963-9976, or by sending an email to info@WalgreensSecuritiesLitigation.com.

CAN I SEE THE COURT FILE?
WHOM SHOULD I CONTACT IF I HAVE QUESTIONS?

69. This Notice contains only a summary of the terms of the Settlement. For the terms and conditions of the Settlement, please see the Stipulation available at www.WalgreensSecuritiesLitigation.com. More detailed information about the matters involved in this Action can be obtained by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.ilnd.uscourts.gov, or by visiting, during regular office hours, the Office of the Clerk, United States District Court for the Northern District of Illinois, Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, IL 60604. Additionally, copies of any related orders entered by the Court and certain other filings in this Action will be posted on the website www.WalgreensSecuritiesLitigation.com.

All inquiries concerning this Notice and the Claim Form should be directed to:

Walgreens Securities Litigation
c/o A.B. Data, Ltd.
P.O. Box 173092
Milwaukee, WI 53217
1-866-963-9976

info@WalgreensSecuritiesLitigation.com
www.WalgreensSecuritiesLitigation.com

and/or

Andrew L. Zivitz
Kessler Topaz Meltzer
& Check, LLP
280 King of Prussia Road
Radnor, PA 19087
1-610-667-7706

info@ktmc.com
www.ktmc.com

PLEASE DO NOT CALL OR WRITE THE COURT, THE CLERK'S OFFICE, DEFENDANTS, OR DEFENDANTS' COUNSEL REGARDING THIS NOTICE.

Dated: July 28, 2022

By Order of the Court
United States District Court
Northern District of Illinois

APPENDIX A

Proposed Plan of Allocation of Net Settlement Fund Among Authorized Claimants

The Plan of Allocation set forth herein is the plan that is being proposed to the Court for approval by Class Representative after consultation with its damages expert. The Court may approve the Plan of Allocation with or without modification, or approve another plan of allocation, without further notice to the Class. Any orders regarding a modification of the Plan of Allocation will be posted on the website, www.WalgreensSecuritiesLitigation.com. Defendants have had, and will have, no involvement in or responsibility for the terms or application of the Plan of Allocation.

The objective of the proposed Plan of Allocation is to equitably distribute the Net Settlement Fund among those Class Members who suffered economic losses as a result of the alleged violations of the federal securities laws set forth in the Amended Consolidated Complaint and sustained by the Court in subsequent orders, as opposed to economic losses caused by market or industry factors or Walgreens-specific factors unrelated thereto. To that end, Class Representative's damages expert calculated the estimated amount of alleged artificial inflation in the per share price of Walgreens common stock over the course of the Class Period (*i.e.*, April 17, 2014 through August 5, 2014, inclusive) that was allegedly proximately caused by Defendants' alleged materially false or misleading statements.

Calculations made pursuant to the Plan of Allocation do not represent a formal damages analysis that has been adjudicated in the Action and are not intended to measure the amounts that Class Members would have recovered after a trial. Nor are these calculations intended to be estimates of the amounts that will be paid to Authorized Claimants pursuant to the Settlement. Rather, the computations under the Plan of Allocation are a method to weigh the claims of Authorized Claimants against one another for the purposes of making *pro rata* allocations of the Net Settlement Fund.

For losses to be compensable damages under the federal securities laws, the disclosure of the allegedly misrepresented or concealed information must be the cause of the decline in the price of the security. Accordingly, to have a "Recognized Loss Amount" pursuant to the Plan of Allocation, a person or entity must have purchased or otherwise acquired Walgreens common stock during the Class Period and ***held such Walgreens common stock through*** the alleged corrective disclosure on August 6, 2014, that removed the alleged artificial inflation related to that information.

CALCULATION OF RECOGNIZED LOSS AMOUNTS

1. For purposes of determining whether a Claimant has a "Recognized Claim," purchases, acquisitions, and sales of Walgreens common stock will first be matched on a First In, First Out ("FIFO") basis as set forth in ¶ 5 below.

2. A "Recognized Loss Amount" will be calculated as set forth below for each share of Walgreens common stock purchased or otherwise acquired between April 17, 2014 and August 5, 2014, inclusive, that is listed in the Claim Form and for which adequate documentation is provided. To the extent that the calculation of a Claimant's Recognized Loss Amount results in a negative number, that number shall be set to zero. The sum of a Claimant's Recognized Loss Amounts will be the Claimant's Recognized Claim.

3. A Claimant's Recognized Loss Amount will be calculated as follows:

a. For each share of Walgreens common stock purchased or otherwise acquired during the Class Period and subsequently sold prior to August 6, 2014, the Recognized Loss Amount is $0.

b. For each share of Walgreens common stock purchased or otherwise acquired during the Class Period and subsequently sold from August 6, 2014, through and including November 3, 2014,[6] the Recognized Loss Amount shall be ***the least of***:

[6] November 3, 2014, represents the last day of the 90-day period subsequent to the end of the Class Period, *i.e.*, the period from August 6, 2014 through November 3, 2014 (the "90-day Look-Back Period"). The Private Securities Litigation Reform Act of 1995 (PSLRA) imposes a statutory limitation on recoverable damages using the 90-day Look-Back Period. This limitation is incorporated into the calculation of a Class Member's Recognized Loss Amount. Specifically, a Class Member's Recognized Loss Amount cannot exceed the difference between the purchase price paid for the Walgreens common stock and the average price of Walgreens common stock during the 90-day Look-Back Period if the Walgreens common stock was held through November 3, 2014, the end of this period. Losses on Walgreens common stock purchased/acquired during the period between April 17, 2014 and August 5, 2014, and sold during the 90-day Look-Back Period cannot exceed the difference between the purchase price paid for the Walgreens common stock and the average price of Walgreens common stock during the portion of the 90-day Look-Back Period that had elapsed prior to the date of sale (the "90-day Look-Back Value"), as set forth in **Table 1** below.

i. $8.69 per share (the amount of alleged artificial inflation removed from the price of Walgreens common stock on August 6, 2014); or

ii. the actual purchase/acquisition price of each share (excluding taxes, commissions, and fees) ***minus*** the 90-day Look-Back Value as set forth in **Table 1** below; or

iii. the Out-of-Pocket Loss, calculated as the actual purchase/acquisition price per share (excluding taxes, commissions, and fees) ***minus*** the actual sale price per share (excluding taxes, commissions, and fees).[7]

c. For each share of Walgreens common stock held as of the close of trading on November 3, 2014 (*i.e.*, the last day of the 90-day Look-Back Period), the Recognized Loss Amount shall be ***the lesser of***:

i. $8.69 per share (the amount of alleged artificial inflation); or

ii. the actual purchase/acquisition price of each share (excluding taxes, commissions, and fees) ***minus*** $61.62 (the average closing price of Walgreens common stock during the 90-day Look-Back Period (*i.e.*, August 6, 2014 through November 3, 2014), as shown on the last line in **Table 1** below).

ADDITIONAL PROVISIONS

4. The Net Settlement Fund will be allocated among all Authorized Claimants whose Distribution Amount (defined in ¶ 9 below) is $10.00 or greater.

5. If a Class Member has more than one purchase/acquisition or sale of Walgreens common stock during the Class Period, all purchases/acquisitions and sales shall be matched on a FIFO basis. Class Period sales will be matched first against any holdings of Walgreens common stock at the beginning of the Class Period, and then against purchases/acquisitions of Walgreens common stock, in chronological order, beginning with the earliest purchase/acquisition made during the Class Period.

6. Purchases/acquisitions and sales of Walgreens common stock shall be deemed to have occurred on the "contract" or "trade" date as opposed to the "settlement" or "payment" date. The receipt or grant by gift, inheritance, or operation of law of Walgreens common stock during the Class Period shall not be deemed a purchase, acquisition, or sale of Walgreens common stock for purposes of the calculation of an Authorized Claimant's Recognized Claim, nor shall the receipt or grant be deemed an assignment of any claim relating to the purchase/acquisition of such Walgreens common stock unless (i) the donor or decedent purchased or otherwise acquired such Walgreens common stock during the Class Period; (ii) no Claim Form was submitted by or on behalf of the donor, on behalf of the decedent, or by anyone else with respect to such Walgreens common stock; and (iii) it is specifically so provided in the instrument of gift or assignment.

7. The date of covering a "short sale" is deemed to be the date of purchase or acquisition of the Walgreens common stock. The date of a "short sale" is deemed to be the date of sale of the Walgreens common stock. In accordance with the Plan of Allocation, however, the Recognized Loss Amount on "short sales" is zero. In the event that a Claimant has an opening short position in Walgreens common stock, the earliest purchases or acquisitions during the Class Period shall be matched against such opening short position and not be entitled to a recovery until that short position is fully covered.

8. Walgreens common stock is the only security eligible for recovery under the Plan of Allocation. Option contracts to purchase or sell Walgreens common stock are not securities eligible to participate in the Settlement unless such options were exercised during the Class Period. With respect to Walgreens common stock purchased or sold through the exercise of an option, the purchase/sale date of the Walgreens common stock is the exercise date of the option and the purchase/sale price is the exercise price of the option. Any Recognized Loss Amount arising from purchases of Walgreens common stock acquired during the Class Period through the exercise of an option on Walgreens common stock[8] shall be computed as provided for other purchases of Walgreens common stock in the Plan of Allocation.

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[7] To the extent that the calculation of an Out-of-Pocket Loss results in a negative number reflecting a gain on the transaction, that number shall be set to zero.

[8] This includes (1) purchases of Walgreens common stock as the result of the exercise of a call option, and (2) purchases of Walgreens common stock by the seller of a put option as a result of the buyer of such put option exercising that put option.

9. The Net Settlement Fund will be distributed to Authorized Claimants *pro rata* based on the relative size of their Recognized Claims. Specifically, a "Distribution Amount" will be calculated for each Authorized Claimant, which will be the Authorized Claimant's Recognized Claim divided by the total Recognized Claims of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund. If any Authorized Claimant's Distribution Amount calculates to less than $10.00, it will not be included in the final calculation of total Recognized Claims for purposes of the *pro rata* distribution, and no distribution will be made to that Authorized Claimant.

10. After the initial distribution of the Net Settlement Fund, the Claims Administrator will make reasonable and diligent efforts to have Authorized Claimants cash their distribution checks. To the extent any monies remain in the Net Settlement Fund by reason of uncashed checks, or otherwise, nine (9) months after the initial distribution, if Class Counsel, in consultation with the Claims Administrator, determines that it is cost-effective to do so, the Claims Administrator will conduct a re-distribution of the funds remaining after payment of any unpaid fees and expenses incurred in administering the Settlement, including for such re-distribution, to Authorized Claimants who have cashed their initial distributions and who would receive at least $10.00 from such re-distribution. Additional re-distributions may occur thereafter if Class Counsel, in consultation with the Claims Administrator, determines that additional re-distributions, after deduction of any additional fees and expenses incurred in administering the Settlement, including for such re-distributions, would be cost-effective. At such time as it is determined that the re-distribution of funds remaining in the Net Settlement Fund is not cost-effective, the remaining balance shall be contributed to non-sectarian, not-for-profit organization(s) to be recommended by Class Counsel and approved by the Court.

11. Payment pursuant to the Plan of Allocation, or such other plan of allocation as may be approved by the Court, will be conclusive against all Claimants. No person shall have any claim against Class Representative, Class Counsel, Class Representative's damages expert, Defendants, Defendants' Counsel, any of the other Releasees, the Claims Administrator, or other agent designated by Class Counsel arising from distributions made substantially in accordance with the Stipulation, the plan of allocation approved by the Court, or further Orders.

Table 1
Walgreens Common Stock 90-Day Look-Back Value
by Sale/Disposition Date

Sale Date	90-Day Look-Back Value	Sale Date	90-Day Look-Back Value
8/6/2014	$59.21	9/22/2014	$61.86
8/7/2014	$60.04	9/23/2014	$61.84
8/8/2014	$60.26	9/24/2014	$61.83
8/11/2014	$60.69	9/25/2014	$61.79
8/12/2014	$60.99	9/26/2014	$61.75
8/13/2014	$61.23	9/29/2014	$61.69
8/14/2014	$61.38	9/30/2014	$61.63
8/15/2014	$61.42	10/1/2014	$61.56
8/18/2014	$61.49	10/2/2014	$61.52
8/19/2014	$61.56	10/3/2014	$61.50
8/20/2014	$61.60	10/6/2014	$61.48
8/21/2014	$61.56	10/7/2014	$61.44
8/22/2014	$61.52	10/8/2014	$61.44
8/25/2014	$61.47	10/9/2014	$61.45
8/26/2014	$61.43	10/10/2014	$61.48
8/27/2014	$61.37	10/13/2014	$61.46
8/28/2014	$61.32	10/14/2014	$61.45
8/29/2014	$61.28	10/15/2014	$61.44
9/2/2014	$61.21	10/16/2014	$61.42
9/3/2014	$61.16	10/17/2014	$61.39

Sale Date	90-Day Look-Back Value	Sale Date	90-Day Look-Back Value
9/4/2014	$61.22	10/20/2014	$61.37
9/5/2014	$61.35	10/21/2014	$61.38
9/8/2014	$61.42	10/22/2014	$61.38
9/9/2014	$61.47	10/23/2014	$61.39
9/10/2014	$61.54	10/24/2014	$61.41
9/11/2014	$61.61	10/27/2014	$61.44
9/12/2014	$61.66	10/28/2014	$61.48
9/15/2014	$61.70	10/29/2014	$61.50
9/16/2014	$61.76	10/30/2014	$61.53
9/17/2014	$61.83	10/31/2014	$61.57
9/18/2014	$61.87	11/3/2014	$61.62
9/19/2014	$61.90		

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Milwaukee, WI 53217

Toll-Free Number: 1-866-963-9976
Email: info@WalgreensSecuritiesLitigation.com
Website: www.WalgreensSecuritiesLitigation.com

PROOF OF CLAIM AND RELEASE FORM

To be eligible to receive a share of the Net Settlement Fund from the proposed Settlement of the action captioned *Washtenaw County Employees' Retirement System v. Walgreen Co. et al.*, Civil Action No. 1:15-cv-3187 (N.D. Ill.) ("Action"), you must complete and sign this Proof of Claim and Release Form ("Claim Form") and mail it by First-Class Mail to the above address, or submit it online at www.WalgreensSecuritiesLitigation.com, **postmarked (or received) no later than November 5, 2022**.

Failure to submit your Claim Form by the date specified will subject your claim to rejection and may preclude you from being eligible to recover any money in connection with the proposed Settlement.

Do not mail or deliver your Claim Form to the Court, the Parties to the Action, or their counsel. Submit your Claim Form only to the Claims Administrator at the address set forth above, or online at www.WalgreensSecuritiesLitigation.com.

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PART I – GENERAL INSTRUCTIONS

1. It is important that you completely read and understand the Notice of (I) Proposed Settlement; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses ("Settlement Notice"), including the proposed Plan of Allocation set forth in the Settlement Notice ("Plan of Allocation"). The Settlement Notice describes the proposed Settlement, how Class Members are affected by the Settlement, and the manner in which the Net Settlement Fund will be distributed if the Settlement and Plan of Allocation are approved by the Court. The Settlement Notice also contains the definitions of many of the defined terms (which are indicated by initial capital letters) used in this Claim Form. By signing and submitting this Claim Form, you will be certifying that you have read and that you understand the Settlement Notice, including the terms of the Releases described therein and provided for herein.

2. This Claim Form is directed to **all persons and entities who purchased or otherwise acquired Walgreen Co. ("Walgreens") common stock during the Class Period (*i.e.*, the period between April 17, 2014 and August 5, 2014, inclusive), and were damaged thereby**. Certain persons and entities are excluded from the Class by definition as set forth in ¶ 28 of the Settlement Notice.

3. By submitting this Claim Form, you are making a request to share in the proceeds of the Settlement described in the Settlement Notice. IF YOU ARE NOT A CLASS MEMBER (*see* definition of "Class" contained in ¶ 28 of the Settlement Notice), OR IF YOU SUBMITTED A REQUEST FOR EXCLUSION FROM THE CLASS IN CONNECTION WITH THE PREVIOUSLY DISSEMINATED CLASS NOTICE AND ARE LISTED ON APPENDIX 1 TO THE STIPULATION, DO NOT SUBMIT A CLAIM FORM AS **YOU MAY NOT, DIRECTLY OR INDIRECTLY, PARTICIPATE IN THE SETTLEMENT.** THUS, IF YOU ARE EXCLUDED FROM THE CLASS, ANY CLAIM FORM THAT YOU SUBMIT, OR THAT MAY BE SUBMITTED ON YOUR BEHALF, WILL NOT BE ACCEPTED.

4. **Submission of this Claim Form does not guarantee that you will share in the proceeds of the Settlement. The distribution of the Net Settlement Fund will be governed by the Plan of Allocation set forth in the Settlement Notice, if it is approved by the Court, or by such other plan of allocation as the Court approves.**

5. Use the Schedule of Transactions in Part III of this Claim Form to supply all required details of your transaction(s) (including free transfers and deliveries) in and holdings of Walgreens common stock. On this Schedule, please provide all of the requested information with respect to your holdings, purchases, acquisitions, and sales of Walgreens common stock, whether such transactions resulted in a profit or a loss. **Failure to report all transaction and holding information during the requested time period may result in the rejection of your claim.**

6. **Please note**: Only Walgreens common stock purchased or otherwise acquired during the Class Period (*i.e.*, the period between April 17, 2014 and August 5, 2014, inclusive) is eligible under the Settlement. However, pursuant to the "90-day Look-Back Period" (described in the Plan of Allocation set forth in the Settlement Notice), your sales of Walgreens common stock during the period from August 6, 2014 through and including the close of trading on November 3, 2014, will be used for purposes of calculating loss amounts under the Plan of Allocation. For the Claims Administrator to balance your claim, the requested purchase information during the 90-day Look-Back Period must also be provided. **Failure to report all transaction and holding information during the requested time periods may result in the rejection of your claim.**

7. You are required to submit genuine and sufficient documentation for all of your transactions in and holdings of Walgreens common stock set forth in the Schedule of Transactions in Part III of this Claim Form. Documentation may consist of copies of brokerage confirmation slips or brokerage account statements, or an authorized statement from your broker containing the transactional and holding information found in a brokerage confirmation slip or account statement. The Parties and the Claims Administrator do not independently have information about your investments in Walgreens common stock. IF SUCH DOCUMENTS ARE NOT IN YOUR POSSESSION, PLEASE OBTAIN COPIES OF THE DOCUMENTS OR EQUIVALENT DOCUMENTS FROM YOUR BROKER. FAILURE TO SUPPLY THIS DOCUMENTATION MAY RESULT IN THE REJECTION OF YOUR CLAIM. DO NOT SEND ORIGINAL DOCUMENTS. **Please keep a copy of all documents that you send to the Claims Administrator. Also, do not highlight any portion of the Claim Form or any supporting documents.**

8. All joint beneficial owners each must sign this Claim Form and their names must appear as "Claimants" in Part II of this Claim Form. The complete name(s) of the beneficial owner(s) must be entered. If you purchased or otherwise acquired Walgreens common stock during the Class Period and held the shares in your name, you are the beneficial owner as well as the record owner. If you purchased or otherwise acquired Walgreens common stock during the Class Period and the shares were registered in the name of a third party, such as a nominee or brokerage firm, you are the beneficial owner of these shares, but the third party is the record owner. The beneficial owner, not the record owner, must sign this Claim Form.

9. **One Claim should be submitted for each separate legal entity or separately managed account**. Separate Claim Forms should be submitted for each separate legal entity (*e.g.*, an individual should not combine his or her IRA transactions with transactions made solely in the individual's name). Generally, a single Claim Form should be submitted on behalf of one legal entity including all holdings and transactions made by that entity on one Claim Form. However, if a single person or legal entity had multiple accounts that were separately managed, separate Claim Forms may be submitted for each such account. The Claims Administrator

reserves the right to request information on all the holdings and transactions in Walgreens common stock made on behalf of a single beneficial owner.

10. Agents, executors, administrators, guardians, and trustees must complete and sign the Claim Form on behalf of persons represented by them, and they must:

(a) expressly state the capacity in which they are acting;

(b) identify the name, account number, last four digits of the Social Security Number (or Taxpayer Identification Number), address, and telephone number of the beneficial owner of (or other person or entity on whose behalf they are acting with respect to) the Walgreens common stock; and

(c) furnish herewith evidence of their authority to bind to the Claim Form the person or entity on whose behalf they are acting. (Authority to complete and sign a Claim Form cannot be established by stockbrokers demonstrating only that they have discretionary authority to trade securities in another person's accounts.)

11. By submitting a signed Claim Form, you will be swearing to the truth of the statements contained therein and the genuineness of the documents attached thereto, subject to penalties of perjury under the laws of the United States of America. The making of false statements, or the submission of forged or fraudulent documentation, will result in the rejection of your claim and may subject you to civil liability or criminal prosecution.

12. If the Court approves the Settlement, payments to eligible Authorized Claimants pursuant to the Plan of Allocation (or such other plan of allocation as the Court approves) will be made after any appeals are resolved, and after the completion of all claims processing. The claims process will take substantial time to complete fully and fairly. Please be patient.

13. **PLEASE NOTE**: As set forth in the Plan of Allocation, each Authorized Claimant shall receive their *pro rata* share of the Net Settlement Fund. If the prorated payment to any Authorized Claimant calculates to less than $10.00, it will not be included in the calculation and no distribution will be made to that Authorized Claimant.

14. If you have questions concerning the Claim Form, or need additional copies of the Claim Form or a copy of the Settlement Notice, you may contact the Claims Administrator, A.B. Data, Ltd., at the above address, by email at info@WalgreensSecuritiesLitigation.com, or by toll-free phone at 1-866-963-9976, or you can visit the website maintained by the Claims Administrator, www.WalgreensSecuritiesLitigation.com, where copies of the Claim Form and Settlement Notice are available for downloading.

15. **NOTICE REGARDING ELECTRONIC FILES**: Certain claimants with large numbers of transactions may request, or may be requested, to submit information regarding their transactions in electronic files. To obtain the ***mandatory*** electronic filing requirements and file layout, you may visit the website www.WalgreensSecuritiesLitigation.com, or you may email the Claims Administrator's electronic filing department at info@WalgreensSecuritiesLitigation.com. **Any file that is not in accordance with the required electronic filing format will be subject to rejection.** No electronic files will be considered to have been properly submitted unless the Claims Administrator issues an email to you to that effect. **Do not assume that your file has been received until you receive this email. If you do not receive such an email within 10 days of your submission, you should contact the Claims Administrator's electronic filing department at info@WalgreensSecuritiesLitigation.com to inquire about your file and confirm it was received.**

IMPORTANT PLEASE NOTE:

YOUR CLAIM IS NOT DEEMED SUBMITTED UNTIL YOU RECEIVE AN ACKNOWLEDGEMENT POSTCARD. THE CLAIMS ADMINISTRATOR WILL ACKNOWLEDGE RECEIPT OF YOUR CLAIM FORM BY MAIL WITHIN 60 DAYS. IF YOU DO NOT RECEIVE AN ACKNOWLEDGEMENT POSTCARD WITHIN 60 DAYS, CALL THE CLAIMS ADMINISTRATOR TOLL-FREE AT 1-866-963-9976.

PART II – CLAIMANT IDENTIFICATION

Please complete this PART II in its entirety. The Claims Administrator will use this information for all communications regarding this Claim Form. If this information changes, you MUST notify the Claims Administrator in writing at the address above.

Beneficial Owner's First Name

Beneficial Owner's Last Name

Co-Beneficial Owner's First Name

Co-Beneficial Owner's Last Name

Entity Name (if Beneficial Owner is not an individual)

Representative or Custodian Name (if different from Beneficial Owner(s) listed above)

Address 1 (street name and number)

Address 2 (apartment, unit, or box number)

City

State

Zip Code

Country

Last four digits of Social Security Number or Taxpayer Identification Number

Telephone Number (home)

Telephone Number (work)

Email address (Email address is not required, but if you provide it you authorize the Claims Administrator to use it in providing you with information relevant to this claim.)

Account Number (where securities were traded)[1]

Claimant Account Type (check appropriate box)

- ☐ Individual (includes joint owner accounts)
- ☐ Corporation
- ☐ IRA/401K
- ☐ Pension Plan
- ☐ Estate
- ☐ Other _____ (please specify)
- ☐ Trust

[1] If the account number is unknown, you may leave blank. If filing for more than one account for the same legal entity you may write "multiple." Please see ¶ 9 of the General Instructions above for more information on when to file separate Claim Forms for multiple accounts.

PART III – SCHEDULE OF TRANSACTIONS IN WALGREEN CO. COMMON STOCK

Complete this Part III if and only if you purchased or otherwise acquired Walgreens common stock during the period between April 17, 2014 and August 5, 2014, inclusive. Please be sure to include proper documentation with your Claim Form as described in detail in Part I – General Instructions, ¶ 7, above. Do not include information regarding securities other than Walgreens common stock.

1. HOLDINGS AS OF APRIL 17, 2014 – State the total number of shares of Walgreens common stock held as of the opening of trading on April 17, 2014. (Must be documented.) If none, write "zero" or "0." _____	Confirm Proof of Holding Position Enclosed ○

2. PURCHASES/ACQUISITIONS BETWEEN APRIL 17, 2014 AND AUGUST 5, 2014, INCLUSIVE – Separately list each and every purchase/acquisition (including free receipts) of Walgreens common stock from after the opening of trading on April 17, 2014 through and including the close of trading on August 5, 2014. (Must be documented.)

Date of Purchase/Acquisition (List Chronologically) (Month/Day/Year)	Number of Shares Purchased/ Acquired	Purchase/Acquisition Price Per Share	Total Purchase/ Acquisition Price (excluding taxes, commissions, and fees)	Confirm Proof of Purchases/ Acquisitions Enclosed
/ /		**$**	**$**	○
/ /		**$**	**$**	○
/ /		**$**	**$**	○
/ /		**$**	**$**	○
/ /		**$**	**$**	○

3. PURCHASES/ACQUISITIONS BETWEEN AUGUST 6, 2014 AND NOVEMBER 3, 2014, INCLUSIVE – State the total number of shares of Walgreens common stock purchased/acquired (including free receipts) from after the opening of trading on August 6, 2014 through and including the close of trading on November 3, 2014. (Must be documented.) If none, write "zero" or "0."[2] _____

4. SALES BETWEEN APRIL 17, 2014 AND NOVEMBER 3, 2014, INCLUSIVE – Separately list each and every sale/disposition (including free deliveries) of Walgreens common stock from after the opening of trading on April 17, 2014 through and including the close of trading on November 3, 2014. (Must be documented.)

IF NONE, CHECK HERE ○

Date of Sale (List Chronologically) (Month/Day/Year)	Number of Shares Sold	Sale Price Per Share	Total Sale Price (not deducting taxes, commissions, and fees)	Confirm Proof of Sales Enclosed
/ /		$	$	○
/ /		$	$	○
/ /		$	$	○
/ /		$	$	○
/ /		$	$	○

[2] **Please note**: Information requested with respect to your purchases/acquisitions of Walgreens common stock from after the opening of trading on August 6, 2014 through and including the close of trading on November 3, 2014 is needed in order to perform the necessary calculations for your claim; purchases/acquisitions during this period, however, are not eligible transactions and will not be used for purposes of calculating Recognized Loss Amounts pursuant to the Plan of Allocation.

5. HOLDINGS AS OF NOVEMBER 3, 2014 – State the total number of shares of Walgreens common stock held as of the close of trading on November 3, 2014. (Must be documented.) If none, write "zero" or "0." _____	Confirm Proof of Holding Position Enclosed ○

IF YOU REQUIRE ADDITIONAL SPACE FOR THE SCHEDULE ABOVE, ATTACH EXTRA SCHEDULES IN THE SAME FORMAT. PROVIDE THE BENEFICIAL OWNER'S FULL NAME AND LAST FOUR DIGITS OF SOCIAL SECURITY/TAXPAYER IDENTIFICATION NUMBER ON EACH ADDITIONAL PAGE. IF YOU DO ATTACH EXTRA SCHEDULES, CHECK THIS BOX. ☐

PART IV - RELEASE OF CLAIMS AND SIGNATURE

YOU MUST ALSO READ THE RELEASE AND CERTIFICATION BELOW AND SIGN ON PAGE 7 OF THIS CLAIM FORM.

I (we) hereby acknowledge that, pursuant to the terms set forth in the Stipulation, without further action by anyone, upon the Effective Date of the Settlement, I (we), on behalf of myself (ourselves) and my (our) heirs, executors, administrators, predecessors, successors, and assigns, in their capacities as such, shall be deemed to have, and by operation of law and of the judgment shall have, fully, finally, and forever compromised, settled, released, resolved, relinquished, waived, and discharged each and every Released Class Representative's Claim against Defendants and the other Defendants' Releasees, and shall forever be barred and enjoined from prosecuting any or all of the Released Class Representative's Claims against any of Defendants or the other Defendants' Releasees in any forum of any kind.

CERTIFICATION

By signing and submitting this Claim Form, the Claimant(s) or the person(s) who represent(s) the Claimant(s) agree(s) to the release above and certifies (certify) as follows:

1. that I (we) have read and understand the contents of the Settlement Notice and this Claim Form, including the Releases provided for in the Settlement and the terms of the Plan of Allocation;

2. that the Claimant(s) is a (are) member(s) of the Class, as defined in the Settlement Notice, and is (are) not excluded by definition from the Class as set forth in the Settlement Notice;

3. that the Claimant(s) did **not** submit a request for exclusion from the Class in connection with the previously disseminated Class Notice;

4. that I (we) own(ed) the Walgreens common stock identified in the Claim Form and have not assigned the claim against Defendants or any of the other Defendants' Releasees to another, or that, in signing and submitting this Claim Form, I (we) have the authority to act on behalf of the owner(s) thereof;

5. that the Claimant(s) has (have) not submitted any other Claim covering the same purchases/acquisitions of Walgreens common stock and knows (know) of no other person having done so on the Claimant's (Claimants') behalf;

6. that the Claimant(s) submit(s) to the jurisdiction of the Court with respect to the Claimant's (Claimants') Claim and for purposes of enforcing the Releases set forth herein;

7. that I (we) agree to furnish such additional information with respect to this Claim Form as Class Counsel, the Claims Administrator, or the Court may require;

8. that the Claimant(s) waive(s) the right to trial by jury, to the extent it exists, agree(s) to the determination by the Court of the validity or amount of this Claim, and waives any right of appeal or review with respect to such determination;

9. that I (we) acknowledge that the Claimant(s) will be bound by and subject to the terms of any judgment(s) that may be entered in the Action; and

10. that the Claimant(s) is (are) NOT subject to backup withholding under the provisions of Section 3406(a)(1)(C) of the Internal Revenue Code because (a) the Claimant(s) is (are) exempt from backup withholding or (b) the Claimant(s) has (have) not been notified by the IRS that they are subject to backup withholding as a result of a failure to report all interest or dividends or (c) the IRS has notified the Claimant(s) that they are no longer subject to backup withholding. **If the IRS has notified the Claimant(s) that they are subject to backup withholding, please strike out the language in the preceding sentence indicating that the Claim is not subject to backup withholding in the certification above.**

UNDER THE PENALTIES OF PERJURY, I (WE) CERTIFY THAT ALL OF THE INFORMATION PROVIDED BY ME (US) ON THIS CLAIM FORM IS TRUE, CORRECT, AND COMPLETE, AND THAT THE DOCUMENTS SUBMITTED HEREWITH ARE TRUE AND CORRECT COPIES OF WHAT THEY PURPORT TO BE.

Signature of Claimant Date

Print Claimant name here

Signature of joint Claimant, if any Date

Print joint Claimant name here

If the Claimant is other than an individual, or is not the person completing this form, the following also must be provided:

Signature of person signing on behalf of Claimant Date

Print name of person signing on behalf of Claimant here

Capacity of person signing on behalf of Claimant, if other than an individual, *e.g.*, executor, president, trustee, custodian, etc. (Must provide evidence of authority to act on behalf of Claimant – *see* ¶ 10 on page 3 of this Claim Form.)

Walgreens Securities Litigation
c/o A.B. Data, Ltd.
P.O. Box 173092
Milwaukee, WI 53217

COURT APPROVED NOTICE REGARDING
Walgreens Securities Litigation

REMINDER CHECKLIST

1. Sign the above release and certification. If this Claim Form is being made on behalf of joint Claimants, then both must sign.
2. Attach only **copies** of acceptable supporting documentation as these documents will not be returned to you.
3. Do not highlight any portion of the Claim Form or any supporting documents.
4. Keep copies of the completed Claim Form and any supporting documentation for your own records.
5. The Claims Administrator will acknowledge receipt of your Claim Form by mail, within 60 days. Your Claim is not deemed submitted until you receive an acknowledgement postcard. **If you do not receive an acknowledgement postcard within 60 days, please call the Claims Administrator toll-free at 1-866-963-9976.**
6. If your address changes in the future, you must send the Claims Administrator written notification of your new address. If you change your name, inform the Claims Administrator.
7. If you have any questions or concerns regarding your Claim, please contact the Claims Administrator at the address below, by email at info@WalgreensSecuritiesLitigation.com, or by toll-free phone at 1-866-963-9976 or you may visit www.WalgreensSecuritiesLitigation.com. DO NOT call the Court, Defendants, or Defendants' Counsel with questions regarding your Claim.

THIS CLAIM FORM MUST BE MAILED TO THE CLAIMS ADMINISTRATOR BY FIRST-CLASS MAIL, OR SUBMITTED ONLINE AT WWW.WALGREENSSECURITIESLITIGATION.COM, **POSTMARKED (OR RECEIVED) NO LATER THAN NOVEMBER 5, 2022.** IF MAILED, THE CLAIM FORM SHOULD BE ADDRESSED AS FOLLOWS:

Walgreens Securities Litigation
c/o A.B. Data, Ltd.
P.O. Box 173092
Milwaukee, WI 53217

If mailed, a Claim Form received by the Claims Administrator shall be deemed to have been submitted when posted, if a postmark date on or before November 5, 2022, is indicated on the envelope and it is mailed First-Class, and addressed in accordance with the above instructions. In all other cases, a Claim Form shall be deemed to have been submitted when actually received by the Claims Administrator.

You should be aware that it will take a significant amount of time to fully process all of the Claim Forms. Please be patient and notify the Claims Administrator of any change of address.

EXHIBIT C

36 Mo Performance Rating	Fund	YTD % Chg	12Wk % Chg	5 Yr After Tax Rtn	Net Asset Value	NAV Chg
C	Glob Alloc	-12	+1	+18	17.32n	-.08
A	LarCapCore	-14	+3	+52	17.35n	+.00
A-	LngHrznEqty	-14	+10	+55	10.47n	-.07
A	MidCapDiv	-4	-1	+53	21.02n	-.03
A-	**OppInstl**	+24	-8	+33	11.57n	+.16
A-	SciOpInst	-9	+4	+65	67.87n	+.14
A+	Technology	-28	+7	+127	47.32n	-.30
	BlackRock K					
	$ 34.4 bil 212-810-5596					
A	S#P500Ind	-12	+3	+77	486.73n	-.73
	Blackrock R					
	$ 100 bil 212-810-5596					
A-	AdvCapCore	-15	+3	+48	14.83n	+.00
C-	Glob Alloc	-13	+1	+15	16.03n	-.07
A	MidCapDivd	-4	-1	+48	16.20n	-.02
A-	OppsR	-9	+4	+60	61.73n	+.13
	BlackRock Svc					
	$ 28.8 bil 212-810-5596					
A+	SmCapGr	0	+0	+80	20.80n	+.00
	Blackrock Funds					
	$ 143 bil 212-810-5596					
A+	Oppertunity	-29	+7	+115	34.56n	-.22
A	StockIndex	-13	+3	+74	30.35n	-.05
E	StratIncOpp	-6	-1	-1	9.58n	-.03
E	StratIncOpp	-6	-1		9.59n	-.02
E	StrtIncOppA	-6	-1		9.58	-.03
	BNY Mellon					
	$ 41.9 bil 212-495-1784					
A	EquityOppM	-17	+3	+58	16.55n	-.02
A	LgCapEql	-18	+1	+63	22.72n	-.05
A+	MultiStratM	0	+0	+62	16.56n	+.00
A	ResearchGrw	-23	+7	+67	14.29n	-.04
A+	**ResourcesI**	+21	-7	+94	50.92n	+.80
A	TxSnstvLgCp	-13	+3	+64	18.38n	+.01
	Boston & Walden					
	$ 1.5 bil 617-726-7250					
A-	SmallCap	-9	+3	+59	16.32n	+.03
	BridBuild					
	$ 66.7 bil 855-823-3611					
A+	LrgCapGrwth	-19	+6	+84	19.16n	-.04
A-	LrgCapVal	-7	-1	+57	16.07n	+.02
	Bridges					
	$ 201 mil 203-780-8000					
A	BridInvst	-17	+7	+74	86.60n	-.10
	Bridgeway Funds					
	$ 2.7 bil 800-531-4066					
A-	BluChp35Idx	-10	+2	+61	13.03n	-.02
A+	OmniSmallIN	-2	+2	+46	21.94n	+.13
A+	TaxManagedN	-3	+2	+42	21.17n	+.12
A-	**UltSmCoMkt**	-15	+3	+22	11.62n	+.13
	BrightRock					
	$ 298 mil 800-826-6101					
A-	QltyLCInstl	-8	+4	+65	20.96n	+.05
	Brown Advisory					
	$ 9.5 bil 410-537-5400					
A	EquityInv	-14	+4	+78	29.78n	+.01
A	FlexEqtInst	-14	+4	+79	29.91n	+.02
A+	GrowthI	-18	+13	+122	41.21n	+.17
	Buffalo Funds					
	$ 3.8 bil 800-492-8332					
A-	FlexInc	-1	-3	+47	18.00n	+.09
A	**SmallCap**	-20	+14	+68	15.35n	+.19
	–C–					
	Calamos Funds					
	$ 25.8 bil 630-245-7200					
A-	ConvertI	-16	+3	+50	16.79n	+.00
A-	Gr#IncC	-13	+2	+53	40.79n	-.07
A-	Gr#IncI	-13	+2	+58	38.60n	-.06
	Calvert Group					
	$ 2.9 bil 800-368-2745					
A	EquityC	-14	+8	+96	35.85n	-.03
	Cambiar Funds					
	$ 4.4 bil 866-777-8227					
A+	OpportInstl	-5	+4	+51	26.27n	+.04
	CapMgmt					
	$ 889 mil 212-752-8777					
A	DivEqInst	-6	-1	+52	27.64n	+.05
	Carillon Family					
	$ 22.8 bil 800-421-4184					
A+	CapApprI	-17	+6	+81	55.37n	-.12
A+	CapitalAppA	-17	+5	+78	51.61	-.12
	CGM Funds					
	$ 705 mil 800-345-4048					
B+	**Focus**	-3	-1	-12	42.33n	+.86
B	**Mutual**	-5	-3	+9	27.15n	+.35
	ClearBridge Inv					
	$ 12.5 bil 800-691-6960					
A-	DivStrtegyA	-7	+1	+61	28.09	+.02
	Coho					
	$ 575 mil 484-318-7575					
A	EquityAdv	-3	+1	+52	16.61n	+.06
	Columbia A					
	$ 113 bil 800-345-6611					
A	ContraCore	-12	+3	+60	29.09	+.01
A-	Conv Secs	-14	+3	+51	20.00	+.07
A-	DivInc	-7	+0	+62	29.11	+.07
A+	LargeGrA	-21	+4	+73	48.13	-.14
A+	LargeGrow	-17	+5	+68	9.01	-.02
A	Lg Cp Idx	-12	+3	+64	51.00n	-.08
A	LrgCapCore	-13	+3	+63	16.73	-.01
A	LrgEnCore	-11	+2	+57	22.98n	-.02
A-	MidCapVal	-8	+2	+42	12.31n	+.08
A-	MidCapVal	-9	+1	+41	12.26	+.08
A+	SelGlbTch	-20	+3	+127	58.69	-.36
A-	SelLgCpVal	-6	-2	+49	28.64	+.18
A-	SmCpVal	-7	+4	+30	39.06	+.22
A-	SmCpValII	-10	+4	+34	16.99n	+.10
A-	SmCpValII	-10	+4	+33	16.59	+.10
A+	Tech#InfoA	-19	+3	+125	104.62	-.71
A+	Technology	-21	+7	+117	54.39	-.18
	Columbia C					
	$ 94.4 bil 800-345-6611					
A	Contrar	-12	+3	+55	25.04n	+.01
A-	LargeCore	-13	+1	+56	12.23n	+.00
A	LrgCapGrow	-22	+4	+64	35.71n	-.11
A-	MidCapValC	-9	+1	+36	10.72n	+.06
A+	SelgCom#Inf	-20	+3	+109	54.38n	-.37
A+	SelGlbTch	-20	+3	+115	38.28n	-.23
A+	Technology	-21	+7	+110	47.51n	-.16
	Columbia I,T&G					
	$ 22.2 bil 800-345-6611					
A-	DivIncT	-7	+0	+62	29.12	+.07
	Columbia R					
	$ 132 bil 800-345-6611					
A	ContraCore	-12	+3	+62	30.15n	+.02
A	Contrar	-12	+3	+59	29.08n	+.02
A+	Contrar	-12	+3	+63	30.13n	+.02
A-	Convert	-14	+4	+53	20.28n	+.07
A	CoreR5	-13	+2	+62	12.69n	-.01
A-	Dividend	-7	+0	+61	29.13n	+.07
A-	DivIncAdv	-7	+0	+64	29.68n	+.07
A-	DivIncR5	-7	+0	+64	29.64n	+.07
A	Largecap	-12	+3	+66	52.64n	-.08
A	LGcap	-11	+2	+55	22.87n	-.02
A-	Midcap	-8	+2	+43	12.86n	+.08
A-	MidCapVal	-9	+1	+39	12.18n	+.07
A-	MidCapVal	-8	+2	+42	12.86n	+.08
A+	SelCom#Inf	-19	+3	+122	96.46n	-.65
A-	Selctla	-6	-2	+51	30.54n	+.18
A-	SmallCap	-10	+4	+34	17.51n	+.11
	Columbia Y					
	$ 39.8 bil 800-345-6611					
A+	ContrarCore	-11	+3	+63	30.16n	+.02
A-	Dividend	-7	+0	+65	29.69n	+.07
A+	LrgEnCore	-11	+2	+59	22.97n	-.02
A	Midcap	-8	+2	+43	12.24n	+.07
A-	SmallCap	-10	+4	+35	17.66n	+.10
	Columbia Z					
	$ 45.8 bil 800-345-6611					
A	DisCore	-13	+2	+62	12.76n	+.00
A-	DiscpVal	-5	+0	+37	8.77n	+.01
A-	DivIncZ	-7	+0	+64	29.14n	+.07
A-	Largecap	-6	-2	+51	30.05n	+.18
A-	SmCpVal	-7	+4	+32	45.13n	+.26
	Columbia Funds					
	$ 41.9 bil 800-345-6611					
A	ContraCore	-12	+3	+60	28.70	+.02
A-	ConvSecs	-14	+3	+52	20.04n	+.06
A+	LargeGrV	-21	+4	+73	47.51	-.14
A+	SelCom#Inf	-19	+3	+130	120.47n	-.81
A+	SelGlob	-19	+4	+130	60.48n	-.37
A+	SeligCom	-19	+3	+129	119.63n	-.81
	CONGRESS					
	$ 1.3 bil 800-234-4516					
A+	CapGrowth	-18	+5	+91	36.48n	+.05
A	GrwthRetail	-20	+5	+71	25.62n	+.23
	Credit Suisse ABCD					
	$ 9.0 bil 877-870-2874					
A+	CommodRtn	+20	-7	+760	27.35	-.07
	CRM Funds					
	$ 2.9 bil 800-276-2883					
A-	CapValInst	-8	+1	+52	24.02n	+.13
A-	MidCapInv	-8	+1	+51	22.75n	+.13
A-	SmlMidVal	-9	+3	+42	11.14n	+.07
	–D–E–					
	Dearborn					
	$ 613 mil 312-795-1000					
A-	RisingDiv	-8	+5	+69	21.83n	+.09
	Delaware A					
	$ 62.7 bil 877-693-3546					
A+	GrwEquityA	-21	+2	+71	11.14	+.01
	Delaware C					
	$ 40.9 bil 877-693-3546					
A+	GrowthC	0	+0	+69	18.19n	+.00
	Delaware Instl					
	$ 37.2 bil 877-693-3546					
A	SmlCpGrow	-19	+9	+64	13.39n	+.09
	DEUTSCHE Asst & Wealth					
	$ 3.3 bil 800-621-7705					
A	Eq500Idx	-12	+3	+57	179.97n	-.28
A	LgCpFocGrw	-21	+8	+82	65.52n	+.11
	Diamond Hill Funds					
	$ 53.8 bil 888-255-8955					
A+	CapY	-10	+3	+68	19.69n	+.03
	Dimensional Funds					
	$ 319 bil 512-306-7400					
D	EmMktCorEq	-15	-2	+7	21.14n	+.11
D+	IntlCoreEq	-15	-2	+10	13.52n	-.09
A	USCorEq1	-11	+3	+69	32.15n	+.03
A	USCorEq2I	-11	+3	+64	29.16n	+.05
A+	USLCpGr	-13	+4	+87	28.30n	-.03
B	USLgCapVal	-8	-2	+38	41.95n	+.20
A	USLgCo	-12	+3	+75	29.52n	-.05
A-	USSmCpGr	-14	+4	+51	22.79n	+.05
A+	USSmlVall	-4	+3	+41	41.37n	+.25
A+	USTgtVall	-5	+2	+46	28.52n	+.18
A+	USTgtValR1	-5	+2	+46	28.52n	+.18
A-	USVectorEq	-9	+1	+46	22.45n	+.10
	Dodge&Cox					
	$ 113 bil 800-621-3979					
A	Stock	-7	+0	+55	225.40n	+.86
	Domini Soc Inv					
	$ 5.0 bil 800-762-6814					
A	EqtInstl	-17	+5	+59	28.88n	-.10
A	EquityR	-17	+5	+44	28.92n	-.10
	Doubleline Funds					
	$ 106 bil 213-633-8200					
A	Commodity N	+12	-11	+28	11.09n	+.03
A	CommodityI	+12	-11	+44	11.21n	+.02
A-	Enhance	-13	+4	+57	15.28n	+.00
E	TotRtrnBndN	-8	+0		9.40n	-.08
	Dreyfus					
	$ 27.6 bil 800-346-8893					
A+	Apprciatn	-14	+4	+73	40.69n	-.07
A-	MidcapValC	-6	+0	+28	23.88n	+.21
A-	MidcapValI	-6	+0	+34	30.26n	+.26
A-	Research	-23	+7	+65	14.15	-.04
A+	StrategicI	-3	+1	+54	39.97n	+.26
A+	SustinUSEqt	-14	+6	+66	16.44	+.00
A	WldWdGrwthC	-15	+3	+58	52.15n	-.21
A+	WrldwdGrwth	-14	+4	+66	63.62n	-.26
	DREYFUS A					
	$ 14.3 bil 800-346-8893					
A-	EqtyIncome	-7	+0	+53	24.62	+.07
	DREYFUS C					
	$ 5.8 bil 800-346-8893					
A-	GrowthC	-23	+7	+57	11.52n	-.03
	DREYFUS I					
	$ 10.2 bil 800-346-8893					
A-	EquityIncoI	-7	+0	+54	24.67n	+.07
	Driehaus Funds					
	$ 2.8 bil 312-587-3800					
A+	**Growth**	-27	+13	+109	11.88n	+.25
A	SmallCapGr	-18	+1	+41	18.07n	+.18
	DWS Funds A					
	$ 10.3 bil 800-728-3337					
A	LgCpFocGrw	-21	+8	+80	61.55	+.10
	DWS Funds C					
	$ 4.4 bil 800-728-3337					
A	Technology	-23	+8	+78	14.43n	+.01
	DWS Funds Instl					
	$ 737 mil 800-728-3337					
A	Eq500Idx	-12	+3	+58	184.54n	-.28
	DWS Funds S					
	$ 15.1 bil 800-728-3337					
A	CapGrowth	-19	+8	+82	102.76n	-.08
A+	SmallCapCor	-11	+3	+59	43.10n	+.14
	Eagle Funds					
	$ 32.0 bil 800-237-3101					
A+	CapApprC	-17	+5	+68	31.11n	-.07
	Eaton Vance A					
	$ 35.1 bil 800-225-6265					
A	HealthSciA	-9	+4	+62	13.30	-.02
	Eaton Vance C					
	$ 29.9 bil 800-225-6265					
A-	TxMgGr 1.1	-15	+4	+69	71.63n	-.04
A-	TxMgGr 1.2	-15	+4	+68	34.73n	-.02
A	WWHlthSci	-9	+3	+58	13.49n	-.02
	Eaton Vance Instl					
	$ 40.0 bil 800-225-6265					
A-	DivBuilder	-10	+0	+62	17.70n	+.05
	EqtyinvCorp					
	$ 244 mil 404-239-0111					
A+	ValueInstnl	-1	-2	+56	15.78n	+.00
	–F–					
	Fairholme					
	$ 1.4 bil 866-202-2263					
A-	Fairholme	-19	-14	+36	25.19n	-.52
	Federated Hermes A					
	$ 75.7 bil 800-245-5051					
A	CloverValue	-7	+5	+25	25.32n	+.00
	Federated Hermes C					
	$ 39.2 bil 800-245-5051					
A-	CloverSmVI	-7	+5	+26	22.92n	+.00
A	MaxCapIdx	-13	+3	+45	8.03n	-.02
A	MaxCapIdx R	-13	+3	+47	8.35n	-.02
	Federated Hermes Inst					
	$ 31.1 bil 800-245-5051					
A	CloverSmVI	-7	+5	+32	25.29n	+.00
A	MaxCapIdx	-13	+3	+51	8.62n	-.01
	Fidelity					
	$ 44.7 bil 800-343-3548					
A-	Canada	-5	-1	..	13.85n	-.06
A	CapDiscover	-13	+1	+45	10.83n	+.00
A+	GrowthComp	-22	+7	+105	15.83n	+.03
	Fidelity Adv A					
	$ 138 bil 800-343-3548					
A-	Balanced	-13	+2	+48	24.94	-.09
A-	CanadaA r	-4	-1	+40	61.57	-.33
A+	**EnergyA** r	+34	-8	+37	36.49	+.72
A+	**EnergyM** r	+34	-8	+36	37.45	+.75
A+	EquityGr	-15	+7	+97	14.66	+.03
A-	EquityVal	-6	+0	+41	22.08	+.05
B	InsightsZ	-21	+3	+54	32.76n	-.03
A	LargeCap	-8	+1	+51	34.59	+.15
A-	MidCpII	-13	+4	+39	20.17	+.11
A+	SeriesEqGr	-14	+8	+96	14.16n	+.02
A-	SmallCap	-18	+5	+40	26.41	+.20
A	StkSelAll	-14	+4	+64	59.66	+.04
E	TotalBond r	-10	+0	+2	9.89	-.09
A+	ValueStrat	-6	+0	+48	39.71	+.02
	Fidelity Adv C					
	$ 158 bil 800-343-3548					
A	Advisor	-16	+1	+62	26.95n	+.00
A+	**EnergyC** r	+34	-9	+33	33.34n	+.66
A+	EquityGrow r	-15	+7	+87	11.18n	+.02
A-	Gr#Inc r	-6	+1	+47	28.77n	+.12
A	GrowthOpp r	-27	+5	+108	84.97n	+.37
A-	LargeCap	-8	+1	+46	29.95n	+.13
A	LevCoStk	-17	+1	+38	38.76n	-.08
A	MegaCapC x	-10	+1	+49x	16.42n	-.41
C+	NewInsight	-21	+3	+44	24.66n	-.03
A	SmlCpVal r	-10	+1	+37	16.28n	+.06
E	TotalBond r	-10	+0		9.89n	-.09
	Fidelity Adv I					
	$ 165 bil 800-343-3548					
A-	Balanced	-12	+2	+49	25.56n	-.09
A-	CanadaInst r	-4	-1	+42	61.93n	-.33
A+	DiverStck	-15	+1	+70	31.24n	-.01
A+	**EnergyI**	+34	-8	+39	38.65n	+.77
A+	EquityGrow	-15	+7	+100	16.87n	+.02
A-	EquityInc	-2	+0	+36	32.77n	+.01
A+	GrowthOpp	-27	+5	+121	115.93n	+.51
A+	LevCoStk	-16	+1	+47	48.86n	-.10
A-	MidCpII	-13	+4	+40	21.10n	+.12
B	NewInsight	-21	+3	+54	32.62n	-.03
A-	SmallCap	-17	+5	+43	30.24n	+.23
A+	SmlVal r	-9	+1	+45	19.57n	+.08
A	StkSelAll	-14	+4	+66	60.93n	+.04
A-	**StkSelSC** r	-15	+6	+55	29.40n	+.33
A-	Utilities r	+6	+6	+59	40.93n	+.01
A+	ValueStrat	-6	+0	+50	44.80n	+.01
	Fidelity Advisor Z					
	$ 43.3 bil 800-343-3548					
A-	Advsmall	-17	+5	+44	30.40n	+.22
A-	MidCapVal	-8	+1	+24	26.19n	+.05
A+	Technology	-23	+7	..	86.71n	-.07
	Fidelity Freedom					
	$ 173 bil 800-343-3548					
D+	2020	-12	+1	+18	13.85n	-.09
C-	2025	-13	+1	+21	12.71n	-.08
C	2030	-13	+1	+25	15.86n	-.08
B-	2040	-15	+1	+32	9.61n	-.03
A+	Fund K x	-18	+5	+83x	64.39n	-.17
	Fidelity Select					
	$ 15.0 bil 800-343-3548					
A+	Const#Hse r	-21	+4	+94	84.81n	+.44
A+	**Energy** r	+35	-8	+39	47.45n	+.95
A-	Utilities r	+6	+6	+60	108.91n	+.02
A	Wireless	-14	+4	+62	11.74n	-.03
	Fidelity Spartan Adv					
	$ 62.1 bil 800-343-3548					
D	IntlIdFd I	-16	-1	+10	41.52n	-.34
E	USBdIdl	-9	+1	+1	10.76n	-.12
	Fidelity Invest					
	$ 1577 bil 800-343-3548					
D+	2020Freedom	-12	+1	+18	13.84n	-.09
B-	2035Freedom	-14	+1	+29	13.60n	-.05
A+	500IdxInsPr	-12	+3	+78	144.01n	-.22
A-	AdvBalZ	-12	+2	+50	25.57n	-.09
A	AdvCapDevA	-8	+1	+52	17.45	+.08
A+	AdvDivStkA	-15	+1	+68	28.63	+.00
A+	AdvDivStkO	-15	+1	+71	29.81n	-.01
A+	**AdvGlbComA**	+12	-7	+68	18.12	+.26
A+	**AdvGlbComC**	+11	-8	+64	17.96n	+.26
A+	**AdvGlbComI**	+12	-7	+69	18.14n	+.26
A	AdvGrwIncZ	-6	+1	+46	32.20n	+.13
A-	AdvisorZ	-2	+0	+33	32.73n	+.01
A+	AdvLevCoSt	-16	+1	+47	49.10n	-.10
A	AdvSer	-17	+5	+46	12.01n	+.09
A+	AdvSrsGro	-26	+6	+101	10.33n	+.05
A+	AdvTechA r	-23	+7	+119	77.63	-.07
A	AllCpZ	-14	+4	+56	59.54n	+.05
A-	BalancedK	-12	+2	+48	26.50n	-.10
A+	BluChpGroK	-26	+6	+105	136.94n	-.44
A+	BlueChip	-26	+6	+108	20.72n	-.06
A-	Canada r	-4	-1	+42	61.89n	-.33
A+	CaptlApprK	-13	+7	+76	38.47n	+.09
A+	CommStra	+17	-8	+33	10.30n	-.06
A-	Contrafund	-21	+3	+78	18.38n	+.00
A	ConvSec	-12	+4	+58	31.74n	+.24
A	DiscipEqK	-19	+5	+67	52.63n	+.06
A-	Discovery	-5	+0	+46	12.96n	+.03
A+	DiversStk	-15	+1	+66	28.23	+.00
A+	EnhancedIdx	-11	+2	+77	19.29n	-.03
A+	EqGrowthZ	-15	+7	+102	17.09n	+.03
A-	EqtDivInc	-2	+0	+38	27.07n	+.00
A-	EqtDivIncK	-2	+0	+39	27.07n	+.01
A-	EqtyIncK	-7	-1	+45	64.56n	+.16
A-	EquityVal	-6	+0	+40	22.08	+.06
A+	FocusedStk r	-18	+4	+98	28.33n	+.09
C	Freedom	-13	+1	+24	15.85n	-.08
C-	Freedom2025	-13	+1	+22	12.66n	-.08
C-	Freedom2025	-13	+1	+21	12.70n	-.07
C	Freedom2030	-13	+1	+25	15.80n	-.08
B	Freedom2040	-15	+1	+33	9.57n	-.03
B	Freedom2040	-15	+1	+32	9.61n	-.03
D+	FreedomK6	-12	+1	+19	13.79n	-.09
A	Gr#IncK	-6	+1	+60	48.42n	+.20
A	Growth#Inc	-6	+1	+51	31.35	+.14
A	GrowthOpp	-27	+5	+115	103.34	+.44
A+	GrwDiscovyK x	-15	+7	+102x	46.14n	-1.4
A	IndependncK	0	+0	+69	45.04n	+.00
A-	LargeCap	-8	+1	+50	34.47	+.15
A	LevCoStk	-17	+1	+43	44.38	-.09
A-	LgValEnhIdx	-7	-1	+48	14.91n	+.02
A	LowPriced	-8	-1	+52	14.06n	+.01
A	LowPriStkK	-9	-1	+41	48.94n	+.03
A-	LowPrStk	-9	-1	+41	48.98n	+.03
A	LvgCoStkK	-17	+1	+54	39.88n	-.07
A	Magellan	-17	+10	+73	12.32n	-.04
A-	MaterialsC r	-14	-6	+25	89.78n	+.60
A	MaterialsI r	-14	-6	+30	94.24n	+.64
A	MaterialsM r	-14	-6	+27	92.61	+.62
A	MegaCap x	-9	+1	+53x	16.79	-.48
A	MegaCap x	-9	+1	+52x	16.80	-.45
A-	Midcap	-13	+4	+41	21.09n	+.12
A	MidcapStck	-7	+2	+57	37.67n	+.16
A-	MidCapVal r	-8	+1	+31	26.46n	+.05
A	MidCpStkK	-6	+2	+58	37.72n	+.16
A-	MomIndx	-18	+1	+69	13.76n	+.05
B-	NewInsight	-21	+3	+49	29.52	-.02
A-	NewMillnm	-4	+1	+51	40.21n	+.24
A+	OppsGrowth	-27	+5	+121	117.37n	+.51
A+	OTC	-23	+6	+91	15.10n	-.05
A+	OTCK	-23	+6	+91	15.42n	-.05
B+	PuritanK	-13	+1	+45	23.47n	-.08
A	SaiUS	-12	+3	+75	19.95n	-.03
A-	SaiUSValInd	-3	-2	..	11.99n	+.03
A+	SelectTech r	-23	+6	+103	21.63n	-.01
A	SmlCpVal r	-10	+1	+41	18.31	+.07
C+	SpExIdAdv	-19	+6	+42	70.53n	+.52
A	StkSelAll	-14	+4	+63	59.62	+.04
A	StkSelAllCp	-14	+4	+66	59.97n	+.04
A	StkSlAllCpK	-14	+4	+66	59.84n	+.04
A+	Technology	-23	+7	+116	71.29	-.06
A+	Technology r	-23	+6	+109	59.03n	-.05
E	TotalBond r	-10	+0	+2	9.87	-.09
A-	ValDisc	-6	+0	+44	36.02n	+.10
A-	ValDiscK	-6	+0	+45	36.05n	+.10
A+	ValueK	-7	+0	+46	13.72n	+.02
A-	WIDINSTL	-20	+3	+57	28.67n	-.02
	FidelityMgmt					
	$ 291 bil 800-544-8544					
A+	BluChpGr	-26	+6	+105	136.39n	-.43
A-	Chemicals r	-14	-6	+21	15.64n	+.03
A-	Contrafund	-21	+3	+70	14.63n	-.01
A-	EqtyInc	-7	-1	+45	64.61n	+.16
A-	FidBalanced	-12	+2	+47	26.50n	-.10
A+	GrowthComp	-23	+8	+114	28.20n	+.03
A	MaterialsA r	-14	-6	+29	93.77	+.63
A+	MegaCapStk x	-9	+1	+55x	17.10n	-.51
A+	**NatResFund**	+17	-9	+39	33.00n	+.59
A	Nordic r	-23	+2	+29	49.46n	-1.0
A	SelctMatrls r	-14	-6	+30	94.44n	+.63
A+	SmlVal r	-9	+1	+45	19.57n	+.08
A+	Value	-7	+0	+46	13.70n	+.03
A+	ValueStrat	-6	+0	+51	48.73n	+.01
	FidltyAdvFoc C					
	$ 4.7 bil 800-343-3548					
A-	Convertible	-13	+4	+52	31.38n	+.23
	First Eagle					
	$ 97.5 bil 800-334-2143					
C-	GlobalA	-8	-1	+25	59.40	-.23
	Frank/Tmp Tp A					
	$ 62.2 bil 800-342-5236					
E	Glob Bond	-6	-2	-20	8.04	-.04
	Frank/Tmp TpAd					
	$ 63.6 bil 800-342-5236					
E	Glob Bond	-6	-2	-19	8.00n	-.04
	Franklin A					
	$ 216 bil 800-342-5236					
B	Dynatech	-26	+11	+90	114.38	-.01
C	Income	-4	+0	+21	2.34	+.00
A	MicroCpVal	-4	+6	+28	27.04	+.01
	Franklin Temp					
	$ 159 bil 800-342-5236					
A	GrthR6	-17	+8	+76	125.48n	-.24
A	GrwthA	-17	+8	+74	124.59	-.25
A	RisDivR6	-10	+2	+74	86.12n	+.26
E	TempGlb	-6	-2	-19	7.99n	-.04
	FranklinAdv					
	$ 225 bil 800-342-5236					
A	Grwth	-17	+8	+76	125.53n	-.25
C	Income	-4	+0	+21	2.31n	-.01
A	MicroCpVal	-4	+6	+29	27.39n	+.01
A	RisingDivs	-11	+2	+74	86.14n	+.27
	FranklinInvC					
	$ 251 bil 800-342-5236					
A-	Grwth	-18	+8	+67	108.76n	-.22
C-	Income	-5	-1	+19	2.38n	+.00
A-	RisingDivsC	-11	+2	+67	84.36n	+.25
A-	RisingDivsR	-11	+2	+70	85.92n	+.26
	FranklinInvR					
	$ 150 bil 800-342-5236					
A-	Grwth	-17	+8	+72	123.47n	-.25
C-	Income	-5	-1	+19	2.28n	-.01
	FrostFunds					
	$ 7.2 bil 800-513-7678					
A	GrwEqInv b	-20	+8	+77	15.14n	-.05
	–G–H–I–					
	Gabelli					
	$ 12.2 bil 800-422-3554					
A-	EquityIncI	-6	+1	+17	11.41n	+.01
A-	GrowthI	-23	+8	+83	79.42n	+.01
	Gabelli AAA					
	$ 3.4 bil 800-422-3554					
A-	GrowthAAA	-24	+8	+80	76.35n	+.02
	Glenmede Funds					
	$ 1.9 bil 800-966-3200					
A	SmlEqAdv	-8	+2	+45	33.83n	+.22
	GMO Trust III					
	$ 21.9 bil 617-330-7500					
A	Quality	-11	+4	+56	26.30n	-.09
A+	USEquity	-9	+2	+44	12.59n	+.02
	GMO Trust IV					
	$ 22.9 bil 617-330-7500					
A+	Quality	-11	+4	+61	26.38n	-.08
	GMO Trust VI					
	$ 11.6 bil 617-330-7500					
A	Quality	-11	+4	+76	26.31n	-.08
	GoldmnSachs A					
	$ 32.0 bil 800-292-4726					
A	EqInsightA	-14	+3	+53	50.81	-.02
A+	InsghtsA	-19	+6	+67	27.76	-.06
A-	StrucTaxMgd	-16	+2	+59	32.34	+.00
	GoldmnSachs C					
	$ 6.6 bil 800-292-4726					
A-	CapitlGrwth	-15	+5	+54	14.40n	-.02
A-	EqInsightC	-14	+3	+47	43.06n	-.02
A	InsghtsC	-19	+6	+58	21.69n	-.04
A-	TechOpps	-23	+9	+69	14.47n	+.04
	GoldmnSachs In					
	$ 30.8 bil 800-292-4726					
A	CapitalGr	-15	+5	+71	32.39n	-.04
A-	ConclntlEq	-16	+2	+37	24.54n	+.00
A	MidCapVal	-9	+3	+30	37.76n	+.11
A	USEqInsight	-13	+3	+56	53.18n	-.03
	GreatWest					
	$ 24.2 bil 866-831-7129					
A+	IndexL	-10	+0	+71	20.52n	+.00
A+	LrgCapGrwth	-28	+7	+80	8.30n	+.00
A-	ProfileL	0	+0	+47	15.26n	+.00
A	S#P500Idx	-12	+3	+70	27.83n	+.00
A-	TRowePrice	-5	-1	+50	25.62n	+.00
	Green Century					
	$ 308 mil 800-934-7336					
A	Institut	-16	+3	..	64.57n	-.22
	Guidemark					
	$ 1.4 bil 925-263-2078					
A	LgCpCoreSvc	-14	+2	+72	26.33n	-.01
	GuideStone G2					
	$ 4.3 bil 888-473-8637					
A	EqIndxInst	-13	+4	+78	43.58n	+.00
	GurdianTr					
	$ 3.9 bil 704-705-1860					
A	GrUSEq	-10	+4	+66	29.47n	+.05
	Harbor Funds					
	$ 104 bil 800-422-1050					
A	CapApprAdm	-25	+8	+73	72.29n	-.45
A	CapApprInv	-26	+8	+71	69.61n	-.44
A-	LgCpValInst	-12	+2	+61	20.42n	+.01
A-	LrgValInv	-12	+2	+60	20.66n	+.01
	Hartford A					
	$ 45.1 bil 860-547-5000					
A-	Healthcare	-12	+6	+42	35.40	+.09
	Hartford C					
	$ 79.7 bil 860-547-5000					
A-	CoreEq	-14	+4	+69	38.48n	+.03
A-	Div#Gr	-8	+0	+56	29.91n	+.06
A-	EqtyInc	-3	+0	+46	21.86n	+.01
	Hartford HLS IA					
	$ 9.4 bil 860-547-5000					
A	DiscpEq	-14	+4	+67	18.01n	+.01
A	Div#Gr	-8	+0	+60	25.43n	+.05
A	Stock	-6	+3	+75	107.18n	+.02
	Hartford HLS IB					
	$ 22.2 bil 860-547-5000					
A-	DiscpEq	-14	+4	+65	17.69n	+.02
A	Div#Gr	-8	+0	+58	25.22n	+.05
A-	Health	-12	+6	+37	18.82n	+.05
A-	Stock	-6	+3	+73	106.95n	+.01
	Hartford I					
	$ 71.5 bil 860-547-5000					
A-	Capvalue	-6	+0	+39	16.84n	+.06
A	Div#GrI	-8	+0	+62	31.07n	+.06
A-	EqtyInc	-3	+0	+52	21.82n	+.01
A-	Health	-12	+6	+45	38.45n	+.11
	Hartford R3					
	$ 54.6 bil 860-547-5000					
A	Div#GrR3	-8	+0	+59	31.80n	+.06
A-	EqtyInc	-3	+0	+49	22.03n	+.02
A-	HealthcarFd	-13	+6	+40	36.24n	+.09
	Hartford R4					
	$ 54.6 bil 860-547-5000					
A	Div#GrR4	-8	+0	+60	32.08n	+.06
A-	EqtyInc	-3	+0	+50	22.07n	+.02
	Hartford R5					
	$ 40.5 bil 860-547-5000					
A	Div#GrR5	-8	+0	+62	32.24n	+.07
A-	EqtyInc	-3	+0	+52	22.20n	+.01
	Hartford Y					
	$ 70.7 bil 860-547-5000					
A-	CoreEq	-13	+4	+77	43.46n	+.04
A	Div#GrY	-8	+0	+63	32.25n	+.07
A-	EquityInc	-3	+1	+52	22.28n	+.02
A-	Health	-12	+6	+46	43.27n	+.11
A-	MidCapVal	-6	+0	+40	18.48n	+.07
	Hennessy					
	$ 1.8 bil 800-966-4354					
A+	**CorMid**	-1	-2	+49	20.39n	+.24
	Homestead					
	$ 1.2 bil 800-258-3030					
A-	Value	-9	+0	+53	47.87n	+.22
	Hotchkis & Wiley					
	$ 9.7 bil 800-796-5606					
A	MidCapValA	-3	-4	+30	42.14	-.13
A-	MidCapValC	-4	-4	+26	36.45n	-.10
A	MidCapValI	-3	-4	+31	42.90n	-.13
A	SmCapValA	+1	+1	+42	72.22	+.37
A+	SmCapValI	+1	+1	+43	72.60n	+.37
A-	ValOppsA	-9	+0	+44	32.11	+.06
	Invesco Funds					
	$ 28.5 bil 800-959-4246					
A+	**EnergyInv**	+29	-8	+22	24.16n	+.48
	Invesco Funds A					
	$ 141 bil 800-959-4246					
A	CapApprec	-20	+5	+63	55.30	-.07
E	DevelopMkt	-23	+3	-6	36.61	+.15
A+	GlbHlthCare	-15	+5	+60	34.27	+.06
A-	OppenValue	-2	-2	+43	33.35	+.21
A+	TechnologyA	-24	+7	+84	45.64	-.01
	Invesco Funds C					
	$ 140 bil 800-959-4246					
D	ActAlloC	-16	+2	+17	12.56n	-.02
A	CapitalC	-21	+5	+50	29.16n	-.04
A	**EnergyC**	+28	-8	+18	20.36n	+.41
A+	GlbHlthCare	-15	+5	+62	17.69n	+.03
A-	OppenValue	-3	-2	+38	31.05n	+.19
A	S#P500 Idx	-13	+3	+71	42.08n	-.07
A+	TechnologyC	-25	+7	+82	30.00n	+.00
	Invesco Funds R					
	$ 125 bil 800-959-4246					
A	OppCapAprec	-21	+5	+60	48.79n	-.07
A-	OppenValue	-3	-2	+41	32.36n	+.20
A-	OppMainStrt	-14	+4	+51	20.61n	+.01
A-	OppRsingDiv	-10	+3	+52	23.87n	+.02
A	OppValueI	-2	-2	+44	34.36n	+.21
	Invesco Funds Y					
	$ 101 bil 800-959-4246					
A	CapApprec	-20	+5	+67	64.16n	-.08
E	DevelpMkts	-23	+3	-5	36.04n	+.15
A-	OppRisngDiv	-10	+3	+51	23.95n	+.03
A	S#P500IdxY	-12	+3	+76	44.56n	-.07
	Investments					
	$ 581 mil 831-429-6513					
A	InstlnI	-6	+1	+52	51.17n	+.03
	Ivy Funds					
	$ 213 bil 866-941-4482					
A-	BalancedB	0	+0	+50	29.43n	+.00
A+	CoreEqA	-13	+5	+75	16.78	+.00
A+	CoreEqB	0	+0	+93	16.51n	+.00
A	EmerMktB	0	+0	+35	21.34n	+.00
A	GlbNatResE	+24	+7	+28	17.54	+.00
A+	LrgCapGrC	-17	+9	+88	20.80n	-.02
A+	LrgCapGrI	-17	+9	+102	30.82n	-.03
A+	LrgCapGrY	-17	+9	+99	29.57n	-.02
A+	MidCapGrB	0	+0	+135	30.04n	+.00
A-	MidCapGrC	-22	+8	+79	22.45n	+.10
A-	MidCapGrI	-22	+8	+92	33.11n	+.15
A-	MidCapGrR	-22	+8	+84	28.01n	+.12
A-	MidCapGrY	-22	+8	+88	31.34n	+.14
A-	RealEstB	0	+0	+42	29.04n	+.00
A+	Sci#TechB	0	+0	+117	74.85n	+.00
A-	SmlCapGrB	0	+0	+62	13.20n	+.00
A-	ValueA	-6	-2	+45	25.91	+.14
A	ValueB	0	+0	+46	26.81n	+.00
A-	ValueC	-6	-3	+40	24.52n	+.13
	–J–K–L–					
	J Hancock A					
	$ 44.5 bil 800-225-5291					
A-	USGlbLdGr	-22	+6	+68	53.58	-.17
	J Hancock C					
	$ 19.9 bil 800-225-5291					
A	LrgCapEq	-13	+7	+51	52.70n	-.22
	Janus Henderson					
	$ 146 bil 800-668-0434					
A	EuroFocC	-17	+2	+16	36.44n	-.53
A-	Forty	-25	+4	+74	40.25	-.06
A-	FortyS	-25	+4	+72	37.94n	-.06
A-	**GlbLifeSci**	-8	+8	+54	63.50n	+.92
A-	Growth#Inc	-12	+4	+67	69.07n	+.02
	Jensen Inv Management					
	$ 11.9 bil 800-992-4144					
A	QltyGrowthR	-12	+5	+78	58.76n	-.11
A+	QualtGrowI	-12	+5	+82	59.04n	-.11
	JP Morgan A					
	$ 234 bil 800-480-4111					
E	CoreBond	-8	+1	+3	10.79	+.00
A	EquityIdx	-12	+3	+75	62.27	+.00
A+	GrAdvantg r	-19	+8	+105	25.75	+.00
A+	IntrepidGr	-17	+7	+74	56.42	+.00
A+	LgCapGr	-18	+5	+109	49.28	+.00
A+	LgCapVal	-3	-2	+49	18.59	+.00
A-	SmlCapVal	-9	+4	+26	25.33	+.00
A+	USEquity	-12	+3	+75	19.21	+.00
A+	USLgCorPls	-14	+5	+55	19.92	+.00
A-	USValueA	-5	+1	+58	63.39	+.00
	JP Morgan C					
	$ 163 bil 800-480-4111					
E	CoreBond r	-8	+1	+1	10.87n	+.00
A	EquityIdx	-13	+3	+71	61.58n	+.00
A	IntrepidGr	-17	+7	+70	54.35n	+.00
A+	USEquityC	-13	+3	+71	18.28n	+.00
A+	USLgCorPls	-15	+4	+50	17.10n	+.00
	JP Morgan Fds					

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

Plaintiff,

v.

WALGREEN CO. et al.,

Defendants.

Civil Action No. 1:15-cv-3187

Honorable Sharon Johnson Coleman

SUMMARY NOTICE OF (I) PROPOSED SETTLEMENT; (II) SETTLEMENT HEARING; AND (III) MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

TO: All persons and entities who purchased or otherwise acquired Walgreen Co. ("Walgreens") common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby ("Class"). Certain persons and entities are excluded from the Class, as set forth in the Stipulation and Agreement of Settlement dated June 23, 2022 ("Stipulation") and the Settlement Notice described below.

PLEASE READ THIS NOTICE CAREFULLY;
YOUR RIGHTS WILL BE AFFECTED BY A CLASS ACTION LAWSUIT PENDING IN THIS COURT.

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Northern District of Illinois ("Court"), that Court-appointed Class Representative Industriens Pensionsforsikring A/S ("Class Representative"), on behalf of itself and the Class in the above-captioned securities class action ("Action"), has reached a proposed settlement of the Action with defendants Walgreens, Gregory D. Wasson, and Wade D. Miquelon (collectively, "Defendants"), for $105,000,000 in cash that, if approved, will resolve all claims in the Action ("Settlement").

A hearing will be held on **October 7, 2022, at 10:30 a.m.**, before the Honorable Sharon Johnson Coleman, United States District Judge for the Northern District of Illinois, either in person in Courtroom 1241 of the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, IL 60604, or by video or telephonic conference as the Court may order, to determine whether: (i) the proposed Settlement should be approved as fair, reasonable, and adequate; (ii) the Action should be dismissed with prejudice against Defendants, and the releases specified and described in the Stipulation (and in the Settlement Notice described below) should be entered; (iii) the proposed Plan of Allocation for distributing the net proceeds of the Settlement should be approved as fair and reasonable; and (iv) Class Counsel's motion for attorneys' fees and Litigation Expenses should be approved.

If you are a member of the Class, your rights will be affected by the pending Action and the Settlement, and you may be entitled to share in the Settlement Fund. This notice provides only a summary of the information contained in the detailed Notice of (I) Proposed Settlement; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses ("Settlement Notice"). You may obtain a copy of the Settlement Notice, along with the Claim Form, on the website for the Action, www.WalgreensSecuritiesLitigation.com. You may also obtain a copy of the Settlement Notice and Claim Form by contacting the Claims Administrator by mail at *Walgreens Securities Litigation*, c/o A.B. Data, Ltd., P.O. Box 173092, Milwaukee, WI 53217; by calling toll-free 1-866-963-9976; or by sending an email to info@WalgreensSecuritiesLitigation.com.

If you are a Class Member, in order to be eligible to receive a payment under the proposed Settlement, you must submit a Claim Form ***postmarked (if mailed), or online via www.WalgreensSecuritiesLitigation.com, no later than November 5, 2022***, in accordance with the instructions set forth in the Claim Form. If you are a Class Member and do not submit a proper Claim Form, you will not be eligible to share in the distribution of the net proceeds of the Settlement, but you will nevertheless be bound by any releases, judgments, or orders entered by the Court in the Action.

Any objections to the proposed Settlement, the proposed Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses must be filed with the Court and delivered to Class Counsel and representative Defendants' Counsel such that they are ***received no later than September 16, 2022***, in accordance with the instructions set forth in the Settlement Notice. Because notice was previously issued to the Class in connection with class certification, providing Class Members with the opportunity to exclude themselves from the Class at that time, the Court has exercised its discretion not to allow a second opportunity for Class Members to request exclusion in connection with the settlement proceedings, particularly given that the statute of repose on any claims being released in connection with the Settlement has run and thus, anyone attempting to exclude themselves would not be able to bring any such claims.

PLEASE DO NOT CONTACT THE COURT, THE CLERK'S OFFICE, DEFENDANTS, OR DEFENDANTS' COUNSEL REGARDING THIS NOTICE. All questions about this notice, the Settlement, or your eligibility to participate in the Settlement should be directed to the Claims Administrator or Class Counsel.

Requests for the Settlement Notice and Claim Form should be made to the Claims Administrator:

Walgreens Securities Litigation
c/o A.B. Data, Ltd.
P.O. Box 173092
Milwaukee, WI 53217
1-866-963-9976
info@WalgreensSecuritiesLitigation.com
www.WalgreensSecuritiesLitigation.com

All other inquiries should be made to Class Counsel:

Andrew L. Zivitz
Kessler Topaz Meltzer & Check, LLP
280 King of Prussia Road
Radnor, PA 19087
1-610-667-7706
info@ktmc.com
www.ktmc.com

DATED: August 8, 2022

BY ORDER OF THE COURT
United States District Court
Northern District of Illinois

EXHIBIT D

Kessler Topaz Meltzer & Check, LLP Announce a Proposed Settlement For All Persons and Entities Who Purchased or Otherwise Acquired Walgreen Co., Common Stock Between April 17, 2014 and August 5, 2014, Inclusive.

NEWS PROVIDED BY
Kessler Topaz Meltzer & Check, LLP →
Aug 11, 2022, 10:00 ET

CHICAGO, Aug. 11, 2022 /PRNewswire/ --

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

WASHTENAW COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WALGREEN CO. et al., Defendants.	Civil Action No. 1:15-cv-3187 Honorable Sharon Johnson Coleman

SUMMARY NOTICE OF (I) PROPOSED SETTLEMENT; (II) SETTLEMENT HEARING; AND (III) MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES

TO: All persons and entities who purchased or otherwise acquired Walgreen Co. ("Walgreens") common stock between April 17, 2014 and August 5, 2014, inclusive, and were damaged thereby ("Class"). Certain persons and entities are excluded from the Class, as set forth in the Stipulation and Agreement of Settlement dated June 23, 2022 ("Stipulation") and the Settlement Notice described below.

PLEASE READ THIS NOTICE CAREFULLY;
YOUR RIGHTS WILL BE AFFECTED BY A
CLASS ACTION LAWSUIT PENDING IN THIS COURT.

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Northern District of Illinois ("Court"), that Court-appointed Class Representative Industriens Pensionsforsikring A/S ("Class Representative"), on behalf of itself and the Class in the above-captioned securities class action ("Action"), has reached a proposed settlement of the Action with defendants Walgreens, Gregory D. Wasson, and Wade D. Miquelon (collectively, "Defendants"), for $105,000,000 in cash that, if approved, will resolve all claims in the Action ("Settlement").

A hearing will be held on **October 7, 2022, at 10:30 a.m.**, before the Honorable Sharon Johnson Coleman, United States District Judge for the Northern District of Illinois, either in person in Courtroom 1241 of the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, IL 60604, or by video or telephonic conference as the Court may order, to determine whether: (i) the proposed Settlement should be approved as fair, reasonable, and adequate; (ii) the Action should be dismissed with prejudice against Defendants, and the releases specified and described in the Stipulation (and in the Settlement Notice described below) should be entered; (iii) the proposed Plan of Allocation for distributing the net proceeds of the Settlement should be approved as fair and reasonable; and (iv) Class Counsel's motion for attorneys' fees and Litigation Expenses should be approved.

If you are a member of the Class, your rights will be affected by the pending Action and the Settlement, and you may be entitled to share in the Settlement Fund. This notice provides only a summary of the information contained in the detailed Notice of (I) Proposed Settlement;

(II) Settlement Hearing, and (III) Motion for Attorneys' Fees and Litigation Expenses ("Settlement Notice"). You may obtain a copy of the Settlement Notice, along with the Claim Form, on the website for the Action, www.WalgreensSecuritiesLitigation.com. You may also obtain a copy of the Settlement Notice and Claim Form by contacting the Claims Administrator by mail at *Walgreens Securities Litigation*, c/o A.B. Data, Ltd., P.O. Box 173092, Milwaukee, WI 53217; by calling toll-free 1-866-963-9976; or by sending an email to info@WalgreensSecuritiesLitigation.com.

If you are a Class Member, in order to be eligible to receive a payment under the proposed Settlement, you must submit a Claim Form ***postmarked (if mailed), or online via www.WalgreensSecuritiesLitigation.com, no later than November 5, 2022***, in accordance with the instructions set forth in the Claim Form. If you are a Class Member and do not submit a proper Claim Form, you will not be eligible to share in the distribution of the net proceeds of the Settlement, but you will nevertheless be bound by any releases, judgments, or orders entered by the Court in the Action.

Any objections to the proposed Settlement, the proposed Plan of Allocation, and/or Class Counsel's motion for attorneys' fees and Litigation Expenses must be filed with the Court and delivered to Class Counsel and representative Defendants' Counsel such that they are ***received no later than September 16, 2022***, in accordance with the instructions set forth in the Settlement Notice. Because notice was previously issued to the Class in connection with class certification, providing Class Members with the opportunity to exclude themselves from the Class at that time, the Court has exercised its discretion not to allow a second opportunity for Class Members to request exclusion in connection with the settlement proceedings, particularly given that the statute of repose on any claims being released in connection with the Settlement has run and thus, anyone attempting to exclude themselves would not be able to bring any such claims.

PLEASE DO NOT CONTACT THE COURT, THE CLERK'S OFFICE, DEFENDANTS, OR DEFENDANTS' COUNSEL REGARDING THIS NOTICE. All questions about this notice, the Settlement, or your eligibility to participate in the Settlement should be directed to the Claims Administrator or Class Counsel.

Requests for the Settlement Notice and Claim Form should be made to the Claims Administrator:

Walgreens Securities Litigation
c/o A.B. Data, Ltd.
P.O. Box 173092
Milwaukee, WI 53217
1-866-963-9976

info@WalgreensSecuritiesLitigation.com
www.WalgreensSecuritiesLitigation.com

BY ORDER OF THE COURT
United States District Court
Northern District of Illinois

SOURCE Kessler Topaz Meltzer & Check, LLP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WASHTENAW COUNTY EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. WALGREEN CO. et al., Defendants.	Civil Action No. 1:15-cv-3187 Honorable Sharon Johnson Coleman

APPENDIX OF CASE LAW PUBLISHED ONLY IN AN ELECTRONIC DATABASE CITED IN CLASS REPRESENTATIVE'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

TAB	CASE
A.	*In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011)
B.	*Beezley v. Fenix Parts, Inc.*, 2020 WL 4581733 (N.D. Ill. Aug. 7, 2020)
C.	*Goldsmith v. Tech. Sols. Co.*, 1995 WL 17009594 (N.D. Ill. Oct. 10, 1995)
D.	*Jaffe Pension Plan v. Household Int'l., Inc.*, No. 1:02-cv- 05893 (N.D. Ill. May 7, 2009), ECF No. 1611
E.	*Jaffe Pension Plan v. Household Int'l., Inc.*, No. 1:02-cv- 05893 (N.D. Ill. Nov. 10, 2016), ECF No. 2267
F.	*Kleen Prods. LLC v. Int'l Paper Co.*, 2017 WL 5247928 (N.D. Ill. Oct. 17, 2017)
G.	*In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 16, 2009)
H.	*Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, 2001 WL 1568856 (N.D. Ill. Dec. 10, 2001)
I.	*Roberti v. OSI Sys., Inc.*, 2015 WL 8329916 (C.D. Cal. Dec. 8, 2015)

TAB	CASE
J.	*In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig.*, 2016 WL 772785 (N.D. Ill. Feb. 29, 2016)
K.	*Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 5627171 (N.D. Ind. Sept. 18, 2020)
L.	*Snyder v. Ocwen Loan Servicing, LLC*, 2019 WL 2103379 (N.D. Ill. May 14, 2019)
M.	*Swift v. Direct Buy, Inc.*, 2013 WL 5770633 (N.D. Ind. Oct. 24, 2013)
N.	*T.K. Through LeShore v. Bytedance Tech. Co., Ltd.*, 2022 WL 888943 (N.D. Ill. Mar. 25, 2022)
O.	*Todd v. STAAR Surgical Co.*, 2017 WL 4877417 (C.D. Cal. Oct. 24, 2017)
P.	*In re Vivendi Universal, S.A. Sec. Litig.*, Civ. No. 02-5571 (RJH/HBP) (S.D.N.Y. Feb. 2, 2010), ECF No. 998
Q.	*In re Vivendi Universal, S.A. Sec. Litig.*, Civ. No. 02-5571 (RJH/HBP) (S.D.N.Y. May 9, 2017), ECF No. 1317
R.	*Wong v. Accretive Health, Inc.*, 2014 WL 7717579 (N.D. Ill. Apr. 30, 2014)

EXHIBIT A

2011 WL 1585605
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

In re BANKATLANTIC BANCORP, INC. Securities Litigation.

No. 07–61542–CIV.
|
April 25, 2011.

Attorneys and Law Firms

David Reich Chase, David R. Chase PA Penthouse 2, Fort Lauderdale, FL, Jules Brody, Stull Stull & Brody, Mark S. Arisohn, Michael W. Stocker, Serena W. Hallowell, Jonathan Gardner, Mindy Dolgoff, Labaton Sucharow LLP, New York, NY, Julie Prag Vianale, Kenneth J. Vianale, Vianale & Vianale, Boca Raton, FL, Ronald D. Shindler, Fowler White Burnett, Adam Michael Schachter, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami, FL, Benjamin J. Hinerfeld, Mark S. Danek, Matthew Mustokoff, Michelle M. Newcomer, Nichole T. Browning, Andrew L. Zivitz, Barroway Topaz Kessler Meltzer & Check LLP, Radnor, PA, Jonathan Louis Alpert, The Alpert Law Firm PA, Miami Beach, FL, for Plaintiffs.

Eugene E. Stearns, Adam Michael Schachter, Andrea Naomi Nathan, Cecilia Duran Simmons, Gordon Mcrae Mead, Jr., Richard Bryan Jackson, James A. White, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami, FL, for Defendants.

ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR NEW TRIAL

URSULA UNGARO, District Judge.

***1** THIS CAUSE is before the Court upon Defendants' Motion for Judgment as a Matter of Law and Defendants' Motion for New Trial. (D.E. 666 & 669.) Plaintiffs filed Responses in Opposition to both Motions, and Defendants filed Replies in Support of both Motions. (D.E. 674–75, 677 & 679.) Both Motions are ripe for disposition.

THE COURT has considered the Motions and the pertinent portions of the record and is otherwise fully advised in the premises.

AS SET FORTH BELOW, the Court will GRANT Defendants' Motion for Judgment as a Matter of Law and will CONDITIONALLY DENY Defendants' Motion for New Trial. Defendants are entitled to judgment in their favor as to all of Plaintiffs' claims.

I. Procedural Background

Plaintiffs are the class of individuals who purchased the common stock of Defendant BankAtlantic Bancorp, Inc. (Bancorp) between November 9, 2005 and October 25, 2007 (the Class). [1]

1 On February 4, 2008, the Court appointed State–Boston Retirement System as the Lead Plaintiff. (D.E.45.) State–Boston is an institutional investor claiming to have purchased shares in Bancorp during the class period and to have suffered over $1.8 million in losses. (D.E.45.) On October 19, 2009, the Court named State–Boston and Erie County Employees Retirement System as Co–Class Representatives. (D.E.153.)

Bancorp is the publicly traded parent company of BankAtlantic, a federally chartered bank offering consumer and commercial banking and lending services throughout Florida. The remaining Defendants are current and former officers and directors of Bancorp: (1) James A. White, the former Executive Vice President and Chief Financial Officer (CFO) of Bancorp and former CFO of BankAtlantic; (2) John E. Abdo, the Vice–Chairman of the Board of Directors for Bancorp and BankAtlantic; (3) Valerie C. Toalson, CFO of Bancorp and Executive Vice President and CFO of BankAtlantic; (4) Jarett Levan, the President of BankAtlantic, and from January 16, 2007, the President of Bancorp and the Chief Executive Officer (CEO) of BankAtlantic; and, (5) Alan Levan, the former Chairman of the Board and CEO of Bancorp and former Chairman of the Board and President and CEO of BankAtlantic.

Plaintiffs contend that Defendants misrepresented and concealed the true quality and consequent value of certain assets in BankAtlantic's loan portfolio in violation of the Securities Exchange Act of 1934 (the Exchange Act), 15 U.S.C. § 78a *et seq.*, and caused Plaintiffs to suffer a loss when the truth was revealed.

A. *Pleadings & Class Certification*

Plaintiffs filed their initial Complaint on October 29, 2007 and their Consolidated Amended Complaint on April 22, 2008. On December 12, 2008, the Court dismissed the Consolidated Amended Complaint without prejudice pursuant to Defendants' motion and Federal Rules of Civil Procedure 9(b) and 12(b)(6). On January 12, 2009, Plaintiffs filed their First Amended Consolidated Complaint. And on May 12, 2009, the Court denied Defendants' motion to dismiss the First Amended Consolidated Complaint.

In the First Amended Consolidated Complaint, Plaintiffs sought damages under §§ 10(b), 20(a), and 20A of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a) & 78t–1. (D.E.80.)

In Count I, Plaintiffs alleged that, throughout the class period, Defendants knowingly made materially false and misleading statements, in violation of § 10(b) of the Exchange Act as implemented by Exchange Act Rule 10b–5, 17 C.F.R. § 240.10b–5, regarding the value of its loan portfolio. Plaintiffs' Rule 10b–5 claims fell into three broad categories: misrepresentations and non-disclosures of the poor or deteriorating credit quality of BankAtlantic's land loan portfolio; misrepresentations and non-disclosures of its poor underwriting practices; and misrepresentations and non-disclosures of the adequacy of its loan loss reserves and the accuracy of its financial statements. The claims were further divided into two separate periods of damage ending with respective stock-price declines on April 26, 2007 and October 26, 2007.

***2** In Count II, Plaintiffs alleged that the individual Defendants were control persons of Bancorp and as such were liable for its Rule 10b–5 violations under § 20(a) of the Exchange Act. And in Count III, Plaintiffs alleged that Defendants Abdo and Alan Levan profited from the sale of Bancorp stock while in the possession of material, non-public information in violation of § 20A of the Exchange Act.

On October 20, 2009, after Defendants stated their non-opposition to Plaintiffs' motion to certify, the Court certified the Class. [2] (D.E. 147 & 153.) At that time, the case had been pending for two years, the discovery deadline was May 21, 2010, and trial was scheduled to begin on August 16, 2010. (D.E.148.)

2 Defendants later reversed their position and moved to decertify the class at trial. (D.E.529.) The Court denied the motion. (D.E.694.)

Nevertheless, on April 22, 2010, nine months after the deadline to amend the pleadings and less than a month before the close of discovery, Plaintiffs moved to amend their complaint. (D.E. 208 & 210.) Plaintiffs offered three reasons for the amendment: shortening the class period to begin on October 19, 2006; discontinuing the insider trading claims under § 20A; and identifying additional public statements which all "relate[d] to Plaintiffs' original theory of liability, *i.e.,* fraudulent misrepresentations regarding the true risk of BankAtlantic's land loan portfolio." (D.E.210.) The Court denied the motion.

In denying the motion, the Court agreed with Defendants to the extent they argued that shortening the class period and abandoning the § 20A claims would unfairly deny them a final adjudication of those issues. Further, the Court was unconvinced the remaining amendments were necessary as Plaintiffs had argued the additional statements were substantively indistinguishable from the claims in the First Amended Consolidated Complaint and offered no authority supporting the proposition that identification of the additional statements was required to state a legally sufficient claim. Moreover, the Court observed that, if required, Federal Rule of Civil Procedure 15(b) would allow for amendment of the pleadings at trial to conform to the evidence; in that regard, the Court stated "Defendants have been put on notice of these additional misstatements and omissions." (D.E.242.) Accordingly, the case proceeded on the First Amended Consolidated Complaint.

B. *Motions for Summary Judgment & to Exclude Expert Testimony*

In June 2010, the parties filed cross-motions for summary judgment. Defendants moved for summary judgment on all claims. And Plaintiffs moved for summary judgment only on the narrow issues of the falsity of four statements made by Alan Levan in a July 25, 2007 conference call. In its August 18, 2010 Omnibus Order, the Court granted Defendants' motion in part and Plaintiffs' partial motion in full. *In re BankAtlantic Bancorp, Inc. Sec. Litig.,* 2010 WL 6397500

(S.D.Fla. Aug.18, 2010.) In that order, the Court also granted in part Defendants' motion to exclude the proposed testimony of Plaintiffs' loss causation and damages expert, Candace Preston. *Id.*

***3** The order entitled Defendants to final summary judgment on the claims Plaintiffs previously attempted to abandon: the claims from the first year of the class period (pre-October 19, 2006) and the claims under § 20A of the Exchange Act. *Id.* The order also entitled Defendants to final summary judgment on claims arising from any statements regarding BankAtlantic's loan loss reserves and on claims of damages caused by Bancorp's October 29, 2007 stock-price decline. *Id.* Collectively, these rulings shortened the class period to October 19, 2006 through October 26, 2007, and finally adjudicated the claims of insider trading and accounting fraud in Defendants' favor. *Id.*

As to the balance of Plaintiffs' claims, Defendants strongly emphasized Plaintiffs' failure to produce credible, reliable evidence regarding loss causation and damages. [3] To that end, Defendants also moved to exclude Preston's testimony. The Court granted the motion to exclude in part; what survived from Preston's testimony was, in the Court's view, sufficient to create a genuine issue of fact as to loss causation and damages. [4]

3 Defendants also sought summary judgment based on the forward-lookingstatement safe harbor under § 27A of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u–5. The Court denied that portion of the motion because "Defendants fail[ed] to identify any particular statement that falls within the protection of the safe harbor." (D.E.411.)

4 The order allowed Preston's expert opinions on the following: the importance of information regarding a bank's credit and borrower quality to its valuation; the company-specific price declines to Bancorp stock following its April and October 2007 press releases and conference calls; the amount of the April 26, 2007 residual decline attributable to the disclosure of previously undisclosed negative information on April 25 and 26, 2007, and her belief that the entire October 26, 2007 residual decline was attributable to the disclosure of previously undisclosed negative information regarding BankAtlantic's land loan portfolio. *In re BankAtlantic,* 2010 WL 6397500.

Finally, the order entitled Plaintiffs to summary judgment as to the narrow issue of the objective falsity of four statements made by Alan Levan during a July 25, 2007 earnings conference call. The four statements at issue concerned the extent to which Alan Levan perceived weakness in certain portions of its loan portfolio. Plaintiffs presented undisputed evidence that those statements were objectively false. And Defendants came forward with no evidence that raised a genuine issue of material fact as to the objective falsity of the statements; rather Defendants focused their argument on the immateriality of the statements and the applicability of the forward-looking safe harbor of § 27A of the Private Securities Litigation Reform Act (the Reform Act), 15 U.S.C. § 78u, neither of which were at issue in Plaintiffs' Motion. Accordingly, the Court granted summary judgment in Plaintiffs' favor on the narrow issue of objective falsity; the Court did not address the materiality of the statements, whether they were made with scienter, or whether they came within the protection of the safe harbor.

C. *Pretrial & Trial*

Before trial the parties filed pre-trial stipulations, proposed jury instructions, and proposed verdict forms. In their joint pre-trial stipulation supplement, [5] each side framed the issues of fact to be litigated at trial. (D.E.473.) Plaintiffs framed the issues as the elements of a Rule 10b–5 claim as they related to each of twenty-nine alleged misstatements and the individual Defendants' controlling-person status under § 20(a) with respect to each of those statements. Plaintiffs identified the twenty-nine alleged misstatements in a document attached to the supplement as Exhibit A and titled "Misstatements and Omissions Alleged by Plaintiffs." It separately listed the twenty-nine statements and, for each statement, the date on which it was made, the document or conference call in which it was made, and the Defendants responsible for the statement.

5 The parties' initial joint pre-trial stipulation failed to conform to the requirements of the Court's trial order, and on September 1, 2010, the Court ordered the parties to supplement the filing. (D.E.470.)

***4** Defendants objected to Plaintiffs' framing of the issues, stating:

> Plaintiffs' statement of the issues to be tried reflected in their Exhibit A is entirely inconsistent with the issues framed by the Court as remaining to be tried in the Court's Omnibus Order, is outside the pleadings, and is inconsistent with what remains of Plaintiffs' damages expert's testimony.

(D.E.473.) Defendants sought to frame the issues around the assumptions of Plaintiffs' damages expert, Candace Preston, without reference to any particular misrepresentations. [6]

[6] Preston, in her expert report, did not analyze or reference any specific fraudulent statements. Instead, Plaintiffs's counsel asked her to generally assume that Defendants misrepresented the true quality and value of the assets in BankAtlantic's commercial real estate portfolio, as follows:

a. At least from the beginning of, and throughout the Class Period, Defendants knew or recklessly disregarded the true state of the land loan portion of BankAtlantic's commercial real estate ("CRE") portfolio.
b. At least from the beginning of, and throughout the Class Period, Defendants were aware of, misrepresented and failed to disclose the credit quality of their borrowers and the quality of the land loans in the land loan portion of the CRE portfolio.
c. During the Class Period Defendants provided the public with false and/or misleading information or omitted material information necessary to make other statements not misleading concerning the quality of the assets in the land loan portion of the company's CRE portfolio, the "conservative" nature of its underwriting, and the collateral supporting the loans.
d. By November 29, 2006 Defendants should have disclosed that, contrary to their assertions that they were unaware of any upcoming credit quality trends or problems and that they were comfortable with their borrowers, they were seeing an increase in problem loans ....
e. By April 26, 2007, Defendants should have disclosed that:

I. contrary to their assertions that their land bank portfolio presented risks not present in other segments of their CRE portfolio, the problem and potential problem loans were, in actuality, distributed throughout the land loan portion of the CRE portfolio;
ii. the number and dollar value of the land loan portion of the CRE problem loans on the loan watch list ("LWL") and the potential problem loans as of April 26, 2007; and
iii the trends and concerns expressed by management as of the date, representative samples of which are detailed below.

(D.E.365, Ex. B, pp. 5–6.) The Court discusses Preston's trial testimony and the consequence of her reliance on these general assumptions below in the discussion of the Motion for Judgment as a Matter of Law. *See infra* Part III.

The Court held an initial pre-trial conference on September 10, 2010 in which the supplemental stipulation was briefly discussed. (D.E.483.) At the conference, Plaintiffs stated: "Our case is essentially 29 misstatements," and Defendants complained: "There's no complaint that says 29 instances." (D.E. 483, pp. 41 & 44.) The issue was raised again at a follow-up pre-trial conference on October 5, 2010. (D.E.518.) At that conference the Court attempted to understand Defendants' position on the twenty-nine statements and asked whether Defendants were highlighting a problem with new statements not contained in the First Amended Consolidated Complaint. Defendants made clear that they were not objecting to the twenty-nine statements because some were not in the pleadings, but because they did not conform to Preston's assumptions:

> It isn't a question whether they're new or old. There are some new ones. But that isn't really [our] point.
>
> Candace Preston, who's their damage expert, was asked to make certain factual assumptions. None of those statements were in her factual assumptions ....

(D.E.518, p. 15.) Defendants argued that Plaintiffs were precluded from proving their Rule 10b–5 claims based on any individual statement, but were instead required to prove the fraud generally articulated by Preston in her assumptions. Ultimately, the Court ruled that Plaintiffs could prove their

Rule 10b–5 claims based on individual statements so long as the fraud proven by the individual statements fit with Preston's assumptions and overall opinion on loss causation and damages. At bottom, an action under Rule 10b–5 requires that the defendant made some *statement* which is misleading or is rendered misleading by the omission of further information. *See, e.g.,* § 78u–4(b)(1); *Roeder v. Alpha Indus., Inc.,* 814 F.2d 26–7 (1st Cir.1987).

Trial began on October 12, 2010. (D.E. 528 & 531.) Plaintiffs rested their case on October 28, 2010, and Defendants moved for judgment as a matter of law. (Tr. 2747.) During oral argument on the motion, Defendants reiterated their position that "this is not a case about 29 separate factual statements. This is a case based on Candace Preston's broad-brush assumptions." (Tr. 2758.) The Court reserved ruling on the motion, but during the course of the arguments, Plaintiffs withdrew seven of the twenty-nine alleged misstatements. (Tr. 2776–77, 87, 99 & 2857.)

***5** Defendants next presented their evidence and rested their case on November 3, 2010. (Tr. 3638–39.) Because the Court and the parties had not completed drafting the jury instructions and verdict form, the Court instructed the Jury to return on a later date.

The ensuing charge conference was protracted due mainly to the Reform Act's requirements that the Jury allocate proportionate liability at the levels of primary and secondary liability depending upon its determinations of scienter with respect to each statement. Both parties had submitted proposed verdict forms, but neither adequately addressed the intricate demands of the Reform Act as they applied to this case—a numerous-statement, varying-defendant, Rule 10b–5 class action involving two separate damage periods atop which was layered a varying-defendant § 20(a) class action. Plaintiffs' proposed verdict form was structured around nineteen individual statements taken from the list of twenty-nine misstatements submitted as part of their pretrial stipulation.[7] (D.E.593.) It asked the Jury to determine: whether each statement was a material misrepresentation on the part of any Defendant to whom it was attributed; the amount of per-share price inflation caused by any misrepresentation on each day of the class period; and, the controlling person status of each Defendant under § 20(a) of the Exchange Act. Defendants' proposed verdict form contained no reference to any particular misstatement. (D.E.593.) Instead, it asked the Jury to determine, for each period of damage, whether Plaintiffs proved Candace Preston's assumptions and, if so, to determine the earliest date on which any misrepresentation was made and the extent of each Defendant's liability. Defendants' form also asked the jury to determine, for each period, the amount of per-share price inflation caused by any misstatement, but not on a daily basis.[8]

7 Plaintiffs had effectively withdrawn an additional three statements of the original twenty-nine when they filed their proposed verdict form on November 1, 2010. (D.E.593.)

8 Defendants' proposed verdict form was unworkable because it failed to address the Reform Act's requirement that the jury make specific findings as to each Defendant's responsibility for each statement or omission. *See* 15 U.S.C. § 78u–4(f).

On November 9, 2010, the Court finalized the jury instructions and verdict form. The final jury instructions were lengthy, but not remarkably complex. (D.E.635.) The final verdict form, on the other hand, was both lengthy and complex—it was 75 pages long and contained over 150 questions. (D.E.632.) In the final verdict form, the Court adopted some components of both parties' proposals. (D.E.599.) The form divided the case into two separate periods as proposed by Defendants. But with respect to each period, rather than ask the Jury to determine the existence of some general type of fraud as assumed by Plaintiffs' damages expert, the form listed, in chronological order, each of 112 of the alleged misstatements (from Plaintiffs' list of nineteen). For each statement the Jury was asked a series of special interrogatories relating to the allocation of primary (Rule 10b–5) and secondary (§ 20(a)) liability under the Reform Act. Lastly, with respect to damages, the Court adapted Defendants' proposal that damages, if any, be assessed from the earliest date a misrepresentation was found to have been made; the verdict form instructed the Jury to determine, for each period, the damages, if any, resulting from the first misrepresentation it found to have been made in violation of Rule 10b–5.[9]

9 Defendants objected to the final verdict form in its entirety and in particular that no single alleged misstatement could support a damages finding given the assumptions on which Preston's opinion relied.

***6** On November 10, 2010, the parties delivered their closing arguments, and the Jury began its deliberations. (D.E. 641 & 643.) After five days of deliberations, on November 18, 2010, the Jury returned a verdict mainly in Defendants' favor. (D.E.665.) The Jury found no liability as to any Defendant for the first period [10] and no liability as to Defendants Abdo, White and Jarrett Levan for the second. The Jury, however, found liability and damages as to Defendants Alan Levan and Bancorp for the second period; the Jury found that Statement 7, made by Alan Levan during the April 26, 2007 earnings conference call, violated § 10(b) and that the violation proximately caused damages of $2.41 per share. The Jury further found Statements 10, 13 through 17, and 19 to have been made in violation of § 10(b); all were attributed to Alan Levan (and Bancorp) except for Statement 19 which was attributed to Alan Levan and Toalson (and Bancorp).

10 Although the Jury found that several of the Defendants made materially false statements during this period, the Jury found no damages. Plaintiffs conceded prior to the discharge of the Jury that a finding of no liability as to this first period was the only possible interpretation of the verdict. (Tr. 4369.)

The Jury's special findings as to Statement 7, however, were inconsistent with both the general finding of liability and each other. The Jury specially found that Alan Levan "acted knowingly with respect to that statement" but also found that Alan Levan "acted in good faith and did not directly or indirectly induce the Section 10(b) violation" as a § 20(a) controlling person of Bancorp. The relevant portion of the verdict as to Statement 7 liability was as follows:

> *Question 7(a):* With respect to Statement 7, do you find that Alan Levan (and therefore Bancorp) violated Section 10(b)?
>
> Yes # No ___
>
> *Question 7(b):* Do you find that Alan Levan acted knowingly with respect to that statement?
>
> Yes # No ___
>
> * * *
>
> *Question 7(d):* For each Defendant for whom you answered "yes" in Question 7(e) [re Section 20(a) controlling person status], do you find that such Defendant acted in good faith and did not directly or indirectly induce the Section 10(b) violation?
>
> Alan Levan: Yes # No ___

(D.E.665.) And the verdict as to damages was as follows:

> *Question II(B):* What is the amount of damages per share proximately caused by the first Section 10(b) violation you found during the period from April 26, 2007 through October 26, 2007?
>
> $*2.41* per share

(D.E.665.)
The Court recognized the inconsistency and addressed the issue with the parties before accepting the verdict. (Tr. 4348–49.) The Court suggested that the inconsistency was potentially irrelevant because the Jury also found Alan Levan and Bancorp liable for Statement 10—a statement from the same April 26, 2007 conference call—and because the damage finding reasonably could be applied to that statement. *Id.* The Court then stated its intention to accept and publish the verdict unless there was some objection. *Id.* No party objected, and the Court summoned the Jury. [11] *Id.* The Court published the verdict and discharged the Jury without either party requesting clarification from the Jury or otherwise objecting. (Tr. 4359–72.)

11 The relevant exchange was as follows:

> THE COURT: [I]n terms of taking the verdict, there's only one place where I see that it's a little confusing. But I don't really think it matters. So that's on statement 7. So statement 7 is the April 26, '07 conference call. The next statement that they find to be associated with a 10(b) violation is from the same conference call.
>
> So the way the case was conceptualized was if they found a 10(b) violation, it would be the first 10(b) violation in the period that damages would relate to, or relate back to. So, both those statements, statement 7 and statement 10, are both from the April 26th conference call.
>
> The response to the questions, the series of questions that relate to 7, I think are difficult to reconcile, but, again, I don't think it matters in light of the fact that the jury found that the fraud entered the market on April 26th.
>
> * * *

> Okay. So, let's just bring the jury in. Unless there's something somebody wants me to do about this problem associated with the questions related to statement 7, my suggestion would be let's bring the jury in.
>
> [No objections]
>
> (Jury returns at 10:50 a.m.)

(Tr. 4348–49.)

II. Pending Judgment

***7** The parties agree on most of the judgment compelled by the verdict—all Defendants are entitled to judgment in their favor for the first period and Defendants Abdo, Jarett Levan, and White are entitled to judgment in their favor for the second. The parties dispute only the proper judgment regarding Defendants Bancorp, Alan Levan, and Toalson as to the second period.

The threshold issue is the effect of the inconsistent verdict as to Statement 7. For the reasons set forth below, the Court will disregard the liability finding for Statement 7 and attach the damages finding to the liability finding for Statement 10.

The resolution of verdict inconsistencies is governed by Federal Rule of Civil Procedure 49. Rule 49 separates verdict forms into two categories: special verdicts under Rule 49(a) and general verdicts, with or without special interrogatories, under Rule 49(b). The verdict form in this case is a general verdict form accompanied by special interrogatories under Rule 49(b). [12] *See Mason v. Ford Motor Co.,* 307 F.3d 1271, 1273–76 (11th Cir.2002). As explained above, while the Jury generally found Alan Levan (and Bancorp) violated § 10(b) as to Statement 7 and specially found that he did so knowingly, it also specially found that he acted in good faith as a controlling person as to the violation. The two special findings are inconsistent with each other, and the latter is inconsistent with the general finding. [13]

12 Defendants argue it is a special verdict form under Rule 49(a). The Court disagrees. The verdict form asked the jury to make conclusory findings which involved application of the law to the facts, such as whether "Alan Levan (and therefore Bancorp) violated Section 10(b)" and to respond to special interrogatories as required by the Reform Act. *See* § 78u–4(f)(3). Accordingly, the verdict form is appropriately characterized as a general verdict form accompanied by special interrogatories under Rule 49(b). *See Mason v. Ford Motor Co.,* 307 F.3d 1271, 1273–76 (11th Cir.2002).

13 There is no question the findings are inconsistent. The jury instructions required at least a finding of severe reckless disregard as to the falsity of the statement in order to find a § 10(b) violation. (D.E.635.) One cannot act either knowingly or with severe reckless disregard as to the falsity of a statement and at the same time act in good faith as a controlling person with respect to the same act.

Rule 49(b)(4) addresses the resolution of such inconsistencies as follows:

> *Answers Inconsistent with Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.

Under this rule, the Court and the parties have two options: further deliberation or new trial. But a party that raises no objection to the inconsistency under Rule 49(b) prior to the discharge of the jury waives the objection. *E.g., Austin–Westshore Constr. Co. v. Federated Dep't Stores,* 934 F.2d 1217, 1226 (11th Cir.1991). And if the objection is waived the district court is no longer constrained by the two options contained in Rule 49(b). [14] *Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 726 (4th Cir.1999) *cited in* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2513 (3d ed.2008).

14 If this was not the case, the rule of waiver would be meaningless and its goal of efficient trial procedure would not be achieved because the Court would be left with no option but new trial. *See Coralluzzo v. Educ. Mgmt. Corp.,* 86 F.3d 185, 186 (11th Cir.1996).

The parties waived the objection in this case, and so the Court is unconstrained by Rule 49(b)(4) in resolving the inconsistency. Constrained only by reason and equity, the Court finds that the most fair and reasonable resolution is what the Court suggested at trial before the parties waived their objection—the Court will disregard the Statement 7 liability finding and, subject to the remaining Rule 50(b) and Rule 59 challenges, construe the Jury's verdict as finding $2.41–per–share damages caused by Statement 10.

***8** This resolution is more fair than a new trial both because it is essentially what the parties agreed to and also because granting a new trial (and selecting and swearing a new jury) now, when all the parties had to do was ask that the Jury clarify the inconsistency, would unnecessarily protract the final resolution of this complex, lengthy, and expensive dispute. *See Coralluzzo v. Educ. Mgmt. Corp.,* 86 F.3d 185, 186 (11th Cir.1996) ("To allow a new trial after the objecting party failed to seek a proper remedy at the only time possible [*i.e.,* before the jury is discharged] would undermine the incentives for efficient trial procedure and would allow the possible misuse of Rule 49 procedures ... by parties anxious to implant a ground for appeal should the jury's opinion prove distasteful to them.") (modification in original). And this resolution is reasonable for the reasons explained at trial regarding the conceptualization of the verdict form and the similarities of Statements 7 and 10, including the fact that Alan Levan made both in the same conference call. [15]

15 It is no impediment to this resolution that Statement 10 was not identified in the First Amended Consolidated Complaint. When Plaintiffs first submitted their list of twenty-nine statements as part of the pretrial stipulations, Defendants did note that some of the statements were not included in the First Amended Complaint. But when questioned further about their resistance to the twenty-nine statements, Defendants clarified that they were not concerned with the fact that statements were not pled, but that they were concerned about Preston's failure to reference any individual statement in her expert opinion. Most importantly, at no point did Defendants identify Statement 10 as a statement which was not pled or object to the inclusion of Statement 10 on the verdict form on that basis. Accordingly, regardless of whether or not the finding as to Statement 10 was sufficient to support a damages finding, it was at issue and properly submitted to the Jury. *See* Fed.R.Civ.P. 15(b)(2).

Having resolved the inconsistency, much of the remaining dispute as to the second period is now moot, *e.g.,* the disagreements regarding Statement 7 and the absence of a damages finding attached to Statement 10. And much of the remaining issues will become moot as the discussion below ensues. The Court begins with a discussion of Defendants' Motion for Judgment as a Matter of Law and then addresses the Motion for New Trial. Any argument not addressed in this order is rejected by the Court.

III. Motion for Judgment as a Matter of Law

Defendants make numerous arguments in support of their Motion for Judgment as a Matter of Law. Among other arguments, Defendants contend that Plaintiffs failed to put forth sufficient evidence at trial to support any of the elements of a Rule 10b–5 claim as to Statement 10 (or any other statement) and that Statement 10 falls within the forward-looking safe harbor of the Reform Act. The Court focuses its discussion on whether the evidence supported a finding that Statement 10 was an actionable misrepresentation or omission and, if so, whether the evidence supported a finding of loss causation or damages as to Statement 10. And because the Court agrees that the evidence of loss causation or damages was insufficient as to Statement 10, it does not address Defendants' remaining arguments.

A. *Rule 50(b) Standard*

Rule 50(a) allows a party, prior to the submission of the case to the jury, to move for judgment in its favor on the basis "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [opposing] party on that issue." If the Court does not grant the motion under Rule 50(a), a party may renew the motion under Rule 50(b) after the jury has returned a verdict.

"Regardless of timing, ... a district court's proper analysis is squarely and narrowly focused on the sufficiency of evidence." *Chaney v. City of Orlando,* 483 F.3d 1221, 1227 (11th Cir.2007). "The question before the district court regarding a motion for judgment as a matter of law remains whether the evidence is 'legally sufficient to find for the party on that issue,' regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury." *Id.* (citations omitted). Generally, "any renewal of a motion for judgment as a matter of law under Rule 50(b) must be based upon the same grounds as the original request for judgment as a matter of law made under Rule 50(a) at the close of evidence and prior to the case being submitted to the jury." *Doe v. Celebrity Cruises, Inc.,* 394 F.3d 891, 903 (11th Cir.2004).

***9** "[I]n entertaining a motion for judgment as a matter of law, the court should review all the evidence of record."

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). "In so doing, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may *not* make credibility determinations or weigh the evidence." *Id.* (emphasis added). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. "That is, the court should give credence to evidence favoring the non-movant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from a disinterested witness." *Id.* (internal quotations omitted).

But "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Nebula Glass Int'l, Inc. v. Reichhold, Inc.,* 454 F.3d 1203, 1210 (11th Cir.2006). "[T]he court should deny a motion for judgment as a matter of law if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case." *Id.*

B. ***Section 10(b) & Rule 10b–5***

Section 10(b) of the Exchange Act makes it unlawful "to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." § 78j(b). In turn, Rule 10b–5 makes it unlawful for any person "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b).

Courts have long recognized the implicit private right of action created by § 10(b) and Rule 10b–5, "which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation." *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 341, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (citations omitted). For cases involving publicly traded securities and purchases or sales in a public securities markets, the elements of the action include: (1) *a material misrepresentation (or omission);* (2) *scienter, i.e.,* a wrongful state of mind; (3) *a connection with the purchase or sale of a security;* (4) *reliance,* often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation;" (5) *economic loss;* and (6) *loss causation, i.e.,* a causal connection between the material misrepresentation and the loss. *Id.* at 341–42 (citations omitted).

C. ***Actionable Misrepresentation or Omission***

Like all banks, BankAtlantic's income is substantially dependent on its borrowers' ability to make loan interest payments. And internal information that its borrowers might likely default on their obligations is highly relevant to BankAtlantic's prospects for future income and the value of Bancorp's stock. Plaintiffs contend that, in late 2006 and early 2007, Defendants had significant indications that the land loan portion of its construction loan portfolio would experience widespread defaults and collateral devaluations, but fraudulently misrepresented or concealed the true extent of this risk from investors. The Court agrees that a jury could have found Statement 10 to have been an actionable concealment of that risk under Rule 10b–5. The following facts are taken from the evidence introduced at trial and viewed in the light most favorable to Plaintiffs.

***10** In 2006 and 2007, BankAtlantic's commercial real estate loan (CRE) portfolio, valued at $1.2 to $1.3 billion dollars, was a major portion of its total loan portfolio. Included within the CRE portfolio was a portfolio of "land loans" valued at $400 to $500 million. (Tr. 272 & 1051–52; DX 5.)

At that time, BankAtlantic had several policies for the approval and monitoring of its CRE loans, including the land loan portfolio. (Tr. 275.) First, BankAtlantic's Major Loan Committee had to approve the initial grant and any modifications to loans in excess of $5 million. [16] (Tr. 285.) Second, BankAtlantic monitored its loan portfolio through an internal loan-grading system in which loans were graded 1 through 13. [17] (PX 151.) Grades 1 through 7 were passing; grade 10 loans were "specially mentioned assets," which have "potential weaknesses that deserve management's close attention"; and, grade 11 loans were "substandard," meaning that the "asset is inadequately protected by the current sound worth and paying capacity of the obligor or the collateral pledged, if any." [18] (PX 151; Tr. 317–19.) Additionally, if BankAtlantic determined that a borrower most likely would not repay his loan according to the terms of the original agreement, that loan was deemed "non-accrual," regardless of the assigned grade. (Tr. 338.) Finally, BankAtlantic created a monthly report called the Loan Watch List to help management track significant potential problem loans. (Tr. 336.) The list included all loans risk-graded 10 or 11 and all non-accrual loans and was distributed monthly to BankAtlantic's senior management. (Tr. 329–30.)

16 Alan Levan and Abdo were members of the Major Loan Committee, and Alan Levan's approval was required for each loan presented to the committee. (Tr. 285 & 3523.)

17 The loan's sponsoring officer assigns a grade to each loan at the time it is made. (PX 151; Tr. 319–20.) After closing, the loan officer or Chief Credit Officer may adjust a loan's grade to reflect changes to its level of risk. (PX 151; Tr. 321–22.)

18 BankAtlantic employees testified inconsistently at trial as to whether loans graded 10 and higher or loans graded 11 and higher were considered "classified" assets. (*See* Tr. 319, 335, 471–74 & 2924.)

By early 2007, Defendants began to take notice of negative performance trends within the land loan portfolio. From January through March 2007, the Major Loan Committee approved payment extensions and modifications for at least nine land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) On March 14, 2007, Alan Levan sent an email to members of the committee, referencing "a parade of land loans coming in for extentions [*sic*] recently." (PX 138.) He stated:

> I'm not sure what the purpose of the extentions [*sic*] are other than hoping that more time will solve their problems (and ours). Experience tells us that in these markets, it is better to force a resolution early rather than wait for the market to further deteriorate.... Later, with pressure from all the banks, the borrower will not be able to accommodate us.
>
> * * *
>
> I believe we are in for a long sustained problem in this sector.

(PX 138.) On March 20, 2007, Marcia Snyder, BankAtlantic's former chief of commercial real estate lending, sent an email to BankAtlantic's loan officers, noting that the Major Loan Committee had "significant concerns" about the land loan portfolio. (PX 124, Tr. 458–61.) Snyder informed the loan officers that the Bank would conduct a review of all the loans in the land loan portfolio. [19] (PX 124.)

19 As a result of that review, BankAtlantic determined that many of the land loans had depleted interest reserves which is an indication that the borrower will not be able to continue to pay down the loan. (Tr. 461–62, 1226–28 & 3563.)

***11** The Loan Watch List for March 31, 2007 indicated that two land loans aggregating $20.2 million were on non-accrual status and another $21.3 million loan was risk-grade 11. (PX 350; Tr. 342.) On April 7, 2007, seven additional land loans aggregating approximately $93.2 million were adjusted to grade 10 or 11 and added to subsequent Loan Watch Lists. (DX 15; PX 351 & 356; Tr. 343–47.) In response to concerns over land loans, in the first quarter of 2007, BankAtlantic created a special Land Loan Committee, which met twice monthly to monitor land loans. (Tr. 454.) In early April, Alan Levan authorized a "full legal review" of all the loans in the land loan portfolio, because of the possibility that the Bank would have "legal issues" with the entire portfolio. (Tr. 3563–64.)

As the deadline for filing the 2007 first-quarter financial results approached, [20] BankAtlantic began to distinguish between what came to be called the "builder land bank" or "BLB" loans and the remainder of the land loan portfolio. (Tr. 1071, 3390.) The BLB land loans were loans made to developers to acquire and develop parcels of land into finished lots; these borrowers, who had option contracts for the "take down" of the finished lots with large regional or national homebuilders, relied on the homebuilders to exercise the options on schedule in order to provide the borrowers with revenue to meet their loan obligations to BankAtlantic on a timely basis. (DX 6, p. 18.) The remaining, non-BLB land loans were made to developers to acquire land, develop it into finished lots, and sometimes build residential developments, but did not involve option contracts with national homebuilders. (Tr. 357–59; DX 6, p. 18.)

20 Each quarter, Bancorp publishes its quarterly financial results. The results are first announced in an 8–K press release filed with the Securities and Exchange Commission and are then discussed in an investor conference call. (Tr. 3318.) Conference calls are open to public participation; investment analysts participate in these calls and ask questions of management regarding its quarterly results. (Tr. 3312.) Conference calls provide management an opportunity to speak to investors and analysts and provide more information than is available in

> the quarterly financial results. (Tr. 3312.) After the conference call, the Company files a 10–Q quarterly earnings report with the Commission. (Tr. 3318.)

The problems Defendants observed in the land loan portfolio were not limited to either the BLB or non-BLB land loans —they were spread throughout the portfolio: the Major Loan Committee had approved extensions for both BLB and non-BLB land loans (PX 122, 217, 340, 341, 342, 343, 344 & 348; DX 15; Tr. 1171–72 & 1175); Marcia Snyder did not distinguish the categories of land loans in her email (PX 124, Tr. 458–61); both BLB and non-BLB land loans had depleted interest reserves (Tr. 461–62, 1226–28 & 3563); the March 31, 2007 Loan Watch List included one non-accrual BLB land loan and one non-accrual non-BLB land loan (PX 350; Tr. 342.); and the April 7, 2007 Loan Watch List additions included three BLB land loans and four non-BLB land loans (DX 15; PX 356; Tr. 343–47).

On April 26, 2007, Bancorp filed its first quarter 2007 financial results in an 8–K press release, which reported that BankAtlantic earned $5.7 million net income for the quarter. (DX 4.) Bancorp also announced an increase in non-accrual loans of $19.6 million from the first quarter of 2006, which related to loans in its CRE loan portfolio. (DX 4.) The release warned:

> The current environment for residential land acquisition and development loans is a concern, particularly in Florida, and represents an area where we remain very cautious in our credit management. In view of market conditions, we anticipate we may experience further deterioration in the portfolio over the next several quarters as the market attempts to absorb an oversupply of available lot inventory.

***12** (DX 4.)

The same day, Bancorp held its first-quarter earnings conference call. (DX 5.) In preparing for the call, Alan Levan asked James White, the then-CFO, to focus his discussion only on the BLB land loans.[21] (PX 139; Tr. 1673–76 & 3565–66.) And during the call, Alan Levan emphasized the risks of the BLB land loans to the exclusion of the remaining land loans. He discussed a $19.6 million increase in non-accrual loans, which he attributed to two loans in the "land banking portfolio," and described that portfolio as follows:

> ... those very simply are loans that we made to land developers, people that buy land in anticipation of selling that land to national developers, national or local developers. Generally at the time of borrowing, the borrower or developer had contracts with builders to buy a significant or a substantial portion of the property, which would have been used to pay down the loan in the normal course. As we all recognize, the housing market in the—nationally, but particularly in Florida, is suffering some economic distress. And the amount of deposits that homebuilders nationally in Florida that have walked away from these deposits is pretty high.

(DX 5, p. 4.) This was the first time Alan Levan or Bancorp publicly distinguished the BLB portfolio from the remainder of the land loan portfolio.[22] (Tr. 3328–29 & 3568; DX 5, p. 23.) Alan Levan noted that this "portfolio" consisted of $140 to $160 million in loans and explained that it was a subject of concern because the national homebuilders had "slowed their takedown of lots" and many of the borrowers were requesting extensions "to give the builders more time to ultimately take down the lots." (DX 5, pp. 5 & 24.)

21 In preparation for the first quarter 2007 conference call, Defendant Jim White, then Bancorp's Chief Financial Officer, had prepared to discuss concerns with entire land loan portfolio. (Tr. 1666–73.)

22 Coincidental with the announcement of the first quarter losses and the discussion of Bancorp's concerns with the BLB land loans, Bancorp's stock price declined $0.56 on April 26, 2007. (Tr. 2558.)

On May 10, 2007, Bancorp filed its 10–Q for the first quarter of 2007. The Company noted that the residential real estate market, both in Florida and nationally, "continued to deteriorate during the first quarter of 2007." (DX 6, p. 18.) The report identified the BLB portfolio as comprising $140 million of the $562 million "commercial real estate acquisition and development portfolio." (DX 6, p. 18.) With respect to the non-BLB loans in the portfolio, it stated:

> The loans ... in this category are generally secured by residential and commercial real estate which will be fully developed by the borrower or sold to third parties. These loans generally involve property with a longer investment and development horizon and are guaranteed by the borrower or individuals and/or secured by additional collateral such that it is expected that the borrower will have the ability to service the debt under current conditions for a longer period of time.
>
> (DX 6, p. 18.)

Alan Levan also stated as to the remainder of the CRE portfolio: "The portfolios that are buying land for their own development, those are proceeding in the normal course. We're not really seeing any difference in that portfolio than we've seen in the billion-and-a-half dollar portfolio." (DX 5, p. 24.) And when an investment analyst asked Alan Levan a question regarding the composition of the land loan portfolio, the following exchange ensued:

> [ANALYST]: Hi. So just to follow up on the last set of questions, is it right to infer that your construction portfolio apart from the land bank is about $250 million? Is that the right inference, the construction loan portfolio?
>
> * * *
>
> ALAN LEVAN: I think we—if we—we'd probably have to get back to you on that. By deduction, that would certainly seem likely. If it's a $400 million portfolio and $140 million to $160 million is in this one, probably the rest of it is in some stage of development to our borrower. The answer to that is probably yes, but perhaps we can get back to you (unintelligible) ...
>
> [ANALYST]: Okay, but that—I mean, that $400 million number that was referenced before would encompass all construction-related loans generally speaking?
>
> ***13** ALAN LEVAN: No, no, no. Other—I mean, the entire portfolio is $1.4 billion, $1.5 billion. So there's lots of construction in our portfolio. And Valerie noted today, she'll tell you as soon as I stop talking, we're—we'll have to tell you offline, there's a certain designation when we finance a land acquisition with the anticipation of a building going on that. It tends to get into this land portfolio. And it may recharacterize as we start to build, but lots of our portfolio is a construction portfolio that we're not in any way concerned about.
>
> (DX 5, p. 29.) The last portion of the exchange is what Plaintiffs identified as Statement 10: "But lots of our portfolio is a construction portfolio that we're not in any way concerned about."

Given the context of the statement, a jury could have found that when Alan Levan professed a lack of concern as to "lots of our portfolio," he was essentially stating that he was only concerned with the BLB land loans and *not* with the entire land loan portfolio. Indeed, Plaintiffs argued to the Jury in closing that Statement 10 was misleading with respect to the non-BLB land loans *only*. (Tr. 4093–94.) And a jury also could have found that Alan Levan's professed lack of concern about the balance of the land loan portfolio was untrue.

But not every untrue statement is actionable under Rule 10b–5. Generally, a misstatement or omission is actionable under the Rule if it is of a definite factual nature. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991). And, under certain circumstances, management statements couched as conclusory beliefs can be actionable. *Id.* "Such statements are factual in two senses: as statements that [managers] do hold the belief stated and as statements about the subject matter of the ... belief expressed." *Id.* at 1092. A statement of conclusory belief is actionable as a misrepresentation if a plaintiff demonstrates *both* the managers' disbelief and the falsity of the underlying facts. *Id.* at 1093–96.

In this case, the evidence supports a finding that Statement 10 is actionable. A jury could have found that Alan Levan was in fact concerned about the entire land loan portfolio and that certain of the same justifications he identified as the basis of his concern for the BLB loans existed (and were concealed) with respect to the remainder of the land loan portfolio.

With respect to the first point, Plaintiffs presented evidence that Alan Levan internally expressed undifferentiated concern regarding the entire land loan portfolio prior to the conference call. As detailed above, in a March 2007 email, Alan Levan stated that the land loan portfolio was facing "a long sustained problem," and in another March 2007 email, Marcia Snyder stated that the Major Loan Committee had "significant concerns" about both the BLB and non-BLB land loans. (PX 138 & 124.) Further, by the time of the conference call, BankAtlantic had created a special Land Loan Committee to review and address concerns regarding the entire land loan portfolio—twenty-nine loans were under review, nearly half

of which were non-BLB land loans. Based on this evidence a jury could have found that Alan Levan falsely professed a lack of concern about the remainder of the land loan portfolio.

***14** With respect to the second point, the stated justification for his relative lack of concern was the distinction between the BLB and non-BLB land loans, namely the involvement of national homebuilders in the BLB loans. Alan Levan explained that the BLB loans were made to borrowers whose business model depended on the sale of lots to these national home builders. According to Alan Levan, because of a softening residential real estate market, these builders were not "taking down" lots from the borrowers as scheduled which, in turn, was causing the borrowers to request payment extensions and in a few instances causing the borrowers to miss payments, resulting in non-accrual classifications. Another distinction was that for some BLB loans, the equity component was comprised of a letter of credit from the national home builder as opposed to a cash deposit. In the conference call, Alan Levan claimed these characteristics were unique to the BLB loans.

Plaintiffs put forth evidence, however, that certain of these characteristics were not confined to the BLB loans and were present throughout the land loan portfolio. A jury could have found that, by the time of the conference call, one non-BLB land loan was also on non-accrual status—in fact, it could have found that one of the two non-accrual BLB loans Alan Levan identified during the conference call was actually a non-BLB land loan. And a jury could have found that eight of the nine land loan extensions and modifications the Major Loan Committee had approved by March 2007 were non-BLB land loans. (PX 122, 217, 340, 341, 342, 343, 344, 348; Tr. 1171–72 & 1175; DX 15.) In short, a jury could have found Statement 10 to be an actionable concealment of the risk of substantial losses to the non-BLB land loans.

D. ***Loss Causation & Damages***

Plaintiffs contend that they suffered an actual loss when the true level of risk concealed by Statement 10 (the risk of substantial losses to the non-BLB land loans) was revealed on October 25 and 26, 2007 and the price of Bancorp's stock fell by $2.93. The issue therefore is whether Plaintiffs put forth sufficient evidence that their damages, if any, were "caused" by the concealment of this risk.

On October 25, 2007, Bancorp announced its third quarter 2007 financial results in a press release filed as an 8–K on October 26, 2007. (DX 11.) Bancorp suffered a loss from continuing operations of $29.6 million or $0.52 per diluted share and BankAtlantic suffered a net loss for the quarter of $27.1 million. The press release stated that BankAtlantic's loss:

> was driven by increased loan loss provisions and impairments of real estate owned and held for sale. Other factors contributing to the decline included net interest margin compression and costs associated with opening new stores, offset in part by an increase in non-interest income.

(DX 11.)

Bancorp further announced that BankAtlantic's loan loss provision for the quarter was $48.9 million.[23] (DX 11.) The provision was required by an increase in non-performing loans; Bancorp specifically noted the placement of eleven commercial real estate loans on non-accrual status during the quarter. (DX 11, p. 2.) In the 8–K, Bancorp did not specify what amounts of the $48.9 million loan loss provision were attributable to specific, qualitative, or quantitative reserves, nor did it break down the provision across the various segments of its loan portfolio. However, for the first time, Bancorp detailed the deterioration across the entire land loan portfolio. The release stated:

[23] BankAtlantic reserves funds for potential loan losses; the reserves are counted as losses against BankAtlantic's income in the quarter in which they are taken. (Tr. 2937.) Loan loss reserves include three components: specific reserves, qualitative reserves, and quantitative reserves. (Tr. 539–541.) Specific reserves are provisions for individual, large-balance loans. When BankAtlantic downgrades to a risk grade of 10 or 11 a loan whose balance exceeds a set amount, it may then determine that it is necessary to take a specific reserve for that loan. (Tr. 540–41.) BankAtlantic takes quantitative and qualitative reserves, when necessary, for groups of loans with similar characteristics. Quantitative reserves are determined based on the historic performance of the group of loans. (Tr. 539 &

2930.) Qualitative reserves are based on current and expected economic factors that may affect the repayment of a given group of loans. (Tr. 539–40 & 2931.) When BankAtlantic determines that it will not be able to collect all or a portion of a loan, it charges off that amount. (Tr. 2964–65.) If a specific reserve was previously taken for that loan, the reserved amount is applied to the charge off. (Tr. 2967–68.) If the specific reserve is insufficient to cover the charge off, the difference between the charge off and the reserve is counted as a loss against BankAtlantic's income. (Tr. 2967–68 & 3003–04.)

***15** "The categories within this 'Commercial Residential' portfolio where we believe we have exposure to the declines in the real estate market are as follows:

- Builder land bank loans [BLB land loans]: This category of 13 loans aggregates $149.3 million, of which five loans totaling $81.1 million are non-accrual and an additional three loans totaling $28.7 million were considered classified assets at quarter-end.

- Land acquisition and development loans [non-BLB land loans]: This category of 37 loans aggregates $218.5 million, of which three loans totaling $13.2 million are non-accrual and an additional five loans totaling $19.7 million were considered classified assets at quarter end.

- Land acquisition, development and construction loans [non-BLB land loans]: This category of 24 loans aggregates $165.3 million, of which seven loans totaling $62.0 million are non-accrual and an additional four loans totaling $41.9 million were considered classified assets at quarter end.

(DX 11.) The "classified" loans Bancorp disclosed in this 8–K included those graded 10 and 11. (Tr. 714–16.)

On October 26, 2007, Bancorp held its third quarter 2007 earnings conference call. (DX 12.) During the call, Alan Levan reiterated the results announced in the 8–K. Toalson noted that the loans placed on non-accrual status necessitated a specific reserve of $27.9 million and additional general reserves. *Id.* p. 12. She also noted that the value of BankAtlantic's real estate owned decreased by $6.7 million. *Id.* Coincidental with the announcement of third-quarter losses, Bancorp's stock price declined by $2.93 on October 26, 2007. (Tr. 2560.)

"Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff." *Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 172 (2d Cir.2005) (citation omitted). In order to prove loss causation in a fraud-on-the-market case, a plaintiff must show: (i) that the fraudulently concealed truth was revealed to the market and (ii) that the revelation caused, at least in substantial part, a decline in the market-price of the security. *See Dura,* 544 U.S. at 342–345; *Robbins v. Koger Props., Inc.,* 116 F.3d 1441, 1448–49 (11th Cir.1997). Based on the evidence at trial, a jury could have found the first part of the showing to have been satisfied, but not the second. The Court discusses both below.

(i) *Revelation of the Fraud*

In this case, Plaintiffs contend that Alan Levan, when he made Statement 10, concealed the risk of losses to the entire land loan portfolio by misrepresenting that the risk of significant losses was limited to the BLB loans and that this concealed risk was revealed to the market on October 25 and 26, 2007 when it materialized in the form of significant losses throughout the land loan portfolio. The materialization-of-the-risk theory is not new. Although the Eleventh Circuit has not expressly recognized the theory,[24] numerous courts have recognized that a concealed risk can be revealed when the risk materializes. *See, e.g., Schleicher v. Wendt,* 618 F.3d 679, 683 (7th Cir.2010); *In re Vivendi Universal S.A. Sec. Litig.,* ——F.Supp.2d ——, 2011 WL 590915, ——35–36 (S.D.N.Y. Feb.17, 2011); *In re Scientific Atlanta Sec. Litig.,* ——F.Supp.2d ——, 2010 WL 4793386, ——24–26 (N.D.Ga. Nov.18, 2010). Its general purpose is to allow defrauded investors to prove loss causation and recover under Rule 10b–5 even where the defendant does not publicly correct his fraud, but instead the fraud is revealed through some other event. *See, e.g., Scientific Atlanta,* 2010 WL 4793386 at *26 (citing *Alaska Elec. Pension Fund v. Flowserve Grp.,* 572 F.3d 221, 230 (5th Cir.2009)). With this purpose in mind, the Court agrees with those decisions recognizing the theory and adopts it here.

24 The Eleventh Circuit has acknowledged the concept of the materialization-of-the-risk theory, but has not explicitly adopted it. *See La Grasta v. First Union Sec., Inc.,* 358 F.3d 840, 851 (11th Cir.2004); *Huddleston,* 640 F.2d 534.

***16** Further, the Court agrees that the evidence supports a finding that the disclosures on October 25 and 26, 2007 revealed that the risk of substantial losses was not limited to the BLB loans but existed throughout the entire land loan portfolio. In the 8–K, for instance, Bancorp announced that an almost equal amount of BLB and non-BLB land loans ($81.1 and $74.2 million, respectively) were in non-accrual and also that the majority of the classified land loans at the end of the third quarter were non-BLB land loans. A jury could have found that these announcements revealed information about the risk to the entire land loan portfolio that had been concealed by Alan Levan when he made Statement 10. *See Vivendi,* 2011 WL 590915 at *36.

(ii) *Price Decline Caused by the Revelation*

Plaintiffs next contend that the revelation of this risk was the sole cause of the $2.93 decline in Bancorp's stock price on October 26, 2007. Plaintiffs argue that the market-price of Bancorp's stock was artificially inflated by Alan Levan's concealment of the risk to the non-BLB portion of the land loan portfolio and that when the concealed risk was revealed to the market, the market-price corrected and the inflation was removed. And it was the market's release of this inflation which Plaintiffs claim caused the price decline on October 26, 2007. Plaintiffs rely exclusively on the unrebutted trial testimony of their expert, Candace Preston, to establish that the price decline resulted from the revelation.

At trial, Preston testified to the results of an "event study" she used to analyze the cause of the October 26, 2007 price decline. Preston began her event study by identifying two stock indices she thought best represented the general market and banking industry—the S & P 500 Index and the NASDAQ Bank Index. (Tr. 2550.) Preston explained that she first looked to these indices because Bancorp itself used them as benchmarks for market and industry performance comparisons in its public filings. (Tr. 2550–54.) Preston then confirmed that these indices historically had a "statistical fit" with the market-price of Bancorp's stock. (Tr. 2551.) In other words, through statistical regression analysis Preston confirmed a correlation between the general market and industry indices and the market-price of Bancorp's stock. *Id.*

Using this model, Preston was able to identify, on a daily basis, movements in Bancorp's stock price which were "statistically significant" because they did not correlate with the performance of the general market and industry indices. (Tr. 2557.) According to Preston, this statistical significance was a strong indication that the movement in Bancorp's stock price was caused by some Bancorp-specific event or information and not general market or industry information. (Tr. 2557–59.) Further according to Preston, the $2.93 decline in Bancorp's stock price on October 26, 2007 was statistically significant and, when measured against the expected market-price movement as predicted by the indices, represented a "residual decline" of $3.15. *Id.* Thus, Preston concluded that the decline was attributable to Bancorp-specific information. [25]

25 In reaching this conclusion, Preston also examined the trading volume of Bancorp stock, which, on October 26, 2007, soared above Bancorp's standard trading volume. (Tr. 2562.) Preston opined that this was further indication that Bancorp-specific information caused the $2.93 decline. *Id.*

***17** Preston next discussed her opinion that the entire decline was caused by the October 25, and 26, 2007 announcement in the 8–K and conference call of new, negative information regarding the land loan portfolio. (Tr. 2595–96.) Preston noted that on October 25 and 26, 2007 Bancorp published an 8–K with its third-quarter results and held a teleconference regarding those results. (Tr. 2594.) Preston further identified Bancorp's announcement of a significant increase in non-accrual and classified assets across the BLB and non-BLB portions of the land loan portfolio as the negative information to which the market reacted. [26] (Tr. 2595.) Preston explained that she reviewed over a hundred analyst reports, many of which identified the negative information about the land loan portfolio as a surprise. (Tr. 2599–608.) She referenced one analyst report which stated that, though some stress was expected, "a provision of this magnitude is, in our view, a surprise." (PX 632; Tr. 2600.) The analyst further noted that Bancorp's announcement that many of its land loans were classified assets suggested "the possibility of migration into nonaccruals in the coming quarter." (PX 632; Tr. 2601.) Another analyst report noted that the "pipeline of potential nonperforming loans implies more pain ahead." (PX 630; Tr. 2606.)

26 Specifically, Preston identified the information contained in the "three bullet points" on "page 3" of the 8–K as the information regarding non-accruals and classified assets which caused the price decline. (Tr. 2594–95.)

Preston acknowledged that Bancorp also announced other information that might have affected the stock price on

October 26, 2007, including net interest margin compression, the curtailment of BankAtlantic's branch expansion, and changes in the performance of home equity loans; but she maintained that this other news did not contribute to the residual decline of Bancorp's stock price on October 26, 2007. (Tr. 2608–10.) Preston based this opinion on the analysts' overwhelming focus on the deterioration of the land loans; the fact that Bancorp attributed the net interest margin compression to challenges it faced in its land loan portfolio; and, the analysts' positive reaction to the curtailment of the branch expansion. *Id.*

Finally, Preston concluded that the $3.15 residual decline on October 26, 2007, which she opined was caused by the negative information regarding the land loan portfolio, represented the amount by which Bancorp's stock price was inflated, beginning on April 26, 2007, *i.e.,* "the amount that investors overpaid as a result of [the fraud]." (Tr. 2527 & 2620–22.) Preston also concluded that "the decline due to the release of inflation on October 26th was ... $3.15." (Tr. 2547–48.)

Defendants contend that neither Preston's testimony nor any other evidence is sufficient to support a finding of loss causation or damages. With respect to Preston's testimony, Defendants argue that Preston's underlying assumption of fraud relating to both the BLB and non-BLB land loans was rejected by the Jury's findings and, therefore, that the Jury could not have relied on her opinion. And even if a jury could have relied on her opinion, Defendants argue that it was insufficient to support a finding that the revelation of the fraudulently concealed risk caused the price decline because Preston failed to disaggregate the non-fraud effects of other negative information, including information regarding the risk to the BLB loans which was already known to the market.

***18** These arguments are not new. Defendants consistently raised them since the filing of their motions for summary judgment and to exclude Preston's testimony. And the Court first discussed them in its Omnibus Order addressing those motions:

> With respect to the company-specific decline of $3.15 per share on October 26, 2007, Preston opines that 100% of the decline is attributable to information regarding the credit quality of the entire land loan portfolio. Essentially, Preston's opinion is that there was no other bad news to disaggregate from the information regarding the credit quality of the land loan portfolio and, therefore, that 100% of the residual decline is attributable to the negative land loan information.
>
> Defendants argue that this opinion is inadmissible because Preston fails to disaggregate the confounding, non-fraudulent factors from the October announcements. Specifically, Defendants contend that Preston failed to disaggregate the loss related to BLB loans, the loss related to the increase in general reserves, and the loss attributable to market forces.
>
> In her affidavit, Preston explains that her opinion does not purport to focus only on the non-BLB land loans, but instead the entire land loan portfolio: "Defendants claim that the allegations are somehow limited to [LAD] and [LADC] loans—at the exclusion of the BLB loans. I am advised by Counsel that this is incorrect." Accordingly, the Defendants' arguments regarding the failure to disaggregate the BLB loan information do not go to the reliability of Preston's opinion because Preston is explicitly offering an opinion on the residual decline attributable to information regarding the entire land loan portfolio, including the BLB loans.

In re BankAtlantic, 2010 WL 6397500 at *17 (footnotes and citations omitted). The Court went on to note: "However, the Court will revisit this issue should it become apparent that Plaintiffs have put forth insufficient evidence to support a fraud claim relating to the BLB loans which extends past the April 2007 disclosures." *Id.* at *17 n. 26.

The Court did revisit the issue at trial in connection with Defendants' motion for judgment as a matter of law, but determined that as there was sufficient evidence in the record to support a finding of BLB fraud after April 2007, the Jury would have to decide the issue. (Tr. 3044.) But, again, the Court noted that it would reconsider the issue post-verdict if the Jury found no such BLB fraud:

> Now, in the end, though, I suspect that the Court is not going to be able to rule as a matter of law that there was BLB fraud after April 26th; that the jury is going to have to decide that.
>
> ... There is an issue down the road ... of what should the jury be told about its decision as to whether there was BLB fraud after April 26th and what to do if they find there is no BLB fraud after April 26th.

(Tr. 3045.)

As it turns out, the verdict hinges on Statement 10 which, under *Virginia Bankshares,* does not support a finding of BLB fraud, but only a finding that the risk to the *remainder* (*i.e.,* the non-BLB portion) of the land loan portfolio was fraudulently concealed. *See* 501 U.S. at 1092–94. The Jury effectively rejected Preston's assumption, and so her testimony is—at best—incomplete because she failed to disaggregate the effect of the earlier disclosed negative BLB information on Bancorp's stock price.

***19** As the Supreme Court noted in *Dura,* even if a defrauded plaintiff sells his shares at a lower price after the truth of the fraud is revealed to the market "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price." 544 U.S. at 343. Accordingly, where a fraud is revealed contemporaneously with the announcement of other negative, but non-fraud-related information, plaintiffs bear the burden of disaggregating the effect of the unrelated negative information on the stock price. Simply, establishing that the price reacted in some statistically significant way "to the *entire bundle* of negative information ... suggests only market efficiency, not loss causation, for there is no evidence linking the *culpable* disclosure to the stock-price movement." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.,* 487 F.3d 261, 271 (5th Cir.2007) (emphasis in original).

In this case, there is no question that Bancorp announced a bundle of negative information on October 25 and 26, 2007, some of it fraud-related and some of it not fraud-related. Preston herself testified that Bancorp announced negative information in addition to that regarding the land loans, but she claimed this information had no effect on the stock price. (Tr. 2609.) However, the negative information regarding the land loans was itself a bundle of information. For instance, in its October 25, 2007 8–K, Bancorp did not simply announce an increase in non-accrual and classified assets within the land loan portfolio, it announced the particular increases in each portion of the land loan portfolio. Preston freely admitted at trial that she did not attempt to disaggregate this bundle of negative land loan information because she assumed that it was all fraud related, *i.e.,* that the fraud related to the entire land loan portfolio, including the BLB loans.[27] (Tr. 2691.) Preston did qualify this admission by claiming that such a disaggregation could only have been conducted using information which was not publicly disclosed as of October 26, 2007—Preston claims that Bancorp did not publicly disclose the breakdown of the negative land loan information between BLB and non-BLB loans. (Tr. 2710–11.) This claim is simply untrue, and no jury could have found otherwise. Although there may have been some items of negative news which were not publicly broken down (*e.g.,* the $48.9 million loan loss provision), as explained above, the negative news to which Preston explicitly attributed the price decline in her direct testimony—*i.e.,* the three bullet points in the 8–K announcing the increase in non-accrual and classified assets-was publicly broken down, *in the 8–K,* into its BLB and non-BLB components.

27 In fact, on cross-examination, Preston testified that, without a finding supporting her assumption of continuing BLB fraud after April, her opinion was basically irrelevant:

> Q. And those, in fact, are the assumptions that if those are true, you then rendered your opinion based on those facts?
>
> A. That's correct.
>
> Q. And if those opinions [*spoken error*] are not true, then your opinion on damages, I think you would agree, isn't of much moment?
>
> A. Correct. If there is no liability, the there are no damages.
>
> * * *
>
> Q. So in other words, if the jury finds that the company did adequately warn of the risk of the builder land bank portfolio then your opinion as to the damages in October is wrong, correct?
>
> A. The jury would not find liability, so they would not find damages.
>
> * * *
>
> Q. So we are perfectly clear, if the jury finds no fraud with the BLB portfolio from April to October, then your entire opinion dies?
>
> A. In [*sic*] the jury finds no fraud related to the assumptions I have made regarding the land bank portfolio ..., then they not will find liability and than there will be no damages.

(Tr. 2691, 2713.) Preston may have avoided answering with a clear "yes," but her own assessment of the opinion is clear—without a finding in support of her assumption, it was not of much moment.

Moreover, the fact that neither Bancorp nor any analysts precisely quantified the effects of the negative BLB loan

information versus the negative non-BLB information did not relieve Plaintiffs of the burden to disaggregate—the very nature of the task presumes that the competing factors will not always lend themselves to a mathematically precise disaggregation analysis. *See Dura,* 544 U.S. at 343. And Preston testified at trial that she was capable of a disaggregation analysis where the competing factors were not quantified. With respect to the first period, Preston claimed she was able to disaggregate from the $0.55 residual price decline on April 26, 2007, the effect of non-fraudulent information even though "that wasn't quantified by anyone"—not Bancorp and not the analysts. (Tr. 2588.) For that period, Preston arrived at a "conservative" estimate of $0.37 per share after disaggregation. (Tr. 2582–93.) Preston offered no explanation why a similar analysis would not have been possible to disaggregate the effects of the negative BLB loan information on the October 26, 2007 price decline.

***20** Given that a jury could not have found Statement 10 to include BLB fraud and Preston's admitted failure to disaggregate the effect of the negative information regarding the BLB loans, the Court agrees with Defendants that a jury could not have relied on her opinion—at least not with respect to Statement 10. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). This is fatal to the Jury's verdict because there is no other evidence from which a jury could have found loss causation.

Without Preston's opinion, a jury would be left with no more than the text of the 8–K and the conference call—both jumbles of qualitative and quantitative financial information—and several independently admitted analyst reports which point to the negative information regarding the land loan portfolio as a whole as the most important news. (PX 630, 632 & 638.) This evidence, however, was insufficient to allow the Jury to conclude that the fraud-related (*i.e.,* non-BLB information) affected the stock price. *See, e.g., Oscar,* 487 F.3d at 270–71 (holding that evidence of "analyst commentary" is "little more than well-informed speculation" as to whether a price decline is attributable to one piece of negative information or another). "[A]nalyst speculation about materiality, while better informed than a layman, more closely resembles the latter." *Id.* at 271. Expert testimony may not be required to prove loss causation in every Rule 10b–5 case, but where a tangle of fraud and non-fraud factors affect a stock's price, it usually is—and this case is no exception. *See, e.g., Archdiocese of Milwaukee Supporting Fund, Inc. v. Haliburton Co.,* 597 F.3d 330, 341 (5th Cir.2010) ("This showing of loss causation is a 'rigorous process' and requires both expert testimony and analytical research or an event study that demonstrates a linkage between the *culpable* disclosure and the stock-price movement.") (citations omitted).

Further, even if a jury could have relied on Preston's opinion up to a point—the point where she opined that the entire decline was attributable to the negative land loan information—it could not have completed the analysis and disaggregated the effects of the BLB information on its own. As explained above, the negative land loan information was itself a *bundle* of negative news—some regarding the BLB loans, some regarding the non-BLB loans, and some regarding both. Any attempt to attribute some price decline to one particular piece without expert testimony would also be impermissible speculation. *See id.* While it may be true that the negative land loan news was spread equally between the BLB and non-BLB portions, any inference that each had an equal effect on the stock price is only speculation. *See, e.g., Fener v. Operating Eng'rs Constr. Indus.,* 579 F.3d 401, 410 (5th Cir.2009) ("[F]raudulent practices could have resulted in 90% of the circulation decline, but if the stock price fell because the market was concerned with *only* the reason for the other 10%, loss causation could not be proven."). Accordingly, a jury could not have found loss causation with respect to Statement 10, and judgment as a matter of law will be entered for Defendants.

***21** In concluding that Plaintiffs failed to produce sufficient evidence from which the jury could find loss causation, this Court readily concedes that reasonable minds can differ on the nature and extent of a plaintiff's burden in proving loss causation in a fraud-on-the-market-case under Rule 10b–5.

In *Dura,* the Supreme Court rejected the Ninth Circuit's view that a securities plaintiff adequately pled and proved loss causation by proving that he purchased stock at an inflated price due to fraud and subsequently suffered a loss. While such a showing might show that the misrepresentation "touches upon" a later economic loss, it does not, according to Justice Breyer's opinion, adequately account for the "tangle of factors affecting stock price" such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events"

taken separately or together. *Dura,* 544 U.S. at 343. However, in describing the plaintiff's burden, Justice Breyer merely stated: "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the economic loss and proximate cause that the plaintiff has in mind." *Id.* at 347. He further stated: "We need not, and do not, consider other proximate cause or loss-related questions." *Id.* at 346. Yet, the greater weight of authority as reflected in many of the circuit and district court opinions that have followed *Dura* and are cited herein, is that a securities-fraud plaintiff can satisfy his burden of proving loss causation only by producing the testimony of an expert who has completed a reliable multiple-regression analysis, event study, and financial analysis in order to quantify the extent to which the claimed losses are the result of the alleged fraud.

Whether *Dura* actually requires this level of statistical and econometric analysis to prove loss causation is, in the view of this Court, a debatable proposition, and notwithstanding the conclusion herein that Plaintiffs' proof of loss causation failed, this Court has endeavored to apply a less rigorous standard in its consideration of Candace Preston's testimony and any other evidence relevant to the issue presented at trial. The evidence, however, ultimately failed in this case because Preston, on whose testimony proof of loss causation hinged, wholly failed to consider that the Jury would reject the assumption—the assumption that she was asked by Plaintiffs' counsel to make—that the BLB fraud persisted after April 26, 2007. The Jury therefore was left to impermissibly speculate as to the relative market effects of the various pieces of qualitative and quantitative land loan data contained in the 8–K and conference call. *See, e.g., Oscar,* 487 F.3d at 271 ("[P]laintiffs must, in order to establish loss causation ..., offer some empirically based showing that the corrective disclosure was more than just present at the scene. And this burden cannot be discharged by opinion bereft of the analysis plaintiff's own expert conceded was necessary."); *In re Williams Sec. Litig.,* 558 F.3d 1142–43 (10th Cir.2009).

***22** Further, Preston's testimony, even if sufficient to support a finding of loss causation, was insufficient to support a finding of damages—an essential element of Plaintiffs' claim. *See Dura,* 544 U.S. at 342. Where a plaintiff proves loss causation by demonstrating that the disclosure of the fraud was a substantial contributing cause of his loss, to prove damages, a more rigorous showing is required, because by the express terms of the Exchange Act, a plaintiff's recovery is limited to "actual damages on account of the act complained of." *See* § 78bb(a). And as stated by the Eleventh Circuit in *Robbins v. Koger Properties:* "as long as the misrepresentation is one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement. But in determining recoverable damages, these contributing forces must be isolated and removed. This is often done ... with the help of an expert witness." *Robbins,* 116 F.3d at 1447 n. 5; *accord Miller v. Asensio & Co., Inc.,* 364 F.3d 223 (4th Cir.2004) (requiring a more rigorous disaggregation analysis to prove damages than loss causation).

Preston's testimony on damages fails for the same reasons as it does with respect to loss causation; she fails to adequately isolate the damages caused by the fraud. Without Preston's testimony, Plaintiffs failed to produce sufficient evidence for the Jury to find both the fact of proximately caused damage and the amount of proximately caused damage. *See In re Williams Sec. Litig.,* 496 F.Supp.2d 1195, 1276 (N.D.Okla.2007) (plaintiffs' failure to prove fact and amount of damages fatal to claims). Thus, even had Plaintiffs made a sufficient showing of loss causation, they did not produce sufficient evidence to support an award of damages in any amount.

D. *Remaining Statements*

Having determined that the verdict, which rested on Statement 10, was not supported by the evidence at trial, the question arises as to what should be done with the remaining statements for which the Jury found liability but was not asked to assess damages.[28] The simple answer is that these findings cannot support any judgment for Plaintiffs because there is no finding of damages attached to them.[29] Accordingly, the Court will enter a final judgment for Defendants as to all claims and statements. However, because the Court anticipates that Plaintiffs will move for a new trial on damages as to these remaining statements, the Court will also address under Rule 50(b), the insufficiency of the evidence supporting the liability findings as to these statements.

28 In addition to Statement 10, the jury found that Statements 13 through 17 and 19, were made in violation of Rule 10b–5 by certain Defendants, including Bancorp, Alan Levan, and Toalson.

29 Plaintiffs argue that "while the jury [was] asked to determine the first statement from which damages flowed, it was understood that any finding of damages would be constant and extend

to any subsequent actionable misstatements and omissions." (D.E.675, p. 26.) The Court disagrees. The verdict form *only* asked the Jury to attach damages to "the first Section 10(b) violation [they] found," and, consequently, the Jury only found the amount of damages caused by the first Section 10(b) violation. (D.E. 665; Tr. 3951, 62.) In fact, the initial draft of the verdict form instructed the Jury to skip the remaining statements once the first violation was found in each damage period. (Tr. 3934–35.) Plaintiffs requested that the Jury be asked to adjudicate each statement regardless of whether they found a prior violation in case the first violation the Jury found was disregarded on appeal or in a post-trial motion. *Id.* And the Court accommodated the request. Also, the record is clear that Defendants never agreed that the Jury's finding of damages as to the first violation would automatically shift to the next violation if the first failed. (The resolution of the inconsistency as to Statement 7, on the other hand, was a completely separate issue governed by Rule 49 and for which their was a waiver by both parties. *See* Part II *supra.*)

As with Statement 10, these remaining statements do not fit with Preston's assumptions about the nature of the fraud. The result is a similar failure of proof regarding the causal relationship between the statements and any decline in the price of Bancorp's stock—*i.e.,* loss causation and damages.

Statements 13 through 17 are excerpts of comments made by Alan Levan during the July 25, 2007 second-quarter earnings conference call. (DX 8.) During the call, Alan Levan reiterated his concern for the BLB loans and his relative lack of concern for the remainder of the land loan portfolio. [30] *Id.*

30 As with the third-quarter earnings conference call, the transcript of the entire second-quarter earnings conference call was admitted into evidence at trial. The following are the relevant portions of Alan Levan's comments, embracing Statements 13 through 17:

> [ANALYST]: Basically what I'm trying to —ask you is the $135 million in the land loans that you are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.
>
> ALAN LEVAN: There are no asset classes that we are concerned about in the portfolio as an asset class. You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.
>
> So the portfolio has always performed extremely well, continues to perform extremely well. And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, but that portfolio has performed extremely well.
>
> The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class. But to our knowledge and in—just in thinking through, there are no particular asset classes that we're concerned about other than that one class.
>
> * * *
>
> [ANALYST]: ... If I can just question you about the commercial portfolio for a second, for the construction portion of that, which I think you said was 63% of the portfolio, can you give us some sense of what the various delinquency buckets on that portion of the portfolio looks like at the end of June and how that's changed since the beginning of the year?
>
> ALAN LEVAN: I could be wrong, but I think it's zero. I don't think we have any delinquency in that portfolio, in the entire portfolio.
>
> * * *
>
> Other than the non-accruals we've reported to you, there is, you know, there is no—there are no other delinquencies in that portfolio.
>
> And again, I'm—I could be—don't take it as an absolute, but I'm just telling you to date we have—we do not have any concern about the balance of the portfolio.
>
> * * *
>
> Brian, we've confirmed that—while we were talking, somebody checked and to our

knowledge, at this moment we have no delinquencies in the balance of the portfolio ... in the commercial portfolio.

(DX 8, pp. 20–21, 32–33.)

***23** Thus, apart from the fact that these statements were made some three months after the April 26, 2007 conference call each of these statements, like Statement 10, is at best a fraudulent concealment of the risk to the non-BLB portion of the land loan portfolio. And like Statement 10, a jury could not have found them to be actionable misrepresentations or omissions regarding the BLB loans. Accordingly, Preston's opinion and the other evidence of loss causation and damages fails for the same reason: Preston's failure to disaggregate the non-fraudulent negative information related to the BLB loans from the bundle of negative information announced on October 25 and 26, 2007.

The sole remaining statement for which the Jury found liability, Statement 19, is different from the other misstatements submitted to the Jury. It is not taken from an earnings conference call but from the text of Bancorp's 2007 second quarter 10–Q, published on August 9, 2007. (DX 9.) It is also not a general statement about levels of risk or management concern regarding the land loan portfolio. Instead, it is a discrete statement about the amount of "Total Potential Problem Loans," *i.e.,* a statement that the amount of "Total Potential Problem Loans" amounted to $8.35 million.[31] *Id.* p. 23. At trial, Plaintiffs contended this figure was a fraudulent misrepresentation because one of its components, the amount of "Performing impaired loans" was greatly understated at $4.6 million. According to Plaintiffs, all of BankAtlantic's then-classified assets met the stated definition of performing impaired loans and should have been disclosed as such. The true amount of performing impaired loans, Plaintiffs argued, was tens of millions of dollars higher, as was revealed by the October 25 2007 8–K. (DX 9, p. 23; PX 151; Tr. 4107–08.)

31 The amount was listed in the following table:

	June 30, 2007
NON PERFORMING ASSETS	
Non-accrual:	
Tax Certificates	$ 711
Loans	21,806
Total non-accrual	22,517
Repossessed Assets:	
Real estate owned	23,886
Total nonperforming assets, net	$ 46,403
Allowances	
Allowances for loan losses	$ 54,754
Allowances for tax certificate loses [*sic*]	3,829
Total allowances	$ 58,583
POTENTIAL PROBLEM LOANS	
Contractually past due 90 days or more	$ 164
Performing impaired loans	4,596
Restructured loans	3,588
TOTAL POTENTIAL PROBLEM LOANS	$ 8,348

(DX 9, p. 23.)

Assuming this was an actionable misrepresentation, there is insufficient evidence to connect it to any decline in the price of BankAtlantic's stock. While it may be true that a jury could have found Statement 19 to be a misrepresentation of the amount of potential problem loans across the land loan portfolio, including the BLB portion, Preston offered no opinion on such a fraud. Preston's opinion was based on the assumption that Bancorp broadly misrepresented or concealed the risk of significant losses throughout the land loan portfolio *as of April 26, 2007,* not on the assumption that Bancorp concealed *only* the total amount of classified assets by failing to report them as "performing impaired loans" months later on August 9, 2007.[32] (D.E. 365 Ex. B, p. 6.)

32 Indeed, it should be of no surprise that Preston's assumptions do not fit with Statement 19 because Statement 19 was not plead in the First Consolidated Amended Complaint—the pleading Preston claimed to have reviewed in formulating

her opinion. (D.E. 365 Ex B., p. 4.) Preston's expert report predated Plaintiffs' motion to amend the complaint to include fraudulent understatement of the total potential problem loans in the 2007 second quarter 10–Q. (D.E. 210 & 365 Ex. B.) The importance of this point should not be understated; Preston herself testified at trial when asked why she reviewed the legal complaint: "I've [*sic*] just had to review the complaint, see what the allegations were .... I had to make sure I understand what the allegations are so I don't and up saying, without any basis, oh, the whole decline is related to that." (Tr. 2545.)

As with the previous statements, the divergence between Statement 19 and Preston's assumption about the fraud is fatal to her disaggregation analysis. Without accurate assumptions as to the nature, scope and duration of the fraud, Preston had no way of distinguishing fraudulent information from non-fraudulent information, much less disaggregating their effects on the stock price.[33] In the end, the Jury is left to unreasonably speculate as to whether Preston's disaggregation opinion based on the assumed fraud is equally applicable to some other fraud. *See Brooke,* 509 U.S. at 242. The October 25, 2007 8–K for instance announced increases in classified assets, non-accrual assets, and loan loss reserves relating to the entire land loan portfolio, but Statement 19 concealed only the true amount of total potential problem loans (or classified assets)—the total amount of non-accruals were separately disclosed in the 10–Q and was not found to have been false. *See* Table, *supra* note 31; (DX 9.) And Preston's opinion is silent as to why the increases in either the non-accrual assets or loan loss reserves did not require disaggregation.

33 Jeffrey Mindling, BankAtlantic's Chief Credit Officer, testified at trial that many of the loans that were risk-graded 11 were accounted for in the same table in the category "Allowance for loan losses." (Tr. 611–20.) This, then, is an example of the type of information that arguably should have been considered as part of the disaggregation analysis if liability flowed from Statement 19.

***24** Moreover, even if Statement 19 could be construed as an actionable misrepresentation or concealment of the general risk to the entire land loan portfolio, it is hard to conceive how a jury could find it to be a *material* misrepresentation as to the BLB portion, considering Bancorp's numerous warnings of risk and concern regarding the BLB loans up to that point.[34] *See Basic Inc. v. Levinson,* 85 U.S. 224, 231 (1987). Thus, the original problem of Preston's failure to disaggregate the negative BLB information persists.

34 Bancorp continued to warn of the risk to the BLB loans in the 10–Q:

> Conditions in the residential real estate market nationally and in Florida in particular continued to deteriorate during the six months fo 2007.... The "builder land bank loan" segment, at approximately $135 million, consists of twelve land loans to borrowers who have or had option agreements with regional and/or national home builders. These loans were originally underwritten based on projected sales of the developed lots to the builders/option holders and timely repayment of the loans is primarily dependent upon the acquisition of the property pursuant to the options. If the lots are not acquired as originally anticipated, BankAtlantic anticipates that the borrower may not be in a position to service the loan with the likely result being an increase in nonperforming loans and loan losses in this category.

(DX 9, p. 22.)

For the foregoing reasons, the Court will enter final judgment as a matter of law in favor of Defendants as to all claims and statements.[35]

35 Under § 20(a) of the Exchange Act, every person who directly or indirectly controls any person liable for a § 10(b) violation shall also be liable jointly and severally to the same extent as such controlled person. Because liability under § 20(a) is derivative upon liability under § 10(b), the failure to produce sufficient evidence to support a § 10(b) violation is necessarily fatal to a § 20(a) claim. *See Edward J. Goodman Life Income Trust v. Jabil Cir., Inc.,* 594 F.3d 783 (11th Cir.2010). Accordingly, because all Defendants are entitled to judgment as a matter of law in their favor on all Plaintiffs' claims under § 10(b) and Rule 10b–5, they are likewise entitled to judgment in their favor as to Plaintiffs' claims under § 20(a).

IV. Motion for New Trial

Along with their Motion for Judgment as a Matter of Law, in the alternative, Defendants move for a new trial pursuant to Federal Rule of Civil Procedure 59. Federal Rule of Civil Procedure 50(c) provides that, if the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. Accordingly, the Court addresses whether Defendants would be entitled to a new trial, should the judgment for Defendants be vacated or reversed. [36] For the reasons stated below, the undersigned finds that, should the Court of Appeals reverse the Court's determination that Plaintiffs failed to put forth sufficient evidence of loss causation, Defendants would not be entitled to a new trial.

36 Specifically, the Court examines whether Defendants would be entitled to a new trial should the Court of Appeals reverse the Court's judgment for Defendants and hold that the evidence of loss causation was sufficient to support a finding of liability against Alan Levan and Bancorp with respect to Statement 10.

The Court first addresses Defendants' arguments regarding evidentiary errors. The Court then discusses Defendants' argument that the Court failed to properly instruct the Jury on various points of law and to utilize their proposed verdict form. Finally, the Court discusses Defendants' argument that the Court's instruction on the falsity of Alan Levan's July 25, 2007 statements was prejudicial error.

A. *Rule 59 Standard*

Rule 59 provides that "the court may, on motion, grant a new trial on all or some of the issues ... after a jury trial for any reason for which a new trial has heretofore been granted in an action at law in federal court." A party may seek a new trial by arguing that "the verdict is against the great weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Steger v. Gen. Elec. Co.,* 318 F.3d 1066, 1081 (11th Cir.2003). But under Federal Rule of Civil Procedure 61, the court must disregard all errors and defects that do not affect any party's substantial rights.

B. *Evidentiary Errors*

Defendants argue that the Court made several evidentiary errors and that they are entitled to a new trial as a result. First, they argue that the exclusion of their proposed expert witnesses' testimony was erroneous. Second, Defendants argue that the Court improperly excluded testimony concerning disclosures made by other financial institutions. Finally, Defendants argue that the Court wrongly admitted various statements made in emails by a BankAtlantic employee, Perry Alexander.

***25** The admissibility of evidence is committed to the broad discretion of the trial court. *Walker v. NationsBank of Fla.,* 53 F.3d 1548, 1554 (11th Cir.1995). A new trial is not warranted due to evidentiary error unless the error substantially prejudiced the affected party. Fed R. Civ. P. 61; *Peat, Inc. v. Vanguard Research, Inc.,* 378 F.3d 1154, 1162 (11th Cir.2004).

(i) *Exclusion of Proposed Expert Testimony*

Prior to trial, Plaintiffs moved to exclude the proposed testimony of Defendants' three independent expert witnesses: Stephen Morrell, Jack DeWitt, and Michael Keable. (D.E. 312, 315 & 321.) Upon careful consideration of the Motions, the Court excluded all of Morrell's and DeWitt's proposed testimony and the majority of Keable's proposed testimony. (D.E. 466, 479 & 460.) Defendants contend that the Court's rulings on these matters constitute prejudicial error warranting a new trial.

In the instant Motion for New Trial, Defendants largely reargue issues raised in their responses to Plaintiffs' motions to exclude. (D.E. 366, 369 & 367.) The Court considered and addressed those arguments in its prior rulings and incorporates those findings in the instant order. (*See* D.E. 466, 479 & 460.) Below, the Court addresses only those additional arguments raised in Defendants' Motion for New Trial related to the Court's exclusion of their proposed experts. [37]

37 Because Defendants raise no new issues with respect to DeWitt's testimony, the Court incorporates by reference and relies on the rulings made and reasons provided in its Order on Motion

to Exclude Expert Testimony of Jack DeWitt. (D.E.479.)

a. *Stephen Morrell*

Defendants argue that the exclusion of the proposed testimony of Stephen Morrell was erroneous and warrants a new trial. Defendants incorporate by reference the arguments from their Response to Plaintiffs' Motion to Exclude Morrell's testimony and further argue that the exclusion of Morrell's testimony affected their substantial rights, "because Morrell would have explained how the decline in Bancorp's stock price was driven by a depression in the Florida real estate market." (D.E.666, p. 25.)

The Court did not err in excluding Morrell's proposed testimony. In his report, Morrell offered two broad opinions: first, that the recession in Florida began earlier, lasted longer, and was more severe than that suffered in the rest of the nation; and second, that, few, if any, economists or analysts could have foreseen the depth and breadth of the recession in Florida while it was happening. (D.E. 313, Ex. A ¶¶ 1 & 16.) These opinions were based on Morrell's comparison of a variety of economic measures for Florida and the United States as a whole over dates ranging from 2006 through 2010.

The Court excluded Morrell's proposed testimony under Federal Rules of Evidence 401, 402, 702 and the standards provided by *Daubert v. Merrell Dow Pharms. Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). First, the Court found that Morrell failed to explain the connection between his opinions and the raw economic data cited in his report. (D.E. 466, pp. 5 & 7). Second, the Court found that Morrell's opinions would not assist the trier of fact in determining a fact in issue. (D.E. 466, pp. 6 & 8.) His data and the conclusory opinions derived therefrom related to the economic recession in Florida from 2006 through 2010. Such testimony was both too broad temporally to relate to the instant action and not sufficiently connected to the question of whether Defendants' alleged misrepresentations concerning BankAtlantic's land loans caused Bancorp's stock price to decline in 2007.

***26** Though Defendants argue that Morrell would have explained that Bancorp's share price decline was driven by the collapsing Florida real estate market, Morrell offered no opinion to that effect in his expert report. In fact, Morrell's expert report concerned itself with the Florida real estate market only in the most limited way. He stated that "[h]ousing markets in Florida are experiencing a depression versus a severe United States recession." (D.E. 313, Ex. A ¶ 13.) This opinion was apparently based on two measures: a comparison of the number of building permits for new housing units issued in Florida in 2005 and the number issued in 2009; and a comparison of housing price indices for the Miami and Tampa regions from 2006 through January 2010 against a nationwide index. *Id.* These data and Morrell's resultant opinion were not sufficiently connected to the facts in issue in this case to meaningfully assist the trier of fact. *See Boca Raton Comty. Hosp., Inc. v. Tenet Healthcare Corp.,* 582 F.3d 1227, 1233–34 (11th Cir.2009). The Court, thus, committed no error in excluding Morrell's proposed testimony.

b. *Michael Keable*

Defendants argue that the exclusion of the proposed expert testimony of Michael Keable was erroneous and warrants a new trial. Defendants offered Keable as an expert on loss causation and damages to counter Preston's testimony. Prior to trial, the Court determined that the bulk of Keable's opinions were inadmissible because they were insufficiently supported or explained and were not helpful to the trier of fact in deciding a question in issue. (*See* D.E. 460.) However, the Court ruled that Keable could offer at trial his "opinion regarding the false sense of precision in Preston's calculation of a $0.37 residual decline on April 26, 2007 attributable to negative information regarding the BLB loans." (D.E.460, p. 8.) Nonetheless, Defendants elected not to call Keable to testify at trial.

In their Motion for New Trial, Defendants raise no new arguments regarding the admissibility of Keable's testimony but argue that the Court's rulings on Keable's testimony "affected Defendants' substantial rights by eliminating their most direct answer to Candace Preston's damages analysis and exposing them to the argument made in closing that Alan Levan could not provide testimony to rebut her analysis because he was not an independent, third party expert." (D.E.666, p. 27.) To the extent that Defendants' argument addresses parts of Keable's testimony previously deemed inadmissible, the Court incorporates its earlier rulings. And insofar as Defendants chose not to present Keable's admissible testimony, any prejudice they suffered as a result is wholly self-inflicted and does not warrant a new trial.

(2) *Evidence of Other Banks' Disclosures*

Defendants argue that the Court erroneously excluded evidence and testimony that "few, if any, of the institutions included in the NASDAQ Bank Index made the sort of

disclosure that Plaintiffs claimed should have been made here." (D.E.666, p. 27.) Specifically, Defendants sought to introduce evidence that other banks did not disclose the number or amounts of loans on internal watch lists or those rated special mention or substandard. The Court previously articulated its reasons for excluding such testimony at some length, both from the bench and in a written order. (*See* Tr. 3631–33; D.E. 527.) The Court incorporates those rulings here.

***27** In sum, the Court excluded such evidence because of its limited probative value and its potential to confuse the Jury. Plaintiffs did not claim that Defendants had an independent duty to disclose loans on internal watch lists; rather, they contended that Bancorp intentionally misrepresented the true quality and performance of its land loans, as reflected in the volume of land loans downgraded to special mention or substandard risk grades. Accordingly, evidence of what other banks disclosed would be irrelevant in the absence of a full presentation to the Jury of the types of loans made by those banks, how the loans were performing, and what representations those banks made regarding those assets, which would have required no less than a trial within a trial regarding the practices of unrelated banking institutions. The Court rightly excluded such evidence in light of its potential to confuse and mislead the jury. *See* Fed.R.Evid. 401 & 403.

Moreover, the evidence and testimony Defendants sought to introduce on this subject was incompetent. Defendants failed to lay a proper foundation for the testimony of any BankAtlantic employee who could have testified to a "consensus" among financial institutions regarding disclosure requirements. (*See* D.E. 526–3 & 527.) And Defendants sought to introduce a letter concerning regulatory disclosure requirements issued years after the end of the class period. (*See* D.E. 474, pp. 15–16 & Tr. 3631–33.) The Court committed no error in excluding this evidence.

(3) *Perry Alexander Emails*

Defendants argue that the Court erroneously allowed the introduction of statements contained in eight email exchanges sent by a BankAtlantic employee, Perry Alexander, and that the admission of such evidence warrants a new trial. Defendants contend that the statements were inadmissible hearsay and Plaintiffs did not meet their burden of showing that they fell within an exclusion or exception to the general rule against hearsay. [38]

38 Defendants do not articulate their objections to specific emails in their Motion for New Trial nor do they specify the basis for their objection; rather, they incorporate by reference the arguments they raised in a pretrial Motion *In Limine* to exclude the emails of Alexander. In that Motion, Defendants argued that the emails were neither business records excepted from the hearsay rule under Federal Rule of Evidence 803(6) nor admissions by a party-opponent under Federal Rule of Evidence 803(d)(2)(D). (D.E.298.) The Court denied the Motion without prejudice, as it failed to indicate which of Alexander's emails were the subject of the Motion. (D.E.457.)

Hearsay evidence is generally inadmissible, except as provided by the Federal Rules of Evidence. Fed.R.Evid. 802. Rule 801(d) excludes several categories of statements from the definition of hearsay. A statement is not hearsay if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. Fed.R.Evid. 801(d)(2)(D). Whether a statement falls under Rule 801(d)(2)(D) depends not on whether the statement was made in the scope of the declarant's agency or employment but on whether the statement concerns matters within the scope of the agency or employment. *Wilkinson v. Carnival Cruise Lines,* 920 F.2d 1560, 1565 (11th Cir.1991).

The statements in question were admissible against Bancorp as admissions by a party-opponent. Alexander's statements concerned the credit quality and performance of various land loans coming before BankAtlantic's Major Loan Committee for approval, review, or modification. Alexander was employed as a loan officer and market manager for BankAtlantic from 1995 through 2008 and served on the committee from the second quarter of 2004 through June 2007. (Tr. 1389–90, 1395 & 3525–26.) His position as a member of that committee required him to review the details of the loans that came before it for approval or modification. (Tr. 1396–1400.) Alexander's service on the committee covered the period when many of the land loans in question were first approved and the period when the committee approved extensions and term modifications of many of those loans. His contemporaneous comments on the performance of those land loans as well as the processes by which they were approved and reviewed, thus, concerned matters within the scope of his employment. *See Wilkinson,* 920 F.2d at 1565–66.

***28** Though Alexander was employed by BankAtlantic rather than Bancorp, the statements in the subject emails were nonetheless admissible against Bancorp. Statements made by employees of a subsidiary may be attributed to its corporate parent when the parent dominates the activities of the subsidiary. *Big Apple BMW, Inc. v. BMW of N. Am.,* 974 F.2d 1358, 1372 (3d Cir.1992). There was no dispute before or during trial that BankAtlantic is the wholly owned subsidiary of Bancorp and that Bancorp is a holding company, the primary asset of which is BankAtlantic. (*See* DX 3, pp. 1 & 7–8.) And Plaintiffs laid a sufficient foundation for the Court to find that Bancorp dominates BankAtlantic's activities. [39] (D.E.358.)

39 Though the statements in issue may only have been admissible against Bancorp and not against the individual Defendants, no Defendant requested a limiting instruction from the Court to that effect.

Defendants contend that Alexander's emails include "profanity, slang, gossip, and every other indication of unreliability imaginable." (D.E.666, p. 29.) The admissibility of statements by party-opponents as non-hearsay under Rule 801(d)(2) is the product of the adversary system, rather than the satisfaction of the conditions of the hearsay rule, such as the reliability of the statement. Fed.R.Evid. 801(d)(2)(D) advisory committee's note. Thus, no guarantee of trustworthiness is required in the case of an admission. *Id.* That Alexander's out-of-court statements may have included profanity and slang does not affect their admissibility under Rule 801(d)(2)(D).

Defendants' arguments that the statements should have been excluded as irrelevant and unduly prejudicial also fail. Alexander's statements concerned the underwriting, credit quality, and deterioration of land loans in BankAtlantic's portfolio, matters relevant to the Jury's determination of whether the alleged misstatements constituted material misrepresentations. And though he used colorful and sometimes profane language in expressing his observations and opinions, his manner of expression did not render the statements unduly prejudicial or confusing to the Jury. *See* Fed.R.Evid. 403. In any event, the Court required the redaction of several of Alexander's email exchanges to prevent the introduction of irrelevant and prejudicial material. (*See* Tr. 1376–85.)

Finally, even were Alexander's statements improperly admitted, Defendants fail to demonstrate that they are entitled to a new trial on this basis. Plaintiffs presented sufficient evidence, independent of Alexander's emails, for the Jury to find Alan Levan (and therefore Bancorp) liable for violating Rule 10b–5 with respect to Statement 10. The introduction of Alexander's statements was, thus, not vital to Plaintiffs' case and any error in admitting the statements was harmless. *Cf. Wilkinson,* 920 F.3d at 1564.

C. *Jury Instructions*

Defendants argue that the Court's failure to give several of their requested jury instructions constituted prejudicial error warranting a new trial. Specifically, Defendants argue that the Court should have submitted to the Jury a special interrogatory regarding Preston's assumptions and that the Court improperly instructed the Jury on: causation in a collapsing market; corrective disclosure and length of inflation; disaggregation and damages; and, the claimed amount of damages.

***29** The failure of a court to give a requested instruction is error only if the requested instruction is correct, is not adequately covered by the charge given, and deals with a point so important that the failure to give the instruction seriously impaired the defendant's ability to present an effective defense. *See Adams v. Sewell,* 946 F.2d 757, 767 (11th Cir.1991). A litigant is entitled to have the jury instructed on its theory of the case, so long as there was competent evidence to support the theory and the instruction is properly requested. *Ad–Vantage Tel. Directory Consultants v. GTE Directories Corp.,* 849 F.2d 1336, 1349 (11th Cir.1987). However, the Court need not give the requested instruction in the exact language requested. *Id.*

If the jury charge, as a whole, correctly instructs the jury on the law, no reversible error has been committed, even if a portion of the charge is technically imperfect. *Miller v. Universal City Studios, Inc.,* 650 F.2d 1365, 1372 (5th Cir. Jul.23, 1981). So long as the instructions accurately reflect the law, the court has wide discretion as to the style and wording. *Bateman v. Mnemonics, Inc.,* 79 F.3d 1532, 1543 (11th Cir.1996).

(1) *Preston's Assumptions*

Defendants argue that the Court should have submitted to the Jury a question as to whether Plaintiffs proved by a preponderance of the evidence the factual assumptions on which Preston premised her testimony. Defendants provide no legal support for the proposition that a jury must ratify an

expert's assumptions via special findings in order to consider that expert's testimony. [40]

40 The only legal support Defendants cite in their Motion is *Brooke Grp.,* 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168, which has no bearing on the issue.

(2) *Causation in a Collapsing Market*

Defendants contend that the Court's instruction to the jury on corrective disclosures and materialization of the risk failed to make clear that "Defendants' argument was that the collapsing Florida real estate market severed the causal link." (D.E.666, p. 10.) Defendants' proposed instruction read, in relevant part:

> ... if the loss coincides with a market-wide phenomenon causing comparable losses to other investors, the prospect that the Plaintiffs' loss was caused by the alleged fraud decreases. Plaintiffs must prove that its loss was caused by the alleged fraud as opposed to intervening events.

(D.E.627.) The Court did not give Defendants' proposed instruction, but its instruction on corrective disclosures and materialization of the risk stated the following:

> Defendants contend that the Plaintiffs' losses were solely due to deteriorating conditions in the Florida real estate market, about which investors were forewarned. Defendants do not have the burden of proving this contention by a preponderance of the evidence; rather, it is Plaintiffs' burden, as stated above, to prove that the corrective disclosures and/or materialization of concealed risks, and not other factors, were significant contributing causes of their damages.

(D.E.635, pp. 21–22.) The Court's instructions adequately covered the law and Defendants' argument on causation in a collapsing market. *See Adams,* 946 F.2d at 767.

(3) *Corrective Disclosure & Length of Inflation*

***30** Defendants contend that the Court's failure to give their requested instruction titled "Corrective Disclosure and Length of Inflation" warrants a new trial. Defendants' proposed instruction included the following:

> If you find by a preponderance of the evidence that an alleged misrepresentation or omission artificially inflated the price of BankAtlantic Bancorp stock, you will also have to determine the length of time during which the inflation existed. To make this determination, you must decide the date on which information curing or correcting the alleged misrepresentation or omission was publicly announced or otherwise effectively disseminated to the market. Dissemination of the allegedly withheld or misrepresented information through a public announcement, a press release, or a press report will correct the previous misrepresentation or omission and terminate the period during which purchasers can seek to hold Defendants liable under the securities laws for the misrepresentation or omission. At that point, subsequent purchasers are charged with knowledge of the true state of affairs and the stock's market price is presumed to reflect its true value.

(D.E.593–1, p. 14.)

The legal principle embedded in Defendants' requested instruction was sufficiently covered in the Court's instruction on corrective disclosures and the materialization of the risk.

The Court instructed the Jury, in relevant part, that "Plaintiffs must prove by a preponderance of the evidence that a corrective disclosure or materialization of the concealed risk revealed the truth concealed by the misrepresentation or omission to the market *for the first time."* (D.E.635, p. 20) (emphasis added). The instruction further informed the jury that the alleged revelations of the truth occurred on April 25 and 26, 2007 and October 25 and 26, 2007. (D.E.635, pp. 20–21.)

The Court's instruction accurately and adequately advised the Jury that, if they found the Company revealed the truth concealed in the alleged misrepresentations prior to dates of the alleged revelations, they could not find that the misrepresentations caused the share price declines on April 26, 2007 and October 25, 2007. The Court, thus, committed no error in refusing to give the instruction in the language Defendants requested. *See Adams,* 946 F.2d at 767.

(4) *Disaggregation & Damages*

Defendants argue that the Court failed to make clear in its instructions that the Jury "needed to disaggregate non-fraud factors from any supposed loss...." (D.E.666, p. 12.) During the charge conference, Defendants proposed the following instruction to be added "to the end of the Court's proposed instructions":

> Defendants contend that the stock price declines that occurred were not caused as a result of any alleged misrepresentations or omissions, but were, instead, caused by deteriorating conditions in the Florida real estate market about which investors were forewarned. Any award of damages must subtract from the price declines the losses caused by such factors, and Plaintiffs carry the burden of proof to eliminate from their damage claim losses cause by non-fraud factors.

***31** (D.E.628.)

The first sentence of Defendants' requested instruction pertains more specifically to loss causation than to damages. And, in fact, this sentence was included almost verbatim in the Court's instruction to the Jury on loss causation. (D.E.635, p. 21.) The second part of the requested instruction relates to damages. The Court's instruction to the Jury on damages read, in pertinent part:

> There may be factors other than the alleged fraudulent statements and/or omissions that affected Bancorp's stock price on any given day. For example, market or industry conditions or bad news disclosed by Bancorp that was unrelated to the alleged fraud could have affected Bancorp's stock price. Defendants are not liable for any share price decline resulting from those other non-fraud related events. Plaintiffs bear the burden of disaggregating (or separating out) any share price declines that were caused by non-fraud related events or establishing that the entire share price decline was caused by the alleged fraud.
>
> Plaintiffs claim that the alleged fraud caused damages in the amount of 37 cents per share on April 26, 2007. Plaintiffs also claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007.
>
> Defendants claim that Plaintiffs have failed to separate out price declines caused by market conditions, the conditions of the real estate market, and other conditions not related to the alleged fraud.

(D.E.635, pp. 23–24.)

In line with the Defendants' requested instruction and the applicable law, the Court explicitly instructed the Jury that Plaintiffs could only recover damages actually caused by the misrepresentations and not by non-fraud related events. The instruction also placed the burden squarely on Plaintiffs to disaggregate from Bancorp's share price decline on the days in question the effect of any non-fraud events. And the Court informed the Jury of Defendants' theory, namely that Plaintiffs failed to disaggregate from the price decline the effect of market conditions. The Court committed no error in substituting language substantially equivalent to Defendants' proposed instruction. *See Adams,* 946 F.2d at 767.

(5) *$2.93 Damage Instruction*

Defendants argue that the Court's instruction that the Plaintiffs were seeking $2.93 per share in damages warrants a new trial.[41] Defendants correctly point out that Plaintiffs' damages expert testified that, in her opinion, Bancorp stock was artificially inflated by $3.15 in the second part of the class period. Defendants contend that the Court's instruction

on Plaintiffs' claimed damages, by not holding them to the $3.15 figure presented by Preston, relieved Plaintiffs of the burden of disaggregating non-fraud factors from their damages claim. Defendants argue that the $2.93 figure was based on speculation and conjecture and amounted to an unsupportable basis for a jury verdict.

41 The Court instructed the Jury in relevant part: "Plaintiffs claim that the alleged fraud caused damages in the amount of $2.93 per share on October 26, 2007." (D.E.635, p. 24.)

The Court's instruction on Plaintiffs' damages claim was not error. The $2.93 instruction was merely a recognition that, under the Exchange Act, damages in a securities fraud case are limited to those actually caused by the misrepresentation. *See* § 78bb; *Robbins,* 116 F.3d at 1447 n. 5. Expectation damages are generally not available to a prevailing plaintiff. Though Bancorp's residual decline on October 26, 2007 was, according to Plaintiffs' expert, $3.15 per share, all of which was caused by the revelation of the alleged fraud, the actual decline was $2.93. (Tr. 2596.) Plaintiffs were thus limited to that amount of per-share damages. The Court's instruction as to the amount Plaintiffs claimed in damages was not error.

D. ***Instruction on the Falsity of Alan Levan's Statements***

***32** Defendants argue that the Court committed prejudicial error by instructing the Jury on its pretrial ruling that four statements made by Alan Levan in the July 25, 2007 conference call were false. Defendants argue that the Court erred in its pretrial ruling, that the subject statements were protected by the Reform Act's safe harbor, and that the question of liability regarding those statements should not have been submitted to the Jury because Plaintiffs failed to prove scienter, loss causation and damages with respect to the statements. Accordingly, Defendants argue that the Court erred in instructing the Jury as to its finding and that such error warrants a new trial.

(1) *Summary Judgment: Falsity*

Defendants argue that the Court erred in granting Plaintiffs' Motion for Partial Summary Judgment, and, accordingly, its instruction to the Jury on that ruling was prejudicial error. Prior to trial, Plaintiffs moved for partial summary judgment as to the falsity of four statements Alan Levan made during the July 25, 2007 earnings conference call discussing Bancorp's second-quarter 2007 financial results.[42] The exchange that produced those statements proceeded as follows:

42 Plaintiffs' motion had an extremely narrow focus. They stated:

> As noted above, to establish Defendants' liability under Section 10(b) and Rule 10b–5, Plaintiffs must prove that Defendants issued: "(1) a misstatement or omission, (2) of a material fact, (3) made with scienter, (4) on which plaintiff relied, (5) that proximately caused his injury." *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1202 (11th Cir.2002).... Plaintiffs seek partial summary judgment only as to the first element—falsity—of Levan's July 25, 2007 earnings call statements.

(D.E.237.)

[ANALYST]: [I]s the $135 million in the land loans that you guys are concerned about, are there other portfolios (unintelligible) focus you on the construction portfolio that you feel there might be some risk down the road as well.

ALAN LEVAN: **There are no asset classes that we are concerned about in the portfolio as an asset class.** You know, we've reported all of the delinquencies that we have, which actually I don't think there are any other than the ones that we've, you know, that we've just reported to you.

So, the portfolio has always performed extremely well, continues to perform extremely well. And that's not to say that, you know, from time to time there aren't some issues as there always have, even though we've never taken losses in that—we've not taken—I won't say ever taken any losses, because that's probably never going to be a correct statement, **but that portfolio has performed extremely well.**

The one category that we just are focused on is this land loan builder portfolio because, you know, just from one day to the next, the entire homebuilding industry, you know, went into a state of flux and turmoil and is impacting that particular class. But to our knowledge and in—just thinking through, there are no particular asset classes that we're concerned about other than that one class.

(D.E.338–20, pp. 22–23) (emphasis in original.) Plaintiffs argued that no genuine issue of fact existed as to the falsity

of the four highlighted statements, and the Court granted summary judgment in their favor on that narrow issue. [43] (*See* D.E. 411.)

43 These four statements were listed as Statements 13 through 16 on the verdict form.

The Court did not err in granting summary judgment on this issue. As discussed above, to prevail on a Rule 10b–5 claim, a plaintiff must show that a statement was false or misleading. *Basic Inc.,* 485 U.S. at 238. For a statement to be an actionable misrepresentation, it must be of a definite factual nature. *See Va. Bankshares,* 501 U.S. at 1095. Statements of opinion or belief can be actionable misrepresentations if the plaintiff shows that the speaker falsely stated his belief and shows the factual justification for the statement to be false. *Id.* at 1092. Though Plaintiffs alleged that four separate statements by Alan Levan on July 25, 2007 were false, the Court examined the statements in two categories because of the near identity of the statements. Specifically, the Court assessed the falsity of Alan Levan's statements that the portfolio had always performed and continued to perform extremely well and his statements that he was not concerned with any class of assets in the construction loan portfolio other than the BLB loans.

***33** As to the first category, Plaintiffs presented undisputed evidence of the falsity of Alan Levan's statement that the land loans other than the BLB loans had been and were performing extremely well. [44] First, within BankAtlantic, Alan Levan had undisputedly expressed that the land loan portfolio as a whole, including the non-BLB loans, was not performing extremely well, thus demonstrating the falsity of his public assessment regarding their performance. (D.E.338–19.)

44 Defendants argued in their Motion for Reconsideration and again in their Motion for New Trial that when Alan Levan stated in the July 25, 2007 conference call that the other loans in the portfolio were "performing extremely well," he was actually using a banking term of art, referring to loans that are "performing" as opposed to "non-performing," which is akin to non-accrual status. (D.E. 471, p. 6; D.E. 666, pp. 20–21.) However, at summary judgment (and even in connection with their Motion for Reconsideration), Defendants presented no evidence in support of this argument, let alone evidence that raised a genuine issue of material fact.

Moreover, Plaintiffs presented undisputed evidence of the falsity of the justification for Alan Levan's statements. His internal assessment of the poor performance of the BLB and non-BLB loans was based on the many requested extensions of those loans' maturity dates to the Major Loan Committee, indicating poor performance and possible repayment problems. (D.E.338–14, 15, 16, 17, 18, 83, 84, 104.) Also, by July 25, 2007, two non-BLB loans and one BLB loan were on non-accrual status; four more non-BLB and one more BLB loan had been downgraded to risk grade 11, indicating that the "asset [was] inadequately protected by the current sound worth and paying capacity of the obligor or collateral pledged"; and six more non-BLB and four more BLB loans had been downgraded to risk grade 10, indicating that they had "potential weaknesses.... If left uncorrected, these potential weaknesses may result in the deterioration of the repayment prospects for the asset...." (D.E. 338–27 & D.E. 338–2, p. 5669.) Defendants presented no evidence that raised a genuine issue of fact as to the whether the land loans in the portfolio apart from the BLB loans had been and were continuing to perform extremely well as of July 25, 2007.

As to the second category of statements, Plaintiffs presented undisputed evidence that Alan Levan's professed concern with the BLB portion of the construction portfolio, to the exclusion of the balance of the land loan portfolio, was false. First, they presented undisputed evidence that Alan Levan was concerned with the entire land loan portfolio, because he had expressed undifferentiated concern with the performance of the land loan portfolio in its entirety, including both BLB and non-BLB loans, prior to the July 25, 2007 conference call. (*See* D.E. 338–5 & 338–19.)

Plaintiffs also presented undisputed evidence of the falsity of the factual justification for such statements. Alan Levan stated during the conference call that his concern with the performance of the BLB loans was due to the effects of turmoil and flux in the homebuilding industry. (D.E.338–20, p. 23.) However, turmoil in the homebuilding industry was having the same effect on all the loans in the land loan portfolio, as evidenced by the negative performance trends and deterioration identified above, which were spread throughout the BLB and non-BLB portions of the land loan portfolio.

In response, Defendants argued that the statements in issue were not material and that they were subject to the protections of the Reform Act's safe harbor, neither of which were in issue in Plaintiffs' motion. As to falsity, Defendants argued that the

BLB loans were subject to higher levels of risk than the other land loans and that, months after the July 2007 statements, the BLB loans ultimately suffered greater losses than the non-BLB land loans. These arguments, and the evidence offered in support thereof, failed to meet and rebut Plaintiffs' arguments that the statements were false. That the BLB loans were, perhaps, exposed to greater risk than the non-BLB loans did not raise a genuine issue of fact as to whether Alan Levan was, in fact, concerned with the poor performance of all the land loans. Likewise, the higher losses caused by the BLB loans in the third quarter of 2007 failed to raise a genuine issue of fact as to whether the non-BLB loans were performing poorly and causing concern as of July 2007.

***34** In their Motion for Reconsideration, Defendants argued that the four statements were statements of opinion and Plaintiffs, thus, should have and failed to adduce evidence that Alan Levan knew his statements were false. In denying the motion, the Court noted that Alan Levan's state of mind was not relevant to the inquiry, in that whether he acted with scienter was a separate inquiry left to the Jury. The Court also noted that, though the statements contained an evaluative component, they were not statements of pure opinion, but rather were tethered to objective factual justifications. Insofar as these were statements of belief, the falsity of his belief —though not his intent to deceive-was relevant to the falsity inquiry. *See Va. Bankshares,* 501 U.S. at 1092–96. And because, as discussed above, Plaintiffs had presented undisputed evidence to meet that requirement, in the form of emails by Alan Levan expressing his concern with the poor performance of the entire land loan portfolio, Defendants' argument did not warrant reconsideration.

For these reasons, as well as the additional reasons set forth in the Omnibus Order and Order on Reconsideration, the Court did not err in granting summary judgment to Plaintiffs on the narrow issue of the falsity of these statements. Plaintiffs were entitled to the benefit of the Court's ruling and an appropriate instruction to the Jury, as discussed below.

(2) *Safe Harbor*

Defendants argue that the four statements that were the subject of the Court's partial summary judgment for Plaintiffs were protected by the Reform Act's safe harbor and, thus should not have been submitted for the Jury's consideration. They further argue that, because the statements were immunized by the safe harbor, the Court's instruction on its partial summary judgment finding was unduly prejudicial.

Section 27A of the Reform Act provides a safe harbor from Rule 10b–5 liability for certain forward-looking statements. § 78u–5(c) (1). Corporations and individuals may avoid liability under Rule 10b–5 for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." § 78u–5(c)(1)(A)(I). Forward-looking statements include projections of revenues, income, or other financial items; statements of the plans and objectives of management for future operations; statements of future economic performance; or, any statement of the assumptions underlying or relating to such statements. § 78u–5(i)(1).

Defendants argue that the statements in issue were forward-looking statements. They contend that Alan Levan's answer to the analyst's question was, on the whole, forward-looking, and all statements of historical fact included in his answer also fall within the safe harbor as "assumptions underlying forward-looking statements." (D.E.666, p. 19.) Defendants broadly assert that "[s]tatements that include both forward-looking and factual factors must be treated as forward-looking." *Id.*

***35** Defendants' contention that the safe harbor applies to all statements which include both forward-looking and non-forward-looking components misinterprets the law in this circuit. In *Harris v. Ivax,* 182 F.3d 799 (11th Cir.1999), the Eleventh Circuit assessed the applicability of the safe harbor to a variety of allegedly false and misleading statements made by an issuing corporation. One of the allegedly misleading statements was a list of factors that the company stated "will influence [its] third quarter results." *Id.* at 805. The plaintiffs alleged that the list was misleading in that it did not include the possibility of a goodwill writedown, a circumstance which eventually came to pass and allegedly caused the company's stock price to plummet. The district court ruled that the list was entitled to the protection of the safe harbor.

The Eleventh Circuit affirmed the district court, holding that the list was a "mixed bag," including some sentences that were forward looking and some that were not, but concluding that the list, in its entirety, was to be treated as a forward-looking statement. *Id.* at 806. The court held that "when the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement." *Id.* at 807. The *Harris* court, however, made clear that its holding pertained only to alleged omissions of material risk factors.

Id. (noting that "treating mixed lists as forward-looking may open a loophole for *misleading omissions"*) (emphasis added). The court further clarified that, "of course, if any of the individual sentences describing known facts ... were allegedly false, we could easily conclude that the smaller, non-forward-looking statement falls outside the safe harbor." *Id.* at 806.

Plaintiffs allege that the statements in issue were affirmative misrepresentations, not that Alan Levan's answer to the analyst's question was, on the whole, misleading because it omitted a material piece of information. (*See* D.E. 237.) Accordingly, each allegedly false statement must be evaluated to determine whether it is forward looking. *See Harris,* 182 F.3d at 806.

None of the four statements in issue was forward looking. In two of the subject statements, Alan Levan stated that Bancorp was not concerned with any class of loans in the construction portfolio other than the BLB loans. (DX 8, pp. 20–21.) These statements are assertions regarding the absence of *known* risk in the balance of the construction portfolio apart from the BLB portion. Statements regarding the *known* risk of an investment based upon observed facts, the truth of which are discernable at the time they are made, are not forward looking though they touch upon the future. *See Harris,* 182 F.3d at 805–06. The concept of risk touches upon the future, but whether management *knows* of a certain risk at a given time is ascertainable at that time.

***36** The other two statements concern the past and present performance of the construction portfolio; Alan Levan stated that the portfolio had always performed extremely well and "continues to perform extremely well." (DX 8, p. 20.) These statements, too, are expressions of observed facts, rather than assumptions or any kind of prediction. *See Harris,* 182 F.3d at 806. And the truth of these statements was also discernable at the time the they were made. Accordingly, these statements do not fall under the protection of the Reform Act's safe harbor.

(3) *Scienter*

Defendants argue that Plaintiffs failed to satisfy their burden of proof as to whether Alan Levan acted with scienter in making the four statements in issue. Accordingly, these statements could not support a finding of liability and should not have been submitted to the Jury.

To prove scienter, a plaintiff must show that the defendant made the alleged misrepresentations with "a mental state embracing intent to deceive, manipulate or defraud." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). It is not enough for plaintiffs to prove that the defendant acted negligently. *Id.* at 214. A plaintiff must prove either that the defendant acted with the "intent to deceive, manipulate, or defraud," or that he acted with "severe recklessness." *Bryant v. Avado Brands, Inc.,* 187 F.3d 1271, 1284 (11th Cir.1999). Severe recklessness is

> limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that defendant must have been aware of it.

Id. at 1282 n. 18. Due to the difficulty of proving a defendant's state of mind in fraud cases, circumstantial evidence of scienter may be sufficient to support the inference that he acted with the requisite intent. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 391 n. 30, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).

Though Defendants contend that Plaintiffs "failed to satisfy their burden of showing scienter" with respect to these statements, that question was for the Jury to resolve, because Plaintiffs presented sufficient evidence to support a finding of scienter. For example, Plaintiffs presented evidence that Alan Levan was aware of the significant deterioration of the land loan portfolio—including the non-BLB loans—before the July 2007 conference call, but chose to disclose only the issues with the BLB segment of the portfolio. Alan Levan also acknowledged the importance of investor conference calls as an opportunity for analysts to get information directly from management. (Tr. 3312.) Defendants' contention that the Court's instruction on the falsity of the July 25, 2007 statements was in error because of a failure of proof as to scienter, thus, fails.

(4) *Loss Causation and Damages*

***37** Defendants argue that Plaintiffs failed to present evidence linking Statements 13 through 16 to a loss. Because

Plaintiffs failed to prove loss causation and damages with respect to these statements, they should not have been submitted for consideration to the Jury and the Court's instruction regarding their falsity was prejudicial error.

As discussed above, the Court finds that there was insufficient evidence to support the Jury's finding of loss causation and damages with respect to Statement 10. And though the Jury's damages finding was connected only with Statement 10, the Court further clarified that the loss causation problems with Statement 10 similarly afflict Statements 13 through 16. Thus, should the Court of Appeals reverse the Court's ruling on the sufficiency of the evidence of loss causation and damages as to Statement 10, the same conclusion would follow with respect to Statements 13 through 16. And, accordingly, Defendants would not be entitled to a new trial on this basis.

(5) *Prejudice of Court's Instruction*

Defendants argue that the Court's instruction to the Jury on its partial summary judgment ruling for Plaintiffs prejudiced the Jury such that it could not independently assess other questions of liability. The Court disagrees.

First, the Court precluded disclosure of the pretrial ruling until closing argument. (Tr. 123–26.) Though Plaintiffs mentioned the Court's ruling in connection with the four subject statements, it was not a prominent feature of their closing argument and they made no argument or implication that the Jury should draw inferences as to any other issues from the ruling. (*See* Tr. 4061, 4102–04 & 4255.) Then, the Court read to the Jury, as part of its final instructions, a carefully constructed paragraph explaining the limited nature of the pretrial ruling. The instruction to the Jury on this point read:

> Prior to trial, the Court also made a narrow ruling that four statements made by Alan Levan during a July 25, 2007 conference call were objectively misleading or false. You must also accept that these statements were, in fact, misleading or false. However, the Court has not made any determination regarding whether those statements were material, whether they were made with scienter, or whether they caused Bancorp's share price to decline. The Plaintiffs still must prove, and you will need to decide, the remaining elements of their claims with respect to these statements.
>
> These statements are entries 13, 14, 15, and 16 on the Table that is attached to the Verdict Form.

(D.E.635, p. 30.)

There is no indication that Defendants suffered undue prejudice as a result of this instruction. The Court clearly instructed the Jury on the narrowness of its ruling, and the Court presumes the Jury followed its instructions as to this and every other matter. *See Johnson v. Breeden,* 280 F.3d 1308, 1319 (11th Cir.2002). Indeed, the Jury's findings strongly indicate that this presumption is correct. For example, the Jury found no § 10(b) violation as to Statements 8, 9, and 18, all attributed to Alan Levan. (D.E.665.) So it cannot be said that the instruction prejudiced the Jury against Alan Levan. [45]

45 In fact, as explained above, the Jury found for Defendants on the majority of the issues.

***38** Further, the Jury's findings regarding Statements 13 through 16 are essentially superfluous to the conditional judgment. As discussed above, the award of damages in the amount of $2.41 per share is tied to Statement 10. A finding of no § 10(b) violation as to Statements 13 through 16 would not have affected the conditional judgment. [46]

46 By the same token, there would be no prejudice to Defendants even if the Plaintiffs' Motion for Partial Summary Judgment was wrongly decided. Nevertheless, the ruling on Plaintiffs' Motion for Partial Summary Judgment was extremely narrow and, as set forth above, was warranted based on the parties' briefing of the motion and supporting evidence.

For the reasons stated above, in the event the Court's ruling on Defendants' Motion for Judgment as a Matter of Law is vacated or reversed, Defendants should not be entitled to a new trial.

V. Conclusion

Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion for Judgement as a Matter of Law (D.E.669) is GRANTED. The Court will separately enter its Final Judgment in accordance with this Order and the Jury's Verdict. It is further

ORDERED AND ADJUDGED that Defendants' Motion for a New Trial (D.E.666) is CONDITIONALLY DENIED. It is further

ORDERED AND ADJUDGED that all pending motions are DENIED AS MOOT. It is further

ORDERED AND ADJUDGED that, in order for the Court to undertake its mandatory review of the record to determine whether sanctions for abusive litigation are appropriate under Federal Rule of Civil Procedure 11, the parties shall file their respective motions for sanctions, if any, within ten days hereof. The opposing party shall respond within ten days thereafter. Any replies shall be filed no later than five days after the filing of a response.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1585605

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EXHIBIT B

2020 WL 4581733
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

BEEZLEY

v.

FENIX PARTS, INC., et al.

Case No. 1:17-cv-07896

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Signed 08/07/2020

Attorneys and Law Firms

Erica Lauren Stone, The Rosen Law Firm, P.A., New York, NY, Ex Kano S. Sams, II, Robert Vincent Prongay, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, Laurence M. Rosen, The Rosen Law Firm, PA, South Orange, NJ, for Amanda Beezley.

Ex Kano S. Sams, II, Robert Vincent Prongay, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, James E. Cecchi, Carella Byrne Cecchi Olstein Brody & Agnesso, P.C., Roseland, NJ, Adam M. Apton, Pro Hac Vice, Adam Christopher McCall, Pro Hac Vice, Nicholas Porritt, Pro Hac Vice, Levi & Korsinsky, LLP, Washington, DC, Patrick Doyle Austermuehle, Peter Scott Lubin, Lubin Austermuehle, P.C., Elmhurst, IL, Vincent Louis DiTommaso, DiTommaso Law LLC, Oakbrook Terrace, IL, Eduard Korsinsky, Levi & Korsinsky LLP, Hackensack, NJ, for Thomas Weeks, Douglas Barnard, Keith B. White.

Ex Kano S. Sams, II, Robert Vincent Prongay, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, Laurence M. Rosen, The Rosen Law Firm, PA, South Orange, NJ, for Manny Paulo.

Michael J. Diver, Michael James Lohnes, Zachary M. Schmitz, Katten Muchin Rosenman LLP, Chicago, IL, Eric Thomas Werlinger, Pro Hac Vice, Katten Muchin Rosenman LLP, Washington, DC, for Fenix Parts, Inc., Kent Robertson, Scott Pettit.

Amanda B. Protess, Pro Hac Vice, Goodwin Procter LLP, New York, NY, Brian E. Pastuszenski, Pro Hac Vice, Goodwin Procter LLP, New York City, NY, Ezekiel L. Hill, Pro Hac Vice, Goodwin Procter LLP, Washington, DC, Howard L. Teplinsky, Levin Ginsburg, Chicago, IL, Inez H. Friedman-boyce, Pro Hac Vice, Goodwin Procter LLP, Boston, MA, for BMO Capital Markets Corp., Stifel, Nicolaus & Company, Incorporated, BB&T Capital Markets, Barrington Research Associates, Inc.

JUDGMENT APPROVING CLASS ACTION SETTLEMENT

Charles R. Norgle, United States District Judge

***1** WHEREAS, a consolidated class action is pending in this Court entitled *Beezley v. Fenix Parts, Inc. et al.*, Case No. 1:17-cv-07896 (the "Action");

WHEREAS, (a) Lead Plaintiffs Thomas Weeks, Douglas Barnard, and Keith B. White, on behalf of themselves and the Settlement Class (defined below), and (b) defendants Fenix Parts, Inc. ("Fenix"), Kent Robertson ("Robertson"), and Scott Pettit ("Pettit") (collectively, the "Individual Defendants"; and, together with Fenix, the "Defendants"; and together with Lead Plaintiffs, the "Parties") have entered into a Stipulation and Agreement of Settlement dated November 6, 2019 (the "Stipulation"), that provides for releases and a complete dismissal with prejudice of the claims asserted against Defendants in the Action, and other terms and conditions set forth in the Stipulation, subject to the approval of this Court (the "Settlement");

WHEREAS, unless otherwise defined in this Judgment, the capitalized terms herein shall have the same meaning as they have in the Stipulation;

WHEREAS, by Order dated November 26, 2019 (the "Preliminary Approval Order"), this Court: (a) preliminarily approved the Settlement; (b) certified the Settlement Class solely for purposes of effectuating the Settlement; (c) ordered that notice of the proposed Settlement be provided to potential Settlement Class Members; (d) provided Settlement Class Members with the opportunity either to exclude themselves from the Settlement Class or to object to the proposed Settlement; and (e) scheduled a hearing regarding final approval of the Settlement;

WHEREAS, due and adequate notice has been given to the Settlement Class;

WHEREAS, the Court conducted a hearing on August 12, 2020 (the "Settlement Hearing") to consider, among other things, (a) whether the terms and conditions of the Settlement are fair, reasonable and adequate to the Settlement Class, and should therefore be approved; and (b) whether a judgment

should be entered dismissing the Action with prejudice as against the Defendants; and

WHEREAS, the Court having reviewed and considered the Stipulation, all papers filed and proceedings held herein in connection with the Settlement, all oral and written comments received regarding the Settlement, and the record in the Action, and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

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 and makes a part hereof: (a) the Stipulation filed with the Court on November 8, 2019; and (b) the Notice, the Summary Notice, and the Postcard Notice, all of which were filed with the Court on November 8, 2019.

3. **Class Certification for Settlement Purposes** – The Court hereby affirms its determinations in the Preliminary Approval Order certifying, for the purposes of the Settlement only, the Action as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Settlement Class consisting of all persons and entities who or which purchased or otherwise acquired shares of Fenix common stock (i) in Fenix's initial public offering on May 14, 2015, and/or (ii) on the public market between May 14, 2015 and June 27, 2017, inclusive, and were allegedly damaged thereby. Excluded from the Settlement Class are Defendants; the Officers and/or directors of Fenix; Immediate Family members of each of the Individual Defendants; any person, firm, trust, corporation, Officer, director or other individual or entity in which any Defendant has a controlling interest or which is related to or affiliated with any of the Defendants; and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party. Also excluded from the Settlement Class are the persons and entities listed on Exhibit 1 hereto who or which are excluded from the Settlement Class pursuant to request.

***2** 4. **Adequacy of Representation** – Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, the Court hereby affirms its determinations in the Preliminary Approval Order certifying Lead Plaintiffs as Class Representatives for the Settlement Class and appointing Lead Counsel as Class Counsel for the Settlement Class. Lead Plaintiffs and Lead Counsel have fairly and adequately represented the Settlement Class both in terms of litigating the Action and for purposes of entering into and implementing the Settlement and have satisfied the requirements of Federal Rules of Civil Procedure 23(a)(4) and 23(g), respectively.

5. **Notice** – The Court finds that the dissemination of the Postcard Notice, the online posting of the Notice, and the publication of the Summary Notice: (a) were implemented in accordance with the Preliminary Approval Order; (b) constituted the best notice practicable under the circumstances; (c) constituted notice that was reasonably calculated, under the circumstances, to apprise Settlement Class Members of (i) the pendency of the Action; (ii) the effect of the proposed Settlement (including the Releases to be provided thereunder); (iii) Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses; (iv) their right to object to any aspect of the Settlement, the Plan of Allocation and/or Lead Counsel's motion for attorneys' fees and reimbursement of Litigation Expenses; (v) their right to exclude themselves from the Settlement Class; and (vi) their right to appear at the Settlement Hearing; (d) constituted due, adequate, and sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (e) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4, as amended, and all other applicable law and rules.

6. **Final Settlement Approval and Dismissal of Claims** – Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully and finally approves the Settlement set forth in the Stipulation in all respects (including, without limitation: the amount of the Settlement; the Releases provided for therein; and the dismissal with prejudice of the claims asserted against Defendants in the Action), and finds that the Settlement is, in all respects, fair, reasonable and adequate to the Settlement Class. The Parties are directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Stipulation.

7. The Action and all of the claims asserted against Defendants in the Action by Lead Plaintiffs and the other Settlement Class Members are hereby dismissed with

prejudice. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Stipulation.

8. **Binding Effect** – The terms of the Stipulation and of this Judgment shall be forever binding on Defendants, Lead Plaintiffs and all other Settlement Class Members (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), as well as their respective successors and assigns. The persons and entities listed on Exhibit 1 hereto are excluded from the Settlement Class pursuant to request and are not bound by the terms of the Stipulation or this Judgment.

***3** 9. **Releases** – The Releases set forth in paragraphs 5 and 6 of the Stipulation, together with the definitions contained in paragraph 1 of the Stipulation relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date. Accordingly, this Court orders that:

(a) Without further action by anyone, and subject to paragraph 10 below, upon the Effective Date of the Settlement, Lead Plaintiffs and each of the other Settlement Class Members, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Plaintiffs' Claim against the Defendants and the other Defendants' Releasees, and shall forever be enjoined from prosecuting any or all of the Released Plaintiffs' Claims against any of the Defendants' Releasees. This Release shall not apply to any of the Excluded Claims (as that term is defined in paragraph 1(q) of the Stipulation).

(b) Without further action by anyone, and subject to paragraph 10 below, upon the Effective Date of the Settlement, Defendants, on behalf of themselves, and their respective heirs, executors, administrators, predecessors, successors, and assigns in their capacities as such, shall be deemed to have, and by operation of law and of this Judgment shall have, fully, finally and forever compromised, settled, released, resolved, relinquished, waived and discharged each and every Released Defendants' Claim against Lead Plaintiffs and the other Plaintiffs' Releasees, and shall forever be enjoined from prosecuting any or all of the Released Defendants' Claims against any of the Plaintiffs' Releasees. This Release shall not apply to any person or entity listed on Exhibit 1 hereto.

10. Notwithstanding paragraphs 9(a) – (b) 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. **Rule 11 Findings** – The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the institution, prosecution, defense, and settlement of the Action.

12. **No Admissions** –This Judgment, drafts of a Term Sheet, the Stipulation (whether or not consummated) including the exhibits thereto and the Plan of Allocation contained therein (or any other plan of allocation that may be approved by the Court), the negotiations leading to the execution of the Stipulation, any proceedings taken pursuant to or in connection with the Stipulation and/or the approval of the Settlement (including any arguments proffered in connection therewith), shall not be:

(a) offered against any of the Defendants' Releasees as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by any of the Defendants' Releasees with respect to the truth of any fact alleged by Lead Plaintiffs or the validity of any claim that was or could have been asserted or the deficiency of any defense that has been or could have been asserted in this Action or in any other litigation, or of any liability, negligence, fault, or other wrongdoing of any kind of any of the Defendants' Releasees or in any way referred to for any other reason as against any of the Defendants' Releasees, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation;

***4** (b) offered against any of the Plaintiffs' Releasees, as evidence of, or construed as, or deemed to be evidence of any presumption, concession or admission by any of the Plaintiffs' Releasees that any of their claims are without merit, that any of the Defendants' Releasees had meritorious defenses, or that damages recoverable under the Complaint would not have exceeded the Settlement Amount or with respect to any liability, negligence, fault or wrongdoing of any kind, or in any way referred to for any other reason as against any of the Plaintiffs' Releasees, in any civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; or

(c) construed against any of the Releasees as an admission, concession, or presumption that the consideration to be given under the Settlement represents the amount which could be or would have been recovered after trial;

provided, however, that the Parties and the Releasees and their respective counsel may refer to this Judgment and the Stipulation to effectuate the protections from liability granted hereunder and thereunder or otherwise to enforce the terms of the Settlement.

13. **Retention of Jurisdiction** – Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) the disposition of the Settlement Fund; (c) 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; (d) any motion to approve the Plan of Allocation; (e) any motion to approve the Class Distribution Order; and (f) the Settlement Class Members for all matters relating to the Action.

14. Separate orders shall be entered regarding approval of a plan of allocation and the motion of Lead Counsel for an award of attorneys' fees and reimbursement of Litigation Expenses. Such orders shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement.

15. **Modification of the Agreement of Settlement** – Without further approval from the Court, Lead Plaintiffs and Defendants are hereby authorized to agree to and adopt such amendments or modifications of the Stipulation or any exhibits attached thereto to effectuate the Settlement that: (a) are not materially inconsistent with this Judgment; and (b) do not materially limit the rights of Settlement Class Members in connection with the Settlement. Without further order of the Court, Lead Plaintiffs and Defendants may agree to reasonable extensions of time to carry out any provisions of the Settlement.

16. **Termination of Settlement** – If the Settlement is terminated as provided in the Stipulation or the Effective Date of the Settlement otherwise fails to occur, this Judgment shall be vacated, rendered null and void and be of no further force and effect, and this Judgment shall be without prejudice to the rights of Lead Plaintiffs, the other Settlement Class Members and Defendants, and the Parties shall revert to their respective positions in the Action as of May 30, 2019, as provided in the Stipulation.

17. **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.

SO ORDERED this 7 day of August, 2020.

All Citations

Slip Copy, 2020 WL 4581733

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EXHIBIT C

1995 WL 17009594
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

David GOLDSMITH, et al., on behalf of themselves and all persons similarly situated, Plaintiff,
v.
TECHNOLOGY SOLUTIONS CO., et al, Defendant.

No. 92 C 4374.
|
Oct. 10, 1995.

REPORT AND RECOMMENDATION
of Magistrate Judge Ronald A. Guzmán

GUZMAN, Magistrate J.

INTRODUCTION

***1** This case comes before us on the referral of the Honorable Blanche Manning to conduct a fairness hearing in regards to the proposed settlement of this class action lawsuit. At the hearing plaintiff's counsel characterized the case as an open market fraud case which came about as a result of an initial offering and a secondary offering of stock in the defendant's corporation for sale to the public. The "class period" runs from the date of the initial offering of September 20, 1991 to September of 1992 when press releases first came out announcing the write offs of previously claimed income due by the defendant. It was this announcement, according to the plaintiff's case, that triggered a drop in the price of defendant's stock which in turn caused the losses of which plaintiffs complain. Plaintiffs allege that defendant misrepresented and overstated its revenues and the collectibility of its predicted revenues to the public. These misrepresentations in turn distorted and inflated the price of the defendant's stock which the plaintiff and other class members purchased. When the truth of the misstatements became known, the defendant's stock prices dropped significantly thereby causing damages to the class members.

The terms of the settlement are set forth in the Agreement of Settlement dated June 2, 1995 ("Settlement Agreement"), which has previously been filed and was preliminarily approved by the Court on June 14, 1995.[1] The parties have agreed to settle this securities fraud class action for $4,600,000 in cash with interest thereon (the "Settlement"). Interest has been accruing on the entire $4.6 million since July 3, 1995. In their brief in support of the settlement plaintiff's counsel point out that the proposed Settlement was achieved as a result of intensive arm's-length bargaining by experienced counsel who fully understood the relative strengths and weaknesses of the claims and defenses asserted in this action. In agreeing to the terms of the Settlement Agreement, plaintiffs' counsel evaluated the risks of an unfavorable result inherent in complex litigation such as this, as well as the specific risks associated with this particular action. They also considered the expense and time that would have been necessary to prosecute this action through trial and the inevitable appeal. Confirming plaintiffs' view is the total lack of objections from class members who were notified of the terms of the Settlement Agreement pursuant to the notice approved by this Court. In addition no one opted out of the class. Likewise, as of August 18, 1995, no class members have objected to plaintiffs' proposed Plan of Distribution which was described in full in the Court-approved notice which was sent to Class members.

1 The "Former Individual Defendants" and the "Former Underwriter Defendants," as defined in the Settlement Agreement, are likewise included in this settlement and will be dismissed and released upon its approval. *See* accompanying Joint Affidavit, ¶ 48.

DISCUSSION

With respect to settlement of class actions the Seventh Circuit's position is well known:

> "It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement. *U.S. v. McInnes,* 556 F.2d 436, 441 (9th Cir.1977); *Du Puy v. Director, Office of Workers' Compensation Programs,* 519 F.2d 536, 541 (7th Cir.1975), *cert. denied,* 424 U.S. 965, 96 S.Ct. 1459, 47 L.Ed.2d 732 (1976). In the class action context in particular, "there is an overriding public interest in favor of settlement." *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir.1977)."

***2** *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 312 (7th Cir.1980).

The court in *Armstrong* also discusses, however, the strong countervailing public policies that counsel against automatic judicial acceptance of such settlement agreements. Since most of the members of the class are not involved in the negotiation of a settlement and never have a direct voice in court, they are entirely dependant upon the class representatives, and particularly in the counsel for the class representatives to protect their interests. There exists therefore the possibility that the class representatives may determine that what is best for them in terms of a settlement is not what is in the best interests of the class as a whole. There is also the possibility that the attorneys for the class may be lured by the promise of a substantial fee payable immediately if the case is settled and thereby lose sight of what is in the best interests of the class members in the long run. Finally, in many class action cases there is an issue or issues of broad public interest implicated. This of course is more likely to be present in civil rights actions where the outcome is likely to establish a foundation for broad economic or social policies. It is not however limited to civil rights cases, but exists to some extent in cases such as this one where there are broad issues of consumer rights necessarily involved. The beneficial effects of the vindication of such rights go far beyond the making whole of the individual class members. Such cases will necessarily have a deterrent and instructive impact upon the future actions of others who may be similarly situated. It is because of considerations such as this that Rule 23(e) of the Federal Rules of Civil Procedure requires notice of a proposed settlement to all class members and judicial approval of all such settlements.

The standard for such judicial approval is that the court must find the settlement to be fair, reasonable and adequate. A district court's finding that a settlement is fair, reasonable and adequate will not be reversed unless there is a clear showing of abuse of discretion. *Armstrong, supra,* at 313. The *Armstrong* court goes on to describe the procedure the district court should use in reviewing proposed class action settlements.

> "District court review of a class action settlement proposal is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." This hearing is not a fairness hearing; its purpose, rather, is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing. *Manual for Complex Litigation* § 1.46, at 53–55 (West 1977). If the district court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process, the fairness hearing. Class members are notified of the proposed settlement and of the fairness hearing at which they and all interested parties have an opportunity to be heard. The goal of the fairness hearing is to adduce all information necessary to enable the judge intelligently to rule on whether the proposed settlement is "fair, reasonable, and adequate." *Manual for Complex Litigation* at 57. On the basis of all information available to him, the trial judge must decide whether or not to approve the proposed settlement."

***3** *Armstrong, supra,* at 314.

In determining whether to approve the proposed settlement the court should consider the following factors: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants ability to pay; (3) the complexity, length and expense of trial (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the stage of the proceedings and the amount of discovery completed. *Armstrong, supra,* at 314; *Manual for Complex Litigation* at 56; 3B *Moore's Federal Practice* ¶ 23.80(4) at 23–488 (2d ed.). [2]

2 A number of courts have held that it may be *presumed* that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced. *See Susquehanna,* 84 F.R.D. at 321; *Boggess v. Hogan,* 410 F.Supp. 433, 438 (N.D.Ill.1975); *Krasner v. Dreyfus Corp.,* 90 F.R.D. 665, 667 (S.D.N.Y.1981).

EVALUATION OF THE PROPOSED SETTLEMENT

The Risks of Litigation

a. *Liability*

The risks in this case are very real. Plaintiffs would face substantial difficulties both in proving liability and in establishing damages. To succeed on their claims under Rule 10b–5, plaintiffs would have to establish, *inter alia,* that the defendants were responsible for an omission or a misstatement that was material, that the misstatement in fact caused damage to the Class, and that the defendants acted with

scienter. *See TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n. 12 (1976).

While plaintiffs are reasonably confident as to the likelihood of their success, they recognize that establishing liability at trial would be very difficult, with the outcome by no means guaranteed. Many of the hurdles facing plaintiffs are discussed in the Joint Affidavit, ¶¶ 51–52. Among them are: (1) the notoriously difficult requirement of proving that defendants acted with the requisite degree of *scienter* in issuing the alleged misstatements, *see, e.g., In re Smithkline Beckman Corp. Sec. Litig.,* 751 F.Supp. 525, 529 (E.D.Pa.1990) (recognizing difficulty of establishing *scienter*); and (2) proving that TSC's published financial statements and releases were materially misleading in not stating that TSC began projects without a written contract when it was allegedly known to the public that this was a common practice in the industry.

In this regard the plaintiff was also forced to take into account related litigations. One such case involved a suit by TSC, defendant herein, against Northrup claiming some ten million dollars in receivables due from Northrup. This lawsuit is related and impacts on the case at bar because one of plaintiff's main contentions in this case is that TSC ought not to have claimed receivables from Northrup based upon mere oral agreements with Northrup. A successful lawsuit against Northrup for these very same receivables based upon oral agreements would certainly tend to establish that not only was there no intentional misrepresentation in claiming these receivables, but defendant was actually fully justified in claiming such receivables in the first place. In addition there was a case pending in which Woodrow Chamberlain sued Northwest Airlines. (*Chamberlain v. Northwest Airlines, Inc.,* No. 93 C 1576 (N.D.Ill. May 2, 1995) (J. Zagel). In order to award plaintiff damages in that case, the trier of fact had to conclude that TSC's claim against Northwest Airlines was a valid, legally enforceable, claim. In fact, this actually occurred just after the conclusion of the settlement negotiations. So plaintiff had a number of difficulties in proving its case which had to be weighed in determining settlement value.

b. *Damages*

***4** While Class Plaintiffs believe that they could establish causation and damages, they would have to prove, through the inevitable battle of experts, precisely what the market price of TSC stock would have been but for the alleged fraud on each day of the Class Period. *See, e.g., In re Letterman Bros. Energy Sec. Litig.,* 799 F.2d 967, 972 (5th Cir.1986), *cert. denied,* 480 U .S. 918 (1987); *Grossman v. Waste Management, Inc.,* 589 F.Supp. 395, 401 (N.D.Ill.1984); *Sirota v. Solitron Devices, Inc.,* 673 F.2d 566, 577–78 (2d Cir.), *cert. denied,* 459 U.S. 838 (1982); *Blackie v. Barrack,* 524 F.2d 891, 908 (9th Cir.1975), *cert. denied,* 429 U.S. 816 (1976). In doing so, Class Plaintiffs would have to overcome defendants' arguments that: (1) some or all of the class' losses were caused not by defendants' conduct but instead by market factors or other reasons unrelated to the alleged fraud, such as the market's realization that TSC was losing its biggest customer, Northrup Corp.; (2) the market was aware of TSC's manner of doing business and recognizing revenue and, therefore, any misleading information from the Company regarding those practices did not inflate the market price of the stock, and; (3) if TSC had throughout the Class Period acknowledged that a portion of its revenue was attributable to work performed without a written contract but for which it expected to be paid, the market price would not have been impacted significantly. *See* Joint Aff. ¶¶ 51(b)–51(c). Accordingly, even if plaintiffs were to prevail in establishing liability, providing causation and the existence and amount of damages would remain problematic.

The Complexity, Expense, and Likely Duration of Further Litigation

Continued prosecution of this action through trial and appeals against the vigorous, determined, and resourceful opposition of multiple defendants would entail enormous additional effort and expense with no promise of any greater recovery. Indeed, a trial would be lengthy and expensive, and the appeal process would delay any award substantially well beyond trial. The time value of money is another cost of continued litigation. *Donovan,* 778 F.2d at 309; *Anderson,* 755 F.Supp. at 844. As courts recognize, a dollar obtained in settlement today is worth more than a dollar obtained after a trial and appeals years later. *Id.*

The Stage of the Proceedings and the Amount of Discovery Completed

This Settlement was not reached until almost the conclusion of fact discovery. During the pendency of the case, plaintiffs' counsel reviewed and analyzed over 500,000 pages of documents and numerous computer files produced by the defendants and third parties, took approximately twenty-five depositions of defendants, former employees of TSC and former customers of TSC, and interviewed numerous other

potential witnesses. Plaintiffs' counsel also worked closely with accounting and damage experts in framing the claims and estimating the potential recovery. As a result, plaintiffs' counsel's endorsement of this settlement bears particularly significant weight since they are fully informed about the facts of this case, the defenses raised, and the risks of establishing liability and damages.

***5** Additionally, plaintiffs' counsel have had many years of experience in litigating securities fraud class actions such as this (*see* the affidavits of counsel filed in connection with their fee petition), and in assessing the relative merits of each side's case. *See Susquehanna,* 84 F.R.D. at 321. In plaintiffs' counsel's opinion, balancing the risks and delays of continuing the litigation against the immediate substantial benefits to the Class weighs heavily in favor of the proposed settlement.

The Reaction of Class Members to the Proposed Settlement

The Notice mailed to the Class described terms of the settlement and the procedure by which class members could object to the Settlement. The deadline for serving objections was August 18, 1995. Not a single objection to the proposed Settlement has been received from any class member. Joint Affidavit, ¶ 50. Such a positive response to the Settlement by the Class is strong evidence that the settlement is fair, reasonable, and adequate and should be approved. *See, e.g., Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir.1974); *Flinn v. FMC Corp.,* 528 F.2d 1169, 1174 (4th Cir.1975), *cert. denied,* 424 U.S. 967 (1976). [3]

3 Although in a case such as this were it is not possible to determine the exact amount any one class member will receive until all of the claims are in and have been evaluated, the lack of objections to the settlement amount and the complicated distribution plan may not necessarily indicate overwhelming approval as much as a lack of ability to evaluate the true significance of the same.

The Range of Reasonableness of the Settlement Amount

The determination of a "reasonable" settlement is not susceptible of a mathematical equation yielding a particular sum. Rather, as Judge Friendly explained, "in any case there is a range of reasonableness with respect to a settlement...." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.), *cert. denied,* 409 U.S. 1039 (1972).

The proposed Settlement for more than $4.6 million represents a portion of the damages that could reasonably have been proven on behalf of the Class, and there is no reason to doubt the representations of all counsel that it is well within the "range of reasonableness" in light of the attendant risks of continued litigation. Courts have approved settlements even though, unlike here, the benefits amounted to only a small percentage of the potential recovery. *See, e.g., Detroit,* 495 F.2d at 455 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."); [4] *Weinberger v. Kendrick,* 698 F.2d 61, 65 (2d Cir.1982), *cert. denied,* 464 U.S. 818 (1983) (affirming approval of settlement even though "it is not disputed that the [$2 .84 million] recovery will be only a negligible percentage of the losses suffered by the class," estimated by objectors' counsel as between $250 and $1 billion); *Cagan v. Anchor Sav. Bank FSB,* [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,324, at 96,559 (E.D.N.Y. May 17, 1990) (approving $2.3 million class action settlement over objections, notwithstanding that the "theoretical best possible recovery would be approximately $121 million").

4 The Second Circuit further explained in *Detroit* that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." 495 F.2d at 455 n.2.

Although plaintiff's experts have estimated a substantially greater possible damages sum, i.e., $75 million, these estimates fail to take into account the realities of litigation existing in this case and also assume that ever single person would make a claim and that plaintiffs would be successful in each and every allegation to the fullest extent possible over the entire claims period after trial. Given all of the circumstances the proposed Settlement represents a recovery for the Class that is within the "range of reasonableness" supporting approval.

The Settlement is the Result of Arm's–Length Negotiations Among Competent and Experienced Counsel

***6** In evaluating the propriety of a proposed settlement, courts should consider the negotiating process by which the settlement was reached to determine whether that process was genuinely adversarial and not collusive. *See, e.g., Weinberger,* 698 F.2d at 74; *Boggess,* 410 F.Supp. at 438; *Susquehanna,*

84 F.R.D. at 321 ("The proposed settlement ... was reached only after lengthy and protracted negotiations had been conducted.").

Here, as described in greater detail in the Joint Affidavit, the negotiating process was protracted and extensive. Settlement negotiations commenced about a year after the action was filed in the summer of 1993, and continued, on and off, through the winter of 1994. Judge Andersen, who formerly presided over this case, assisted the parties in confidential mediation sessions which, while not resolving the matter, helped to focus the positions of both sides. Thereafter, discussions continued sporadically until negotiations began in earnest in the Spring of 1995, ultimately resulting in an agreement in principle. Joint Affidavit, ¶¶ 42–46.

THE PROPOSED PLAN OF DISTRIBUTION ALSO WARRANTS COURT APPROVAL

Plaintiffs' proposed Plan of Distribution provides that the Settlement Fund, after deducting reasonable attorneys' fees and expenses as allowed by the Court ("Net Settlement Fund"), shall be distributed to members of the Class who have timely filed valid proofs of claim ("Authorized Claimants") in proportion to their "Recognized Losses." The entire Proposed Plan of Distribution, including the method for calculating Recognized Losses, was printed in the court-approved Notice sent to members of the Class. The Notice informed class members of the right to object to the proposed Plan of Distribution. The deadline for objecting was August 18, 1995. No objections have been received.

Under the proposed plan, Recognized Losses are determined by calculating, for each day during the Class Period, the amount by which the market price of stock was artificially inflated as a result of the alleged misconduct. For shares purchased during the Class Period and held through the end of the Class Period, the Recognized Loss equals the amount of inflation on the date of purchase. For shares purchased *and sold* during the Class Period, the Recognized Loss equals the amount by which the artificial inflation on the date of purchase exceeds the artificial inflation on the date of sale, i.e., the amount by which the Authorized Claimant "benefitted" from the fraud when he or she sold the stock. This comports with the well-accepted out-of-pocket damage measure used in cases such as this one brought under Section 10(b) of the Securities Exchange Act and Rule 10b–5. *Skelton v. General Motors Corp.,* 661 F.Supp. 1368 (N.D.1987); *In re Warner Communications Sec. Litig.,* 618 F.Supp. 735, 744 (S.D.N.Y.1985); *Seagoing Uniforms Corp. v. Texaco, Inc.,* [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,791, at 94,257 (S.D.N.Y. Oct. 24, 1989). If the artificial inflation on the date of sale during the Class Period equals or exceeds the artificial inflation on the date of purchase during the Class Period, the Authorized Claimant is deemed to have a Recognized Loss of $0.25 per share, thereby providing some monetary consideration for the releases such claimants are giving in the settlement.

***7** To determine the artificial inflation attributable to defendants' alleged fraud on any given day during the Class Period, plaintiffs propose using the analysis prepared by plaintiffs' expert, Princeton Venture Research, Inc.

In preparing its analysis, plaintiffs' expert first examined the price movements of a multitude of companies with lines of business similar to that of TSC. This effort was undertaken to determine whether these other companies could serve as a gauge of what TSC's stock price would have been but for the alleged fraud. Because most of the comparison companies were much larger than TSC and also involved in other lines of business, this comparison was helpful, but not determinative. The expert then focused on the market's reaction to the two disclosures by TSC, on June 10, 1992 and July 1, 1992, which revealed that which plaintiffs complained had been improperly withheld from the public. Based upon their knowledge and experience as securities analysts, plaintiffs' expert opined that the true value of TSC stock on each day during the Class Period—unaffected by the alleged fraud—could be fairly estimated by first assuming that the "true value" was reflected in the market price of TSC stock after the June 10, 1992 and July 1, 1992 disclosures. The expert then adjusted that "true value" to reflect the actual stock price percentage movement that had occurred between that day and July 1, 1992, the date of TSC's ultimate disclosure. Similar calculations were made for each day of the Class Period. The schedule of resulting "true values" was provided to class members in the Notice. Plaintiffs' expert was prepared to testify to the validity of their analysis as a fair and reasonable method for allocating the settlement proceeds. [5]

5 Plaintiffs' experts' determination of "true values" assumes that the full impact of the alleged fraud would have been felt every day of the Class Period. Plaintiffs appreciate, however, that if the case had gone to trial, the experts would have had to refine their analysis downward, recognizing

> that the amount of revenue attributable to work done pursuant to oral authorizations increased as the Class Period progressed, and that much of the alleged "phantom revenue" was not reported until after the secondary public offering. Indeed, defendants contend that a large part of the alleged "phantom revenue" was not recorded until TSC's fourth quarter (March–May 1992), and was not reported in any of the published financial statements challenged in the Complaint.

In sum, the proposed Plan of Distribution, conforms to the prevailing out-of-pocket method for calculating damages in Section 10(b) cases, and would provide an equitable distribution of the recovery. *See SEC v. Certain Unknown Purchasers,* 817 F.2d 1018 (2d Cir.1987), *cert. denied,* 484 U.S. 1060 (1988) (pro rata distribution of proceeds is appropriate).

ATTORNEY'S FEES AND COSTS

Plaintiffs' counsel request a fee of $1,533,333 or one third of the Settlement Fund created solely by their efforts and reimbursement of out-of-pocket expenses, including experts' fees in the amount of $391,685.28, plus interest on the fees and expenses at the same rate as earned on the Settlement Fund. There is clear legal precedent for an award of attorney's fees from the common fund created by the settlement. *See Boing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980). Further, in *Harman v. Lyphomed, Inc.,* 945 F.2d 949 (7th Cir.1991) this circuit recognized the trend toward the percentage method and authorized the district court's exercise of discretion in using the percentage method to determine an appropriate fee award. More recently in the *Matter of Continental Illinois Securities Litigation,* 985 F.2d 867 (7th Cir.1993) the Seventh Circuit strongly endorsed the percentage method of computing appropriate fee awards in class action common fund cases such as this. In *Continental,* a class action arising from defaulted loans, a settlement of $45 million was reached early on in the litigation process. The lawyers for the class submitted their petition for fees and expenses to the district court in the amount of $9 million. The district court reduced this amount by one half. The class attorneys appealed and the Seventh Circuit reversed. *In re Continental Securities Litigation,* 962 F.2d 566 (7th Cir.1992). In remanding the cause, the appellate court suggested that the district court judge set the appropriate fees in this case by comparing "the contingent-fee percentage sought by the class lawyers, i.e., 20 percent, with contingent fee arms-length contracts between lawyers and their clients in comparable commercial litigation." at 868. When the district court subsequently announced that it would set the fee amount based upon a sampling of the time sheets, the class counsel filed a petition for *mandamus.* On review, the Seventh Circuit vacated the district court's order and in the process emphasized its prior suggestion that an appropriate manner of setting a fee in this case is to award the plaintiffs' counsel the same percentage of the common fund as they could expect to get if they negotiated at arms length a percentage contingent fee contract with a private client in a comparable commercial litigation case. Specifically with respect to the 20% fee sought in that case the Seventh Circuit found *supra* at page 868:

> ***8** "Taking up this suggestion, the lawyers for the class submitted to the district judge a mass of affidavits concerning contingent fees charged in comparable multimillion dollar commercial suits in which, however, unlike the situation here, there was a negotiated fee between lawyer and client. These affidavits appear to establish that the 20 percent fee that the lawyers for the class are seeking in this case is at the low end of the range found in the market."

It seems therefore, that the fees being requested in this case, i.e. 33 1/3%, are in fact in line with that which has, in previous cases, been approved. Thirty three percent appears to be in line with what attorneys are able to command on the open market in arms-length negotiations with their clients. In *In re Continental Illinois Sec. Litig.,* 962 F.2d at 572, Judge Posner suggested that the percentage method "might save time and expense for everyone." 962 F.2d at 572. Judge Posner noted that the usual range for contingent fees in personal injury cases is between 33% and 50%. *Id.* at 572. *See also McKinnon v. City of Berwyn,* 750 F.2d 1383, 1393 (7th Cir.1984)(40% is common).

Thus, where the percentage method is utilized, courts in this District commonly award attorneys' fees equal to approximately one-third or more of the recovery. *Liebhard v. Square D Co.,* No. 91 C 1103 (N.D.Ill. Jun. 6, 1993) (J. Plunkett) (awarding fees of one-third of the fund plus expenses) (Exhibit A); *Wanninger v. SPNV Holdings,* No. 85

C 2081 (N.D.Ill. May 10, 1993) (J. Marovich) (32% awarded, plus expenses) (Exhibit B); *Long v. Trans World Airlines, Inc.,* No. 86 C 7521, 1993 U.S. Dist. LEXIS 5063 (N .D. Ill. Apr. 15, 1993) (J. Williams) (32% plus expenses) (Exhibit C); *Hammond v. Hendrickson,* No. 85 C 9829 (N.D.Ill. Nov. 20, 1992) (J. Aspen) (one-third of fund, plus expenses) (Exhibit D); *First Interstate Bank of Nevada, N.A. v. National Republic Bank of Chicago,* No. 80 C 6401, slip op. at 2 (N.D.Ill. Feb. 12, 1988) (J. Plunkett) (awarding 39% of settlement fund and recognizing "that this percentage is within the generally accepted range of fee awards in class action securities lawsuits") (Exhibit E). The fee requested here of 33 1/3% of the total recovery fits comfortably within these awards. The fee request also appears reasonable, particularly considering that it represents less than half the aggregate lodestars of plaintiffs' counsel for the services rendered on behalf of the Class.

Factual support for this motion is found in the accompanying Joint Affidavit of John Halebian and Stephen Hoffman ("Joint Affid.") to which the Court is respectfully referred.

As the Court directed, the class members were given notice of the fees and expenses that plaintiffs' counsel intended to seek and an opportunity to object if they believed the request was unreasonable. Joint Affid. ¶¶ 49–50. The deadline has passed and not a single objection has been received.

***9** Plaintiffs' counsel points out that they faced exceptionally capable and tireless opposition from counsel for defendants, particularly Grippo & Elden, a prominent Chicago law firm which took the lead for TSC and most of the individual defendants. Several other prestigious law firms represented the other defendants. In view of all of the above considerations the requested fee of 33 ⅓% of the settlement fund plus expenses of $391,685.28 appears fair and reasonable.

I fail to see the need or the rational for adding to this award, however, interest from the time of the establishment of the fund. The fee is for services rendered, not for the use of plaintiff's counsel's money. I can think of no reason why class members should be charged extra because the settlement windup took some time. Such an award would not be for services rendered, but would in effect, be treating counsel's fee as if it were an investment for which the class members should pay some sort of return. In addition, the fee was not earned as of the day the class fund was established. Quite the contrary, the fee is earned when the district court makes the award and not before. If we are to begin to assess the right to fees incrementally during the course of the case, we would have to contemplate awarding counsel interest for some of this fee from the very first hours of work done on the case. But surely this is not what the parties contemplate in the typical arms length contingency fee contract between lawyer and client. It is part and parcel of such arrangements that counsel agrees not to be paid until the case is finished. Indeed, counsel agrees that he may not get paid at all in such cases. Why then should we pay counsel interest on fees for a time period before there was even any entitlement to such fees? I recommend against the payment of interest on the attorneys fees or expenses being claimed.

AWARDS TO THE NAMED PLAINTIFFS

As set forth in the court-approved Notice to the Class, the two class representatives, through their counsel, are applying for a special awards in the amount of $5,000.00 each. These proposed payments are warranted as a matter of policy and are supported by ample precedent. No class member has objected to granting such awards.Petitioners and the plaintiff/class representatives expended considerable effort and undertook substantial responsibilities to remedy an alleged wrong to the public investors in TSC. They reviewed the complaints, responded to interrogatories and document requests and were deposed, providing testimony over several days. Courts recognize that it is fully appropriate to reward class plaintiffs for the efforts and responsibilities undertaken and for benefits they have conferred. Courts therefore increasingly favor the practice of specially rewarding those who do step forward to champion the rights of the many.

The court in *In re Smithkline Beckman Corp. Sec. Litig.,* 751 F.Supp. at 535 (citing authority), held that such awards were appropriate because the named plaintiffs "have rendered a public service by contributing to the vitality of the federal Securities Acts. 'Private litigation aids effective enforcement of the securities laws because private plaintiffs prosecute violations that might otherwise go undetected due to the SEC's limited resources." ' *Accord Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 250–51 (S.D.Ohio 1991); *In re Dun & Bradstreet Credit Serv. Customer Litig.,* 130 F.R.D. 366 (S.D.Ohio 1990); *In re New York City Shoes Sec. Litig.,* No. 87–4677, 1989 U.S. Dist. LEXIS 6346 (E.D.Pa. Jun. 7, 1989); *McGuinness v. Parnes,* No. 87–2728–LO, 1989 U.S. Dist. LEXIS 3576 (D.Colo. March 22, 1989); *Golden v. Shulman,* [1988–1989 Transfer

Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,060 (E.D.N.Y. Sept. 30, 1988); *In re GNC Shareholder Litig.:* All Actions, 668 F.Supp. 450 (W.D.Pa.1987); *Sherin v. Smith,* [1987–1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,582, at 97,609 (E.D.Pa. Oct. 22, 1987); *In re Continental/Midlantic Shareholders Litig.,* No. 86–6872, 1987 U.S. Dist. LEXIS 8070 (E.D.Pa. Sept. 2, 1987).

***10** This application is therefore consistent with a considerable body of precedent in support of the payment of such special awards to class representatives who have discharged their duties to the benefit of a class as a form of remedial relief within the discretion of the trial court. Particularly in light of the lack of any objections from Class members, awards to plaintiffs Goldsmith and Grijnsztein of $5,000 each is appropriate and reasonable.

CONCLUSION

For all the foregoing reasons, and based on the entire record, we recommend that the Court (i) approve the Settlement Agreement & Plan of Distribution (ii) award the requested attorneys' fees in the total amount of $1,533,333 plus reimbursement of expenses of $391,685.28, (but without interest thereon) and (iii) grant special awards of $5,000 each to plaintiffs Goldsmith and Grijnsztein.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. *See* Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut General Life Ins. Co.,* 900 F.2d 1032, 1039 (7th Cir.1990).

All Citations

Not Reported in F.Supp., 1995 WL 17009594

End of Document

EXHIBIT D

Verdict Form 02 CV 5893

	Question No. 1	**Question No. 2**	**Question No. 3**
	Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 1			
Household	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 2			
Household	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 3			
Household	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 4			
Household	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 5			
Household	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 6			
Household	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 7			
Household	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 8			
Household	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 9			
Household	Yes___ No_X_	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No_X_	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No_X_	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No_X_	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 10			
Household	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No_X_	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 11			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 12			
Household	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 13			
Household	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___ 2+ Delinquency/Re-Aging ___ Restatement ___	Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___ Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 14			
Household	Yes X No___	Predatory Lending X	Knowingly X Recklessly ___
Gilmer	Yes X No___	Predatory Lending X	Knowingly ___ Recklessly X
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes X No___	Predatory Lending X	Knowingly X Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 15			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 16			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 17			
Household	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 18			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 19			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 20			
Household	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 21			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 22			
Household	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 23			
Household	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 24			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 25			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 26			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 27			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 28			
Household	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X	Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 29			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 30			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 31			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 32			
Household	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 33			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 34			
Household	Yes___ No_X_	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No_X_	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No_X_	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No_X_	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 35			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 36			
Household	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X 2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 37			
Household	Yes X No___	Predatory Lending X	Knowingly ___ Recklessly X
Gilmer	Yes X No___	Predatory Lending X	Knowingly ___ Recklessly X
Schoenholz	Yes X No___	Predatory Lending X	Knowingly ___ Recklessly X
Aldinger	Yes X No___	Predatory Lending X	Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 38			
Household	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Gilmer	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Schoenholz	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X
Aldinger	Yes X No___	2+ Delinquency/Re-Aging X Restatement X	Knowingly ___ Recklessly X Knowingly ___ Recklessly X

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked):**	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 39			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

	Question No. 1 Have Plaintiffs prevailed on their 10(b)/Rule 10b-5 claim with regard to any of the statements set forth in Table A?	**Question No. 2** If you answered "yes" for any of the statements in Question No. 1, identify the issue or issues that the statement misrepresented by placing an "X" on the appropriate line(s). **(more than one line can be checked)**:	**Question No. 3** For each issue identified in Question No. 2, indicate whether the defendant acted knowingly or recklessly **(choose one)** in making the statement about the issue by placing an "X" on the appropriate line.
Statement No. 40			
Household	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Gilmer	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Schoenholz	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___
Aldinger	Yes___ No X	Predatory Lending ___	Knowingly ___ Recklessly ___

If you answered "no" for **all** of the statements in Question No. 1, you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form and inform the Court that you have finished.

If you answered "yes" for **any** statement in Question No. 1, please proceed to Question No. 4.

Question No. 4

Determine which, if any, of plaintiffs' proposed damages models reasonably estimates plaintiffs' damages **(choose only one option below)**:

Neither of plaintiffs' proposed damages models reasonably estimates plaintiffs' damages ___

Leakage Model (Plaintiffs' Ex. 1395) reasonably estimates plaintiffs' damages X

Specific Disclosures Model (Plaintiffs' Ex. 1397) reasonably estimates plaintiffs' damages ___

If you determine that neither of the proposed damages models reasonably estimates plaintiffs' damages, then you have finished with the Verdict Form. Please turn to the last page, sign and date the Verdict Form and inform the Court that you have finished.

Otherwise, write the amount of loss per share, if any, that, according to the model you have chosen, any defendant's conduct caused plaintiffs to suffer on each of the dates set forth in Table B. (If no loss was caused on any date, write "none" or "0.") **You may use only one model – the one you have chosen -- to fill out Table B.**

Then proceed to Question No. 5

Question No. 5

If you checked "Knowingly" in Question No. 3 for all 40 alleged false or misleading statements, please proceed to Question No. 6.

If you checked "Recklessly" in Question No. 3 for any of the 40 alleged false or misleading statements, you must determine what percentage of responsibility, if any, for any loss plaintiffs suffered is due to the conduct of Defendants Household, William Aldinger, David Schoenholz, and Gary Gilmer. In making this determination, you should consider the nature of the conduct of each person found to have caused or contributed to plaintiffs' loss and the nature and extent of the causal relationship between each such person's conduct and plaintiffs' loss.

Household	55 %
William Aldinger	20 %
David Schoenholz	15 %
Gary Gilmer	10 %
TOTAL	(This must equal 100%)

Please proceed to Question No. 6.

Question No. 6

With respect to the Section 20(a) claim, have plaintiffs proved that Defendant William Aldinger is a controlling person as to:

Household:	Yes X	No ___
David Schoenholz:	Yes X	No ___
Gary Gilmer:	Yes ___	No ___

Please proceed to Question No. 7.

Question No. 7

With respect to the Section 20(a) claim, have plaintiffs proved that Defendant David Schoenholz is a controlling person as to:

Household:	Yes X	No ___
William Aldinger:	Yes X	No ___
Gary Gilmer:	Yes X	No ___

Please proceed to Question No. 8.

Question No. 8

With respect to the Section 20(a) claim, have plaintiffs proved that Defendant Gary Gilmer is a controlling person as to:

Household:	Yes ___	No X
William Aldinger:	Yes ___	No X
David Schoenholz:	Yes ___	No X

TABLE A
ALLEGED FALSE OR MISLEADING STATEMENTS

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>1.</td><td>08/16/1999</td><td>Household 10-Q

Defendants' Exhibit 854</td><td>Household 10-Q for quarter ending 6/30/99: Household reported net income of $326.9 million for the quarter ended June 30, 1999 and EPS of $0.67 [HHT 0015884]:

Delinquency
Two-Months-and-Over Contractual Managed Delinquency (as a percent of managed consumer receivables):
<table><tr><th></th><th>6/30/99</th><th>3/31/99</th><th>12/31/98</th><th>9/30/98</th><th>6/30/98</th></tr><tr><td>First mortgage</td><td>12.72%</td><td>10.91%</td><td>14.90%</td><td>11.80%</td><td>11.07%</td></tr><tr><td>Home equity</td><td>3.29</td><td>3.54</td><td>3.67</td><td>3.73</td><td>3.55</td></tr><tr><td>Auto finance</td><td>1.87</td><td>1.74</td><td>2.29</td><td>2.05</td><td>1.67</td></tr><tr><td>MasterCard/Visa</td><td>3.11</td><td>3.61</td><td>3.75</td><td>3.73</td><td>3.30</td></tr><tr><td>Private label</td><td>6.62</td><td>6.37</td><td>6.20</td><td>6.55</td><td>6.10</td></tr><tr><td>Other unsecured</td><td>8.17</td><td>7.84</td><td>7.94</td><td>8.03</td><td>7.82</td></tr><tr><td>Total</td><td>4.72%</td><td>4.81%</td><td>4.90%</td><td>4.96%</td><td>4.65%</td></tr></table>[HHT 0015902]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.96 percent, compared with 5.04 percent at March 31, 1999 and 4.89 percent at June 30, 1998. The annualized total consumer owned chargeoff ratio in the second quarter of 1999 was 3.54 percent, compared with 3.92 percent in the prior quarter and 3.69 percent in the year-ago quarter. Managed consumer two-months-and-over contractual delinquency ("delinquency") as a percent of managed consumer receivables was 4.72 percent, compared with 4.81 percent at March 31, 1999 and 4.65 percent at June 30, 1998. The annualized total consumer managed chargeoff ratio in the second quarter of 1999 was 4.10 percent, compared with 4.37 percent in the prior quarter and 4.26 percent in the year-ago quarter." [HHT0015897]</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
2.	10/19/1999	Household Press Release Plaintiffs' Exhibit 506	October 19, 1999 Household Press Release entitled "Household International Reports Highest Quarterly Earnings in Company's History": Household "reported that third quarter net income rose 26 percent to a record $399.9 million, compared with $318.0 million a year ago. Earnings per share increased 32 percent to a record $.83, from $.63 a year ago." [HHS 02914429] * * * "Our quarter reflects excellent performance in all of our businesses, with the key drivers being accelerating internal receivable and revenue growth." [HHS 02914429] * * * "Credit Quality and Loss Reserves Credit quality remained stable in the quarter and improved from a year ago. The annualized managed net chargeoff ratio for the third quarter was 4.09 percent, compared with 4.10 percent in the second quarter and 4.33 percent in the year-ago quarter. The managed delinquency ratio (60+ days) was 4.89 percent at September 30, compared with 4.72 percent at June 30 and 4.96 percent a year ago." [HHS 02914430]
3.	11/12/1999	Household 10-Q Plaintiffs' Exhibit 736	Household 10-Q for quarter ending 9/30/99: Household reported net income of $399.9 million for the quarter ended September 30, 1999 and EPS of $0.84: [HHS 03138203] "Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 5.24 percent at September 30, 1999, compared with 4.96 percent at June 30, 1999 and 5.23 percent at September 30, 1998. The annualized total consumer owned chargeoff ratio was 3.63 percent in the third quarter of 1999, compared with 3.54 percent in the prior quarter and 3.79 percent in the year-ago quarter. Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.89 percent at September 30, 1999, compared with 4.72 percent at June 30, 1999 and 4.96 percent at September 30, 1998. The annualized total consumer managed chargeoff ratio was 4.09 percent in the third quarter of 1999, compared with 4.10 percent in the prior quarter and 4.33 percent in the year-ago quarter." [HHS 03138217]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td></td><td></td><td></td><td>
* * *
Delinquency
Two-Months-and-Over Contractual Managed Delinquency (as a percent of managed consumer receivables):
<table>
<tr><th></th><th>9/30/99</th><th>6/30/99</th><th>3/31/99</th><th>12/31/98</th><th>9/30/98</th></tr>
<tr><td>First mortgage</td><td>12.56%</td><td>12.72%</td><td>10.91%</td><td>14.90%</td><td>11.80%</td></tr>
<tr><td>Home equity</td><td>3.46</td><td>3.29</td><td>3.54</td><td>3.67</td><td>3.73</td></tr>
<tr><td>Auto finance</td><td>2.26</td><td>1.87</td><td>1.74</td><td>2.29</td><td>2.05</td></tr>
<tr><td>MasterCard/Visa</td><td>3.10</td><td>3.11</td><td>3.61</td><td>3.75</td><td>3.73</td></tr>
<tr><td>Private label</td><td>6.66</td><td>6.62</td><td>6.37</td><td>6.20</td><td>6.55</td></tr>
<tr><td>Other unsecured</td><td>8.57</td><td>8.17</td><td>7.84</td><td>7.94</td><td>8.03</td></tr>
<tr><td>Total</td><td>4.89%</td><td>4.72%</td><td>4.81%</td><td>4.90%</td><td>4.96%</td></tr>
</table>
[HHS 03138224]

"Credit quality remained relatively stable in the quarter and improved from a year ago. The modest increase in managed delinquency as a percent of managed consumer receivables from the prior quarter was due to the seasoning of our Beneficial home equity and other unsecured products." [HHS 03138224]
</td></tr>
<tr><td>4.</td><td>01/19/2000</td><td>Household Press Release

Plaintiffs' Exhibit 746</td><td>January 19, 2000 Household Press Release entitled "Household International Reports Best Quarter and Year in Its History": Household "reported that fourth quarter earnings per share increased 30 percent to a record $.92 from $.71 a year ago. Fourth quarter net income rose 25 percent to a record $438.8 million, compared with $349.9 million a year ago. For the full year, Household reported record earnings per share of $3.07, which was 33 percent over 1998 operating earnings per share. Net income totaled $1.5 billion, or 29 percent above the prior year's operating net income." [HHS 03148802]
* * *
"We are very pleased to report another record quarter, the culmination of an absolutely outstanding year for Household. Growth and profitability in the quarter were excellent and exceeded our expectations. Revenues were particularly strong. . . . Our record earnings reflect an outstanding year in our consumer finance business, a dramatic turnaround in our MasterCard/Visa business, and strong results in all of our other businesses. We are particularly pleased with excellent receivable</td></tr>
</table>

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td></td><td></td><td></td><td>growth in 1999, particularly in our branches, while fully realizing all of the acquisition synergies of the Beneficial merger." [HHS 03148802]
* * *
"Credit Quality and Loss Reserves
Credit quality improved from both the third quarter and a year ago. The annualized net chargeoff ratio for the fourth quarter fell 13 basis points to 3.96 percent, the lowest level since 1997. The chargeoff ratio was 4.09 percent in the third quarter and 4.39 percent in the year-ago quarter. The managed delinquency ratio (60+days) improved 23 basis points to 4.66 percent at December 31, compared with 4.89 percent at September 30 and 4.90 percent a year ago." [HHS 03148804</td></tr>
<tr><td>5.</td><td>03/28/2000</td><td>Household FY99 Report on Form 10-K

Plaintiffs' Exhibit 1462</td><td>Household FY99 Report on Form 10-K filed with the SEC on March 28, 2000 Household reported net income of 1.486 billion and E.P.S. of $3.10 [p.127]:
* * *
"Delinquency and Chargeoffs. Our delinquency and net chargeoff ratios reflect, among other factors, the quality of receivables, the average age of our loans, the success of our collection efforts and general economic conditions. . . .
We track delinquency and chargeoff levels on an owned and a managed basis. We apply the same credit and portfolio management procedures to both our owned and off-balance sheet portfolios. Our focus is to use risk-based pricing and effective collection efforts for each loan. We have a process which we believe gives us a reasonable basis for predicting the asset quality of new accounts. This process is based on our experience with numerous marketing, credit and risk management tests. We also believe that our frequent and early contact with delinquent customers is helpful in managing net credit losses." [p.98]
* * *
Managed Two-Month-and-Over Contractual Delinquency Ratios
[p.115]
<table>
<tr><th></th><th>1999</th><th>1998</th><th>1997</th><th>1996</th><th>1995</th></tr>
<tr><td>Home equity</td><td>3.27%</td><td>3.67%</td><td>3.69%</td><td>3.04%</td><td>2.76%</td></tr>
<tr><td>Auto finance/1/</td><td>2.43</td><td>2.29</td><td>2.09</td><td>–</td><td>–</td></tr>
<tr><td>MasterCard/Visa</td><td>2.78</td><td>3.75</td><td>3.10</td><td>2.73</td><td>2.19</td></tr>
<tr><td>Private label</td><td>5.97</td><td>6.20</td><td>5.81</td><td>4.60</td><td>3.93</td></tr>
<tr><td>Other unsecured</td><td>8.81</td><td>7.94</td><td>7.81</td><td>6.21</td><td>5.68</td></tr>
<tr><td>Total consumer</td><td>4.66%</td><td>4.90%</td><td>4.64%</td><td>3.92%</td><td>3.36%</td></tr>
</table></td></tr>
</table>

Stmt No.	Date	Document Title	Statement
			Ratio of Net Chargeoffs to Average Managed Receivables for the Year Home equity 0.58% 0.63% 0.64% 0.60% 0.64% Auto finance /1/ 4.96 5.39 4.60 – – MasterCard/Visa 6.66 5.95 5.55 4.54 4.12 Private label 5.65 5.65 4.62 3.42 3.75 Other unsecured 6.52 6.97 5.48 4.29 3.60 Total Consumer loan products 4.13 4.29 3.84 2.96 2.51 Commercial 0.93 0.52 1.66 0.92 2.10 Total 4.09% 4.24 3.80% 2.92% 2.49% [p.115]
6.	04/19/2000	Household Press Release Plaintiffs' Exhibit 453	April 19, 2000 Household Press Release entitled "Household International Reports Record First Quarter Results": Household "reported that earnings per share rose 20 percent to a first quarter record of $.78, from $.65 a year ago. Net income increased to $372.9 million, up 16 percent from $320.8 million in the first quarter of 1999." [HHS 02902345] * * * "This was the strongest first quarter in our company's history, with all of our businesses performing well. Revenue and receivable growth were strong, and credit quality continued to improve." [HHS 02902345] * * * "Credit Quality and Loss Reserves At March 31, the managed delinquency ratio (60+days) declined to 4.43 percent, from 4.66 percent at December 31 and 4.81 percent a year ago. Dollars of delinquency were flat with year-end 1999. The annualized managed net chargeoff ratio for the first quarter was 4.00 percent compared to 3.96 percent in the prior quarter and improved 37 basis points from the year-ago quarter." [HHS 02902346]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>7.</td><td>05/10/2000</td><td>Household 10-Q

Plaintiffs' Exhibit 735</td><td>Household 10-Q for 3/31/00 quarter ending: Household reported net income of $372.9 million for the quarter ended March 30, 2000 and EPS of $0.79 per share [HHS 03138125]:

* * *

CREDIT QUALITY
We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio.
[HHS 03138142]
Delinquency
Two-Months-and-Over Contractual Managed Delinquency (as a percent of managed consumer receivables):

<table>
<tr><th></th><th>3/31/00</th><th>12/31/99</th><th>9/30/99</th><th>6/30/99</th><th>3/31/99</th></tr>
<tr><td>Managed:</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Real estate secured</td><td>2.99%</td><td>3.27%</td><td>3.46%</td><td>3.29%</td><td>3.54%</td></tr>
<tr><td>Auto finance</td><td>1.52</td><td>2.43</td><td>2.26</td><td>1.87</td><td>1.74</td></tr>
<tr><td>MasterCard/Visa</td><td>3.06</td><td>2.78</td><td>3.10</td><td>3.11</td><td>3.61</td></tr>
<tr><td>Private label</td><td>5.94</td><td>5.97</td><td>6.66</td><td>6.62</td><td>6.37</td></tr>
<tr><td>Other unsecured</td><td>8.56</td><td>8.81</td><td>8.57</td><td>8.17</td><td>7.84</td></tr>
<tr><td>Total</td><td>4.43%</td><td>4.66%</td><td>4.89%</td><td>4.72%</td><td>4.81%</td></tr>
<tr><td>Owned</td><td>4.58%</td><td>4.81%</td><td>5.24%</td><td>4.96%</td><td>5.04%</td></tr>
</table>
[HHS 03138142]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.58 percent at March 31, 2000, compared with 4.81 percent at December 31, 1999 and 5.04 percent at March 31, 1999. The annualized consumer owned chargeoff ratio was 3.53 percent in the first quarter of 2000, compared with 3.62 percent in the prior quarter and 3.92 percent in the year-ago quarter. [HHS 03138137]

Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.43 percent at March 31, 2000, compared with 4.66 percent at December 31, 1999 and 4.81 percent at March 31, 1999. The annualized total consumer managed chargeoff ratio was 4.00 percent in the first quarter of 2000, compared with 3.96 percent in the prior quarter and 4.37 percent in the year-ago quarter." [HHS 03138137]</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
8.	07/19/2000	Household Press Release Plaintiffs' Exhibit 884	July 19, 2000 Household Press Release entitled "Household International Reports Record Strongest Second Quarter in Its History": Household "reported that earnings per share rose to a second quarter record $.80, up 19 percent from $.67 a year ago. Net income increased 17 percent to $383.9 million, from $326.9 million in the second quarter of 1999. . . . The company's managed receivables portfolio grew 22 percent from a year ago, reaching almost $80 billion. The company added $4.5 billion of receivables in the quarter, an increase of 6 percent. Revenues rose 20 percent compared to the year-ago quarter." [HHS 03407363] * * * "Credit Quality and Loss Reserves Credit quality improved dramatically during the quarter, as dollars of chargeoff and delinquency declined from first quarter levels. At June 30, the managed delinquency ratio (60+days) improved for the third consecutive quarter, to 4.16 percent. This represented a 27 basis-point improvement from the first quarter and a 56 basis-point improvement from a year ago. The annualized managed net chargeoff ratio for the second quarter feel 26 basis points sequentially, to 3.74 percent. The chargeoff ratio was 4.10 percent a year ago." [HHS 03407364]

Stmt No.	Date	Document Title	Statement
9.	08/11/2000	Household 10-Q Plaintiffs' Exhibit 404	Household 10-Q for 6/30/00 quarter ending: Household reported net income of $383.9 million for the quarter ended June 30, 2000 and EPS of $0.80: CREDIT QUALITY We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio. [HHS 02879712] Delinquency Two-Months-and-Over Contractual Managed Delinquency (as a percent of managed consumer receivables) [HHS 02879713]:

	6/30/00	3/31/00	12/31/99	9/30/99	6/30/99
Managed:					
Real estate secured	2.72%	2.99%	3.27%	3.46%	3.29%
Auto finance	1.99	1.52	2.43	2.26	1.87
MasterCard/Visa	3.14	3.06	2.78	3.10	3.11
Private label	5.77	5.94	5.97	6.66	6.62
Other unsecured	7.92	8.56	8.81	8.57	8.17
Total	4.16%	4.43%	4.66%	4.89%	4.72%
Owned	4.25%	4.58%	4.81%	5.24%	4.96%

[HHS 02879693]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.25 percent, compared with 4.58 percent at March 31, 2000 and 4.96 percent at June 30, 1999. The annualized total consumer owned chargeoff ratio in the second quarter of 2000 was 3.27 percent, compared with 3.53 percent in the prior quarter and 3.54 percent in the year-ago quarter. [HHS 02879706]

Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.16 percent, compared with 4.43 percent at March 31, 2000 and 4.72 percent at June 30, 1999. The annualized total consumer managed chargeoff ratio in the second quarter of 2000 was 3.74 percent, compared with 4.00 percent in the prior quarter and 4.10 percent in the year-ago quarter." [HHS 02879706]

Stmt No.	Date	Document Title	Statement
10.	10/18/2000	Household Press Release Plaintiffs' Exhibit 505	October 18, 2000 Household Press Release entitled "Household International Reports Highest Quarterly EPS in Its History; Ninth Consecutive Record Quarter": Household reported that "third quarter earnings per share rose 13 percent to $.94, compared to $.83 a year ago. Net income also rose to a third quarter record of $451.2 million, a 13 percent increase from $399.9 million a year ago." [HHS 02914234] * * * "Our strong third quarter results reflect a continuation of outstanding receivables and revenue growth. At the same time, we achieved year-over-year improvements in credit quality." [HHS 02914234] * * * "Credit Quality and Loss Reserves The annualized managed net chargeoff ratio for the third quarter improved for a second consecutive quarter, to 3.47 percent from 3.74 percent in the second quarter. Dollars of net chargeoff also fell for the second consecutive quarter. The third quarter chargeoff ratio dropped 62 basis points from the level of a year ago, with improvement across all products. At September 30, the managed delinquency ratio (60+days) was 4.21 percent, compared with 4.16 percent in the second quarter and significantly below the year-ago level of 4.89 percent." [HHS 02914235]
11.	11/01/2000	*St. Louis Dispatch* article Plaintiffs' Exhibit 824	"Streem says HFC never pressures people to buy credit life insurance." [HHS 03238043]

Stmt No.	Date	Document Title	Statement
12.	11/14/2000	Household 10-Q Defendants' Exhibit 858	Household 10-Q for quarter ending 9/30/2000: "Household reported net income of $451.2 million for the quarter ended September 30, 2000 and EPS of $0.95 [HHT 0015984]:

CREDIT QUALITY
We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio.

Delinquency
Two-Months-and-Over Contractual Managed Delinquency (as a percent of managed consumer receivables):

	September 30, 2000	June 30, 2000	March 31, 2000	December 31, 1999	September 30, 1999
Managed:					
Real estate secured	2.77%	2.72%	2.99%	3.27%	3.46%
Auto finance	2.19	1.99	1.52	2.43	2.26
MasterCard/Visa	3.48	3.14	3.06	2.78	3.10
Private label	5.67	5.77	5.94	5.97	6.66
Other unsecured	7.72	7.92	8.56	8.81	8.57
Total Managed	4.21%	4.16%	4.43%	4.66%	4.89%
Owned	4.29%	4.25%	4.58%	4.81%	5.24%

[HHT 0015998]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.29 percent, compared with 4.25 percent at June 30, 2000 and 5.24 percent at September 30, 1999. The annualized consumer owned chargeoff ratio in the third quarter of 2000 was 3.01 percent, compared with 3.27 percent in the prior quarter and 3.63 percent in the year-ago quarter.

Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.21 percent at September 30, 2000, compared with 4.16 percent at June 30, 2000 and 4.89 percent at September 30, 1999. The annualized total consumer managed chargeoff ratio in the third quarter of 2000 was 3.47 percent, compared with 3.74 percent in the prior quarter and 4.09 percent in the year-ago quarter." [HHT 0015994]

Stmt No.	Date	Document Title	Statement
13.	01/17/2001	Household Press Release Plaintiffs' Exhibit 491	January 17, 2001 Household Press Release entitled "Household International Reports Highest Full Year and Quarterly EPS in Its History; Tenth Consecutive Record Quarter": Household reported full year earnings per share of $3.55, a 16 percent increase over $3.07 a year ago and the highest earnings per share in the company's 122-year history. Net income totaled $1.7 billion, or 14 percent above the prior year. Net managed revenues for the full year increased 18 percent to $8.9 billion, compared to $7.5 billion in 1999. Household's fourth quarter earnings per share rose 12 percent to a record $1.03, from $.92 a year ago. Fourth quarter net income rose 12 percent to an all-time high of $492.7 million, compared with $438.8 million a year ago." "These strong fourth quarter results cap off a terrific year in which we delivered on all or our earnings and growth goals. . . . Growth and profitability in the quarter were excellent, while credit quality and our balance sheet remained strong. . . . Our record earnings per share reflect strong top-line growth and improved credit quality." [HHS 02912516] * * * "Credit Quality and Loss Reserves The fourth quarter annualized managed net chargeoff ratio improved for the third consecutive quarter to 3.41 percent from 3.47 percent in the third quarter. The fourth quarter chargeoff ratio was 55 basis points lower than a year ago and reached its lowest level since the fourth quarter of 1996. The managed delinquency ratio (60+days) at December 31, 2000 was 4.20 percent, stable with 4.21 percent in the third quarter and 46 basis points better than a year ago." [HHS 02912517]
14.	03/23/2001	*Origination News* article Plaintiffs' Exhibit 1307	*Origination News* – March 23, 2001: "Gary Gilmer, president and chief executive of Household's subsidiaries HFC and Beneficial said the company's 'position on predatory lending is perfectly clear. Unethical lending practices of any type are abhorrent to our company, our employees and most importantly our customers.'" [TEL 002334]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>15.</td><td>03/28/2001</td><td>Household FY00 Report on Form 10-K

Defendants' Exhibit 851</td><td>
Household FY00 Report on Form 10-K filed with the SEC on March 28, 2001 Household reported net income of 1.7 billion and E.P.S. of $3.55 [HHT 0015623]:
* * *
"Our focus is to use risk-based pricing and effective collection efforts for each loan. We have a process which we believe gives us a reasonable basis for predicting the credit quality of new accounts. This process is based on our experience with numerous marketing, credit and risk management tests. We also believe that our frequent and early contact with delinquent customers is helpful in managing net credit losses." [HHT 0015608]
* * *
"Delinquency and Chargeoffs: Our delinquency and net chargeoff ratios reflect, among other factors, changes in the mix of loans in our portfolio, the quality of our receivables, the average age of our loans, the success of our collection efforts and general economic conditions." . . .

We track delinquency and chargeoff levels on both an owned and a managed basis. We apply the same credit and portfolio management procedures to both our owned and off-balance sheet portfolios. Our focus is to use risk-based pricing and effective collection efforts for each loan. We have a process which we believe gives us a reasonable basis for predicting the credit quality of new accounts. This process is based on our experience with numerous marketing, credit and risk management tests. We also believe that our frequent and early contact with delinquent customers is helpful in managing net credit losses." [HHT 0015608]
* * *
CONSUMER TWO-MONTH-AND-OVER CONTRACTUAL DELINQUENCY RATIOS
<table>
<tr><th></th><th colspan="4">2000 Quarter End</th><th colspan="4">1999 Quarter End</th></tr>
<tr><th></th><th>4</th><th>3</th><th>2</th><th>1</th><th>4</th><th>3</th><th>2</th><th>1</th></tr>
<tr><td>Managed:</td><td></td><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Real estate secured</td><td>2.63%</td><td>2.77%</td><td>2.72%</td><td>2.99%</td><td>3.27%</td><td>3.46%</td><td>3.29%</td><td>3.54%</td></tr>
<tr><td>Auto finance</td><td>2.55</td><td>2.19</td><td>1.99</td><td>1.52</td><td>2.43</td><td>2.26</td><td>1.87</td><td>1.74</td></tr>
<tr><td>MasterCard/Visa</td><td>3.49</td><td>3.48</td><td>3.14</td><td>3.06</td><td>2.78</td><td>3.10</td><td>3.11</td><td>3.61</td></tr>
<tr><td>Private label</td><td>5.48</td><td>5.67</td><td>5.77</td><td>5.94</td><td>5.97</td><td>6.66</td><td>6.62</td><td>6.37</td></tr>
<tr><td>Other unsecured</td><td>7.97</td><td>7.72</td><td>7.92</td><td>8.56</td><td>8.81</td><td>8.57</td><td>8.17</td><td>7.84</td></tr>
<tr><td>Total Managed</td><td>4.20%</td><td>4.21%</td><td>4.16%</td><td>4.43%</td><td>4.66%</td><td>4.89%</td><td>4.72%</td><td>4.81%</td></tr>
<tr><td>Total Owned</td><td>4.26%</td><td>4.29%</td><td>4.25%</td><td>4.58%</td><td>4.81%</td><td>5.24%</td><td>4.96%</td><td>5.04%</td></tr>
</table>
[HHT 0015609]
</td></tr>
</table>

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>16.</td><td>04/18/2001</td><td>Household Press Release

Plaintiffs' Exhibit 504</td><td>April 18, 2001 Household Press Release entitled "Household International Reports First Quarter Results; 11th Consecutive Record Quarter": Household "reported that earnings per share rose 17 percent to a first quarter record of $.91 from $.78 a year ago. Net income increased to $431.8 million, up 16 percent from $372.9 million in the first quarter of 2000. This quarter marked the 11th consecutive quarter of record results." [HHS 0291412]
* * *
"Credit Quality and Loss Reserves
At March 31, the managed delinquency ratio (60+days) was 4.25 percent, compared to 4.43 percent a year ago and 4.20 percent at December 31, 2000. The annualized managed net chargeoff ratio for the first quarter was 3.56 percent, a 44 basis points improvement from the year-ago quarter and up modestly from 3.41 percent in the prior quarter." [HHS 02914123]</td></tr>
<tr><td>17.</td><td>05/09/2001</td><td>Household 10-Q

Plaintiffs' Exhibit 733</td><td>Household 10-Q for 3/31/01 quarter ended: Household reported net income of $431.8 million for the quarter ended March 31, 2001 and EPS of $0.92 [HHS 03137911]:

CREDIT QUALITY
We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio.

Delinquency
Two-Months-and-Over Contractual Delinquency (as a percent of consumer receivables):
<table><tr><th></th><th>March 31, 2001</th><th>December 31, 2000</th><th>September 30, 2000</th><th>June 30, 2000</th><th>March 31, 2000</th></tr><tr><td>Managed:</td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>Real estate secured</td><td>2.61%</td><td>2.63%</td><td>2.77%</td><td>2.72%</td><td>2.99%</td></tr><tr><td>Auto finance</td><td>1.79</td><td>2.55</td><td>2.19</td><td>1.99</td><td>1.52</td></tr><tr><td>MasterCard/Visa</td><td>3.68</td><td>3.49</td><td>3.48</td><td>3.14</td><td>3.06</td></tr><tr><td>Private label</td><td>5.50</td><td>5.48</td><td>5.67</td><td>5.77</td><td>5.94</td></tr><tr><td>Other unsecured</td><td>8.37</td><td>7.97</td><td>7.72</td><td>7.92</td><td>8.56</td></tr><tr><td>Total managed</td><td>4.25%</td><td>4.20%</td><td>4.21%</td><td>4.16%</td><td>4.43%</td></tr><tr><td>Owned</td><td>4.36%</td><td>4.26%</td><td>4.29%</td><td>4.25%</td><td>4.58%</td></tr></table>[HHS 03137930]</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
			* * * "Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.36 percent at March 31, 2001, compared with 4.26 percent at December 31, 2000 and 4.58 percent at March 31, 2000. The annualized consumer owned chargeoff ratio in the first quarter of 2001 was 3.12 percent, compared with 2.98 percent in the prior quarter and 3.53 percent in the year-ago quarter. Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.25 percent at March 31, 2001, compared with 4.20 percent at December 31, 2000 and 4.43 percent at March 31, 2000. The annualized consumer managed chargeoff ratio in the first quarter of 2001 was 3.56 percent, compared with 3.41 percent in the prior quarter and 4.00 percent in the year-ago quarter." [HHS 03137924]
18.	07/18/2001	Household Press Release Plaintiffs' Exhibit 503	July 18, 2001 Household Press Release entitled "Household International Reports Second Quarter Results; 12th Consecutive Record Quarter": Household "reported record earnings per share of $.93, up 16 percent from a year ago. Net income rose 14 percent, to $439.0 million, from $383.9 million for the second quarter of 2000." . . . "We had a terrific quarter – our 12th consecutive quarter of record results. Given the softening economic environment, I am particularly pleased with our ability to consistently deliver strong, quality earnings. Results for the quarter were excellent. . . . We enjoyed strong receivable and revenue growth compared to a year ago, with all of our businesses performing well. In addition, delinquency was stable in the quarter." [HHS 02914097] "Credit Quality and Loss Reserves At June 30th, the managed delinquency ratio (60+days) was 4.27 percent, stable with 4.25 percent in the first quarter. The managed delinquency ratio a year ago was 4.16 percent. The annualized managed net chargeoff ratio for the second quarter was 3.71 percent, essentially unchanged from the year-ago quarter and up modestly from 3.56 percent in the first quarter." [HHS 02914098]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>19.</td><td>07/27/2001</td><td>Star Tribune article

Plaintiffs' Exhibit 1451</td><td>Star Tribune – July 27, 2001: "Megan Hayden, a Household spokeswoman, said that terms of loans are disclosed to all customers, as required by state and federal laws. 'Frankly, you don't stay in business in this industry by taking advantage of your customers,' she said. 'So I take exception to any characterization that we engaged in predatory lending practices.'"</td></tr>
<tr><td>20.</td><td>08/10/2001</td><td>Household 10-Q

Plaintiffs' Exhibit 6</td><td>Household 10-Q for 6/30/01 quarter ended: Household reported net income of $439 million for the quarter ended June 30, 2001 and EPS of $0.94 [AA 062721]:

CREDIT QUALITY
We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio.
[AA 062738]
Delinquency
Two-Months-and-Over Contractual Delinquency (as a percent of consumer receivables):
<table>
<tr><th></th><th>June 30, 2001</th><th>March 31, 2001</th><th>December 31, 2000</th><th>September 30, 2000</th><th>June 30, 2000</th></tr>
<tr><td>Managed:</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Real estate secured</td><td>2.63%</td><td>2.61%</td><td>2.63%</td><td>2.77%</td><td>2.72%</td></tr>
<tr><td>Auto finance</td><td>2.09</td><td>1.79</td><td>2.55</td><td>2.19</td><td>1.99</td></tr>
<tr><td>MasterCard/Visa</td><td>3.60</td><td>3.68</td><td>3.49</td><td>3.48</td><td>3.14</td></tr>
<tr><td>Private label</td><td>5.66</td><td>5.50</td><td>5.48</td><td>5.67</td><td>5.77</td></tr>
<tr><td>Other unsecured</td><td>8.43</td><td>8.37</td><td>7.97</td><td>7.72</td><td>7.92</td></tr>
<tr><td>Total managed</td><td>4.27%</td><td>4.25%</td><td>4.20%</td><td>4.21%</td><td>4.16%</td></tr>
<tr><td>Owned</td><td>4.48%</td><td>4.36%</td><td>4.26%</td><td>4.29%</td><td>4.25%</td></tr>
</table>
[AA 062739]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.48 percent at June 30, 2001, compared with 4.36 percent at March 31, 2001 and 4.25 percent at June 30, 2000. The annualized consumer owned chargeoff ratio in the second quarter of 2001 was 3.26 percent, compared with 3.12 percent in the prior quarter and 3.27 percent in the year-ago quarter.</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
			Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.27 percent at June 30, 2001, compared with 4.25 percent at March 31, 2001 and 4.16 percent at June 30, 2000. The annualized consumer managed chargeoff ratio in the second quarter of 2001 was 3.71 percent, compared with 3.56 percent in the prior quarter and 3.74 percent in the year-ago quarter." [AA 062733]
21.	10/17/2001	Household Press Release Plaintiffs' Exhibit 978	October 17, 2001 Household Press Release entitled "Household Reports Highest Quarterly Net Income in Its 123-Year History": Household "reported earnings per share of $1.07 rose 14 percent from $.94 the prior year. Net income increased 12 percent, to $504 million, from $451 million in the third quarter of 2000." [HHS 03453676] "Credit Quality and Loss Reserves At September 30th, the managed delinquency ratio (60+ days) was 4.43 percent, compared to 4.27 percent in the second quarter and 4.21 percent a year ago. The sequential increase was across all products and was well within company expectations. The annualized managed net chargeoff ratio for the third quarter was 3.74 percent, up slightly from 3.71 percent in the second quarter. The managed net chargeoff ratio was 3.47 percent in the prior-year quarter." [HHS 03453677]

Stmt No.	Date	Document Title	Statement
22.	11/14/2001	Household 10-Q Plaintiffs' Exhibit 707	Household 10-Q for quarter ended 9/30/01: Household reported net income of $503.8 million for the quarter ended September 30, 2001 and EPS of $1.09 [HHS 03111409]: CREDIT QUALITY We track delinquency and chargeoff levels on a managed basis and we apply the same credit and portfolio management procedures as on our owned portfolio. [HHS 03111425] Delinquency Two-Months-and-Over Contractual Delinquency (as a percent of consumer receivables):

	September 30, 2001	June 30, 2001	March 31, 2001	December 30, 2000	September 30, 2000
Managed:					
Real estate secured	2.74%	2.63%	2.61%	2.63%	2.77%
Auto finance	2.54	2.09	1.79	2.55	2.19
MasterCard/Visa	3.91	3.60	3.68	3.49	3.48
Private label	5.88	5.66	5.50	5.48	5.67
Other unsecured	8.51	8.43	8.37	7.97	7.72
Total managed	4.43%	4.27%	4.25%	4.20%	4.21%
Owned	4.58%	4.48%	4.36%	4.26%	4.29%

[HHS 03111426]

* * *

"Owned consumer two-months-and-over contractual delinquency as a percent of owned consumer receivables was 4.58 percent at September 30, 2001, compared with 4.48 percent at June 30, 2001 and 4.29 percent at September 30, 2000. The annualized total consumer owned chargeoff ratio in the third quarter of 2001 was 3.43 percent, compared with 3.26 percent in the prior quarter and 3.01 percent in the year-ago quarter.

Managed consumer two-months-and-over contractual delinquency as a percent of managed consumer receivables was 4.43 percent at September 30, 2001, compared with 4.27 percent at June 30, 2001 and 4.21 percent at September 31, 2000. The annualized total consumer managed chargeoff ratio in the third quarter of 2001 was 3.74 percent, compared with 3.71 percent in the prior quarter and 3.47 percent in the year-ago quarter." [HHS 03111420]

Stmt No.	Date	Document Title	Statement
			* * * "Managed delinquency as a percent of managed consumer receivables increased modestly over both the previous and prior-year quarters. Compared to the previous quarter, all products reported higher delinquencies principally as the result of a weakening economy." [HHS 03111426]
23.	12/04/2001	Goldman Sachs Presentation Plaintiffs' Exhibit 1248	December 4, 2001 Goldman Sachs Presentation: defendants made false statements regarding Household's accounting practices, including reaging and restructuring. * * * "Charge off policies are appropriate for our target market and result in proper loss recognition" (PFG000158) "All policies have been consistently applied and realistically report results" (PFG000158) "Why are Household's Credit Losses Better" - better credit skills (PFG000152)
24.	01/16/2002	Household Press Release Plaintiffs' Exhibit 706	January 16, 2002 Household Press Release entitled "Household Reports Record Quarterly and Full-Year Net Income": Household "reported fourth quarter earnings per share of $1.17, its fourteenth consecutive record quarter. Fourth quarter earnings per share rose 14 percent from $1.03 the prior year. Net income in the fourth quarter increased 11 percent, to an all-time quarterly record of $549 million. For the full year, Household reported earnings per share of $4.08, representing a 15 percent increase from $3.55 in 2000. Net income for 2001 totaled $1.9 billion, also an all-time high, 13 percent above $1.7 billion earned in 2000." "Household's fourth quarter results were simply outstanding . . . demonstrating the tremendous strength and earnings power of the Household franchise. Receivable and revenue growth exceeded our expectations while credit indicators weakened only modestly in a tough economic environment. . . . In 2001, we demonstrated that our business model generates superior results in a weak economy as well as in the strong economic periods of previous years. Exceptional revenue growth of 18 percent more than offset the increases in credit losses during the year." [HHS 03110403 – HHS 03110404]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td></td><td></td><td></td><td>* * *
"Credit Quality and Loss Reserves
At December 31st, the managed delinquency ratio (60+days) was 4.46 percent, up 3 basis points from 4.43 percent in the third quarter. The managed delinquency ratio was 4.20 percent a year ago. The annualized managed net chargeoff ratio for the fourth quarter was 3.90 percent, up 16 basis points from 3.74 percent in the third quarter. The managed net chargeoff ratio in the year-ago quarter was 3.41 percent." [HHS 03110405]</td></tr>
<tr><td>25.</td><td>02/06/2002</td><td>Copley News Services article

Plaintiffs' Exhibit 1442</td><td>Copley News Services – February 6, 2002: "You simply cannot stay in business for 125 years by misleading your borrowers . . . . We do the right thing for our borrowers. We make good loans that not only are legal loans, but are beneficial for our customers." [p.1]</td></tr>
<tr><td>26.</td><td>02/18/2002</td><td>National Mortgage News article

Plaintiffs' Exhibit 1291</td><td>National Mortgage News – February 18, 2002:

"Our first take on [the allegations of predatory lending raised in the ACORN action] is that it is not a significant issue, not indicative of any widespread problem and certainly not a concern that it will spread elsewhere." [TEL 002227]</td></tr>
<tr><td>27.</td><td>03/13/2002</td><td>Household FY01 Report on Form 10-K

Defendants' Exhibit 852</td><td>Household FY01 Report on Form 10-K filed with the SEC on March 13, 2002 Household reported Net Income of $1.923 billion in 2001, and E.P.S. of $4.13 [HHT 0015815 – HHT 0015816]:

Household International, Inc. and Subsidiaries
CREDIT QUALITY STATISTICS – OWNED BASIS
All dollar amounts are stated in millions. At December 31, unless otherwise indicated.
Owned Two-Month-and-Over Contractual Delinquency Ratios
<table>
<tr><th></th><th>2001</th><th>2000</th><th>1999</th><th>1998</th><th>1997</th></tr>
<tr><td>Real estate secured</td><td>2.63%</td><td>2.58%</td><td>3.10%</td><td>3.95%</td><td>3.66%</td></tr>
<tr><td>Auto finance</td><td>2.92</td><td>2.46</td><td>2.02</td><td>2.90</td><td>1.48</td></tr>
<tr><td>MasterCard/Visa</td><td>5.67</td><td>4.90</td><td>3.59</td><td>5.09</td><td>3.55</td></tr>
<tr><td>Private label</td><td>5.99</td><td>5.60</td><td>6.09</td><td>6.03</td><td>5.60</td></tr>
<tr><td>Personal non-credit card</td><td>9.04</td><td>7.99</td><td>9.06</td><td>8.24</td><td>7.55</td></tr>
<tr><td>Total consumer</td><td>4.53%</td><td>4.26%</td><td>4.82%</td><td>5.31%</td><td>4.87%</td></tr>
</table>
[HHT 0015809]</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
			* * * Household International, Inc. and Subsidiaries CREDIT QUALITY STATISTICS – MANAGED BASIS All dollar amounts are stated in millions. At December 31, unless otherwise indicated. Managed Two-Month-and-Over Contractual Delinquency Ratios Real estate secured 2.68% 2.63% 3.27% 3.67% 3.69% Auto finance 3.16 2.55 2.43 2.29 2.09 MasterCard/Visa 4.10 3.49 2.78 3.75 3.10 Private label 5.48 5.48 5.97 6.20 5.81 Personal non-credit card 8.87 7.97 8.81 7.94 7.81 Total consumer 4.46% 4.20% 4.66% 4.90% 4.64% [HHT 0015810] * * * "Management has long recognized its responsibility for conducting the company's affairs in a manner which is responsive to the interest of employees, shareholders, investors and society in general. This responsibility is included in the statement of policy on ethical standards which provides that the company will fully comply with laws, rules and regulations of every community in which it operates and adhere to the highest ethical standards. Officers, employees and agents of the company are expected and directed to manage the business of the company with complete honesty, candor and integrity." [HHT 0015848] * * * "Our credit and portfolio management procedures focus on risk-based pricing and effective collection efforts for each loan. We have a process which we believe gives us a reasonable basis for predicting the credit quality of new accounts. This process is based on our experience with numerous marketing, credit and risk management tests. We also believe that our frequent and early contact with delinquent customers, as well as policies designed to manage customer relationships, such as reaging delinquent accounts to current in specific situations, are helpful in maximizing customer collections. . . . As a result, charge-off and delinquency performance has been well within our expectations." [HHT 0015797]

Stmt No.	Date	Document Title	Statement
			* * * "We believe our policies are responsive to the specific needs of the customer segment we serve. . . . *Our policies have been consistently applied and there have been no significant changes to any of our policies during any of the periods reported.* Our loss reserve estimates consider our charge-off policies to ensure appropriate reserves exist for products with longer charge-off lives. We believe our charge-off policies are appropriate and result in proper loss recognition." [HHT 0015798] * * * "Our policies for consumer receivables permit reset of the contractual delinquency status of an account to current, subject to certain limits, if a predetermined number of consecutive payments has been received and there is evidence that the reason for the delinquency has been cured. Such reaging policies vary by product and are designed to manage customer relationship and maximize collections." [HHT 0015798]

28.	04/09/2002	Household Financial Relations Conference
		
		Plaintiffs' Exhibit 135
			April 9, 2002 Financial Relations Conference:
			• Credit Quality Trend – Manageable, Modest Increases [chart on HHS 01883530]
			• Credit Policies – Overview – In some cases charge-off policy is longer than bank policy to optimize customer management. [HHS 01883554]
			• Reage Policies – Overview
			  • Reage policies are an inherent part of value proposition for our customers for which they pay above bank prices
			  • Not intended to defer credit loss recognition or to overstate net income
			  • Policies have been consistently applied and are appropriate for each product [HHS 01883557]
			• Credit Policies – Personal Non-Credit Card
			  • Restructures
			  • If an account is ever 90+, lifetime limit of 4 restructures allowed [HHS 01883579]
			Defendants included information regarding Household's reage portfolio in a number of charts included in Plaintiffs' Exhibit 135 – the charts are located at HHS01883560, HHS01883561, HHS01883562, HHS01883564, HHS01883565, HHS01883566, and HHS01883567.

Stmt No.	Date	Document Title	Statement
29.	04/17/2002	Household Press Release Plaintiffs' Exhibit 635	April 17, 2002 Household Press Release entitled "Household Reports Record First Quarter Net Income": Household "reported first quarter earnings per share of $1.09, its fifteenth consecutive record quarter. First quarter earnings per share rose 20 percent from $.91 the prior year. Net income in the first quarter increased 18 percent, to a record $511 million." "Household turned in a very strong first quarter. . . . In addition to delivering record results this quarter, we strongly added to our capital and reserve levels and further enhanced liquidity. We remain committed to maintaining a strong balance sheet and maximum financial flexibility." "Our credit quality performance was well within our expectations in light of the continued weakness in the economy. . . . We anticipate a very manageable credit environment for the remainder of the year." [HHS 02980361] * * * "Credit Quality and Loss Reserves At March 31st, the *managed basis* delinquency ratio (60+days) was 4.63 percent, up 17 basis points from 4.46 percent at year-end 2001 and up 38 basis points from 4.25 percent a year ago. The annualized *managed basis* net charge-off ratio for the first quarter of 4.09 percent increased 19 basis points from 3.90 percent in the fourth quarter of 2001. . . ." "The *owned basis* delinquency ratio at March 31st was 4.77 percent, compared to 4.53 percent at December 31st and 4.36 percent a year ago. The annualized *owned basis* charge-off ratio for the first quarter was 3.61 percent compared to 3.43 percent in the previous quarter and 3.12 percent a year ago." [HHS 02980363]
30.	04/21/2002	*Bellingham Herald* article Plaintiffs' Exhibit 1445	*Bellingham Herald* – April 21, 2002: "It is absolutely against our policy to in any way quote a rate that is different than what the true rate is . . . . I can't underscore that enough." [p.1]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>31.</td><td>05/03/2002</td><td>Chicago Tribune article

Plaintiffs' Exhibit 1440</td><td>Chicago Tribune – May 3, 2002: "Household denied that it misleads customers. 'Acorn continues to launch baseless accusations and lawsuits rather than work to enact real solutions to help eliminate predatory lending from the marketplace,' the lender's statement said." [p.1]</td></tr>
<tr><td>32.</td><td>05/10/2002</td><td>Household 10-Q

Plaintiffs' Exhibit 232</td><td>Household 10-Q for quarter ended 3/31/2002. Household reported net income of $511 million, and E.P.S of $1.09 [HHS 02135167]

CREDIT QUALITY

Delinquency – Owned Basis
Two-Months-and-Over Contractual Delinquency (as a percent of consumer receivables):
<table><tr><th></th><th>March 31, 2002</th><th>December 31, 2001</th><th>March, 31 2001</th></tr><tr><td>Real estate secured</td><td>2.88%</td><td>2.63%</td><td>2.55%</td></tr><tr><td>Auto finance</td><td>2.04</td><td>2.92</td><td>1.74</td></tr><tr><td>MasterCard/Visa</td><td>6.54</td><td>5.67</td><td>5.02</td></tr><tr><td>Private label</td><td>6.33</td><td>5.99</td><td>5.62</td></tr><tr><td>Personal non-credit card</td><td>9.60</td><td>9.04</td><td>8.79</td></tr><tr><td>Total Owned</td><td>4.77%</td><td>4.53%</td><td>4.36%</td></tr></table>[HHS 02135187]</td></tr>
</table>

Stmt No.	Date	Document Title	Statement
33.	05/10/2002	*The Record* article Plaintiffs' Exhibit 1443	*The Record* – May 10, 2002: "Our position is that the accusations [regarding predatory lending] are baseless . . . . The loans are legal, they are compliant with state and federal laws and our own policies, and in each instance they have benefits for each customer. . . . Hayden says the loan[s] conform[] to the company's 'tangible benefits test."
34.	05/31/2002	*American Banker* article Plaintiffs' Exhibit 1446	*American Banker* – May 31, 2002: "It is our regulators' and the attorney general's job to investigate any complaints brought forth by consumers in their state, and we don't find anything unique or surprising that they are doing their job. . . . [W]e take proper steps to work with the department to uncover the facts and if necessary formulate an appropriate resolution for the borrower." . . . "some customers in Bellingham may have indeed been justified in their confusion about the rate of their loans" and claimed Household "took full and prompt responsibility" and is "satisfied that this situation was localized to the Bellingham branch."
35.	07/02/2002	*The Oregonian* Plaintiffs' Exhibit 1447	*The Oregonian* – July 2, 2002: "'We've made mistakes,' said Megan Hayden, spokeswoman for the Prospect Heights, Ill., company. 'Is there a companywide pattern of abuse? Absolutely not.'"
36.	07/17/2002	Household Press Release Plaintiffs' Exhibit 788	July 17, 2002 Household Press Release entitled "Household Reports Record Second Quarter Results on Strong Receivables Growth": Household "reported second quarter earnings per share increased 16 percent to $1.08, from $.93 the prior year. These results mark Household's sixteenth consecutive record quarter. Second quarter net income increased 17 percent, to a record $514 million." * * * "Our results this quarter were fueled by ongoing strong demand for our loan products. . . . Growth this quarter was strong, while we have maintained our conservative underwriting criteria. . . ." [HHS 03195884]

Stmt No.	Date	Document Title	Statement
			* * * "Credit Quality and Loss Reserves At June 30th, the *managed basis* delinquency ratio (60+days) was 4.53 percent, down 10 basis points from 4.63 percent at the end of March, led by improvement in the MasterCard/Visa portfolio. The managed basis delinquency ratio was 4.27 percent a year ago. The annualized *managed basis* netcharge-off ratio for the second quarter of 4.26 percent was 17 basis points higher than the first quarter and 55 basis points higher than a year ago." "The *owned basis* delinquency ratio at June 30th was 4.61 percent, compared to 4.77 percent at March 31st and 4.48 percent a year ago. The annualized *owned basis* net charge-off ratio for the second quarter was 3.76 percent compared to 3.61 percent in the previous quarter and 3.26 a year ago." [HHS 03195886]
37.	08/14/2002	Household Press Release Plaintiffs' Exhibit 227	August 14, 2002 Household Press Release entitled "Household International Certifies Accuracy of SEC filings in 2002": "Household's results for the year-to-date have been fueled by strong demand for our loan products throughout our businesses. Our loan underwriting approach continues to be conservative in these times of economic uncertainty, and we remain committed to strong reserve and capital levels." [HHS 02133695]

<table>
<tr><th>Stmt No.</th><th>Date</th><th>Document Title</th><th>Statement</th></tr>
<tr><td>38.</td><td>08/14/2002</td><td>Household 10-Q

Defendants' Exhibit 874</td><td>Household 10-Q for quarter-ended 6/30/2002 issued on 8/14/2002: Household reported net income of $507 million and E.P.S. of $1.08 [HHT 0017112]

CREDIT QUALITY
Delinquency – Owned Basis
Two-Months-and-Over Contractual Delinquency (as a percent of consumer receivables):
<table><tr><th></th><th>June 30, 2002</th><th>March 31, 2002</th><th>June 30, 2001</th></tr><tr><td>Real estate secured</td><td>2.78%</td><td>2.88%</td><td>2.59%</td></tr><tr><td>Auto finance</td><td>2.99</td><td>2.04</td><td>2.35</td></tr><tr><td>MasterCard/Visa</td><td>6.13</td><td>6.54</td><td>4.80</td></tr><tr><td>Private label</td><td>6.19</td><td>6.33</td><td>6.54</td></tr><tr><td>Personal non-credit card</td><td>9.12</td><td>9.60</td><td>8.79</td></tr><tr><td>Total Owned</td><td>4.61%</td><td>4.77%</td><td>4.48%</td></tr></table>[HHT 0017131]

* * *

"Our credit policies for consumer loans permit the reset of the contractual delinquency status of an account to current, subject to certain limits, if a predetermined number of consecutive payments has been received and there is evidence that the reason for the delinquency has been cured. Such reaging

policies vary by product and are designed to manage customer relationship and ensure maximum collections." [HHT 0017132]

* * *

Household reiterated this disclosure in its Form 10-K/A for fiscal year 2001, filed with the SEC on August 27, 2002.</td></tr>
<tr><td>39.</td><td>08/23/2002</td><td>Origination News article

Plaintiffs' Exhibit 1439</td><td>Origination News – August 23, 2002: "'We clearly follow all state and federal laws and regulations,' Household spokeswoman Megan Hayden said."</td></tr>
</table>

TABLE B

Date	Amount
07/30/99	$ 0 per share
08/02/99	$ 0 per share
08/03/99	$ 0 per share
08/04/99	$ 0 per share
08/05/99	$ 0 per share
08/06/99	$ 0 per share
08/09/99	$ 0 per share
08/10/99	$ 0 per share
08/11/99	$ 0 per share
08/12/99	$ 0 per share
08/13/99	$ 0 per share
08/16/99	$ 0 per share
08/17/99	$ 0 per share
08/18/99	$ 0 per share
08/19/99	$ 0 per share
08/20/99	$ 0 per share
08/23/99	$ 0 per share
08/24/99	$ 0 per share
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08/27/99	$ 0 per share
08/30/99	$ 0 per share
08/31/99	$ 0 per share
09/01/99	$ 0 per share
09/02/99	$ 0 per share
09/03/99	$ 0 per share
09/07/99	$ 0 per share
09/08/99	$ 0 per share
09/09/99	$ 0 per share
09/10/99	$ 0 per share

Date	Amount
09/13/99	$ 0 per share
09/14/99	$ 0 per share
09/15/99	$ 0 per share
09/16/99	$ 0 per share
09/17/99	$ 0 per share
09/20/99	$ 0 per share
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10/18/99	$ 0 per share
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10/21/99	$ 0 per share
10/22/99	$ 0 per share
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Date	Amount
10/26/99	$ 0 per share
10/27/99	$ 0 per share
10/28/99	$ 0 per share
10/29/99	$ 0 per share
11/01/99	$ 0 per share
11/02/99	$ 0 per share
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Date	Amount
12/09/99	$ 0 per share
12/10/99	$ 0 per share
12/13/99	$ 0 per share
12/14/99	$ 0 per share
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01/14/00	$ 0 per share
01/18/00	$ 0 per share
01/19/00	$ 0 per share
01/20/00	$ 0 per share
01/21/00	$ 0 per share
01/24/00	$ 0 per share

Date	Amount
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01/26/00	$ 0 per share
01/27/00	$ 0 per share
01/28/00	$ 0 per share
01/31/00	$ 0 per share
02/01/00	$ 0 per share
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03/01/00	$ 0 per share
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Date	Amount
03/09/00	$ 0 per share
03/10/00	$ 0 per share
03/13/00	$ 0 per share
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04/17/00	$ 0 per share
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Date	Amount
04/24/00	$ 0 per share
04/25/00	$ 0 per share
04/26/00	$ 0 per share
04/27/00	$ 0 per share
04/28/00	$ 0 per share
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05/30/00	$ 0 per share
05/31/00	$ 0 per share
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Date	Amount
06/07/00	$ 0 per share
06/08/00	$ 0 per share
06/09/00	$ 0 per share
06/12/00	$ 0 per share
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06/14/00	$ 0 per share
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07/17/00	$ 0 per share
07/18/00	$ 0 per share
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Date	Amount
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07/24/00	$ 0 per share
07/25/00	$ 0 per share
07/26/00	$ 0 per share
07/27/00	$ 0 per share
07/28/00	$ 0 per share
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Date	Amount
09/05/00	$ 0 per share
09/06/00	$ 0 per share
09/07/00	$ 0 per share
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09/11/00	$ 0 per share
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Date	Amount
10/18/00	$ 0 per share
10/19/00	$ 0 per share
10/20/00	$ 0 per share
10/23/00	$ 0 per share
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Date	Amount
12/01/00	$ 0 per share
12/04/00	$ 0 per share
12/05/00	$ 0 per share
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12/07/00	$ 0 per share
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01/09/01	$ 0 per share
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01/11/01	$ 0 per share
01/12/01	$ 0 per share
01/16/01	$ 0 per share
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Date	Amount
01/18/01	$ 0 per share
01/19/01	$ 0 per share
01/22/01	$ 0 per share
01/23/01	$ 0 per share
01/24/01	$ 0 per share
01/25/01	$ 0 per share
01/26/01	$ 0 per share
01/29/01	$ 0 per share
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02/26/01	$ 0 per share
02/27/01	$ 0 per share
02/28/01	$ 0 per share
03/01/01	$ 0 per share
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Date	Amount
03/05/01	$ 0 per share
03/06/01	$ 0 per share
03/07/01	$ 0 per share
03/08/01	$ 0 per share
03/09/01	$ 0 per share
03/12/01	$ 0 per share
03/13/01	$ 0 per share
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03/15/01	$ 0 per share
03/16/01	$ 0 per share
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04/02/01	$ 23.94 per share
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04/10/01	$ 23.94 per share
04/11/01	$ 23.94 per share
04/12/01	$ 23.94 per share
04/16/01	$ 23.94 per share
04/17/01	$ 23.94 per share

Date	Amount
04/18/01	$23.94 per share
04/19/01	$23.94 per share
04/20/01	$23.94 per share
04/23/01	$23.94 per share
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04/26/01	$23.94 per share
04/27/01	$23.94 per share
04/30/01	$23.94 per share
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05/02/01	$23.94 per share
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05/08/01	$23.94 per share
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05/10/01	$23.94 per share
05/11/01	$23.94 per share
05/14/01	$23.94 per share
05/15/01	$23.94 per share
05/16/01	$23.94 per share
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05/18/01	$23.94 per share
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05/25/01	$23.94 per share
05/29/01	$23.94 per share
05/30/01	$23.94 per share
05/31/01	$23.94 per share

Date	Amount
06/01/01	$23.94 per share
06/04/01	$23.94 per share
06/05/01	$23.94 per share
06/06/01	$23.94 per share
06/07/01	$23.94 per share
06/08/01	$23.94 per share
06/11/01	$23.94 per share
06/12/01	$23.94 per share
06/13/01	$23.94 per share
06/14/01	$23.94 per share
06/15/01	$23.94 per share
06/18/01	$23.94 per share
06/19/01	$23.94 per share
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07/03/01	$23.94 per share
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07/06/01	$23.94 per share
07/09/01	$23.94 per share
07/10/01	$23.94 per share
07/11/01	$23.94 per share
07/12/01	$23.94 per share
07/13/01	$23.94 per share
07/16/01	$23.94 per share

Date	Amount
07/17/01	$23.94 per share
07/18/01	$23.94 per share
07/19/01	$23.94 per share
07/20/01	$23.94 per share
07/23/01	$23.94 per share
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07/25/01	$23.94 per share
07/26/01	$23.94 per share
07/27/01	$23.94 per share
07/30/01	$23.94 per share
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08/08/01	$23.94 per share
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08/14/01	$23.94 per share
08/15/01	$23.94 per share
08/16/01	$23.94 per share
08/17/01	$23.94 per share
08/20/01	$23.94 per share
08/21/01	$23.94 per share
08/22/01	$23.94 per share
08/23/01	$23.94 per share
08/24/01	$23.94 per share
08/27/01	$23.94 per share
08/28/01	$23.94 per share

Date	Amount
08/29/01	$ 23.94 per share
08/30/01	$ 23.94 per share
08/31/01	$ 23.94 per share
09/04/01	$ 23.94 per share
09/05/01	$ 23.94 per share
09/06/01	$ 23.94 per share
09/07/01	$ 23.56 per share
09/10/01	$ 23.94 per share
09/17/01	$ 22.61 per share
09/18/01	$ 22.53 per share
09/19/01	$ 22.38 per share
09/20/01	$ 22.02 per share
09/21/01	$ 21.54 per share
09/24/01	$ 22.62 per share
09/25/01	$ 22.29 per share
09/26/01	$ 23.03 per share
09/27/01	$ 23.42 per share
09/28/01	$ 23.94 per share
10/01/01	$ 23.94 per share
10/02/01	$ 23.94 per share
10/03/01	$ 23.94 per share
10/04/01	$ 23.94 per share
10/05/01	$ 23.94 per share
10/08/01	$ 23.94 per share
10/09/01	$ 23.94 per share
10/10/01	$ 23.94 per share
10/11/01	$ 23.94 per share
10/12/01	$ 23.59 per share
10/15/01	$ 23.94 per share
10/16/01	$ 23.94 per share
10/17/01	$ 23.94 per share

Date	Amount
10/18/01	$23.94 per share
10/19/01	$23.94 per share
10/22/01	$23.94 per share
10/23/01	$23.94 per share
10/24/01	$23.83 per share
10/25/01	$23.94 per share
10/26/01	$23.94 per share
10/29/01	$23.42 per share
10/30/01	$23.00 per share
10/31/01	$22.48 per share
11/01/01	$22.73 per share
11/02/01	$22.67 per share
11/05/01	$23.10 per share
11/06/01	$23.94 per share
11/07/01	$23.94 per share
11/08/01	$23.94 per share
11/09/01	$23.94 per share
11/12/01	$23.94 per share
11/13/01	$23.94 per share
11/14/01	$23.94 per share
11/15/01	$23.94 per share
11/16/01	$23.60 per share
11/19/01	$23.94 per share
11/20/01	$23.85 per share
11/21/01	$23.94 per share
11/23/01	$23.94 per share
11/26/01	$23.94 per share
11/27/01	$23.94 per share
11/28/01	$23.94 per share
11/29/01	$23.94 per share
11/30/01	$23.94 per share

Date	Amount
12/03/01	$22.59 per share
12/04/01	$23.94 per share
12/05/01	$23.94 per share
12/06/01	$23.94 per share
12/07/01	$23.94 per share
12/10/01	$23.30 per share
12/11/01	$22.20 per share
12/12/01	$19.80 per share
12/13/01	$20.29 per share
12/14/01	$19.64 per share
12/17/01	$20.61 per share
12/18/01	$21.84 per share
12/19/01	$22.04 per share
12/20/01	$21.75 per share
12/21/01	$21.37 per share
12/24/01	$21.60 per share
12/26/01	$21.82 per share
12/27/01	$23.30 per share
12/28/01	$23.94 per share
12/31/01	$23.28 per share
01/02/02	$22.58 per share
01/03/02	$22.41 per share
01/04/02	$23.94 per share
01/07/02	$23.19 per share
01/08/02	$22.29 per share
01/09/02	$22.42 per share
01/10/02	$21.70 per share
01/11/02	$19.85 per share
01/14/02	$18.53 per share
01/15/02	$20.28 per share
01/16/02	$19.87 per share

Date	Amount
01/17/02	$ 18.90 per share
01/18/02	$ 20.03 per share
01/22/02	$ 19.24 per share
01/23/02	$ 18.59 per share
01/24/02	$ 18.86 per share
01/25/02	$ 19.70 per share
01/28/02	$ 18.10 per share
01/29/02	$ 16.58 per share
01/30/02	$ 15.76 per share
01/31/02	$ 17.12 per share
02/01/02	$ 17.34 per share
02/04/02	$ 16.06 per share
02/05/02	$ 14.99 per share
02/06/02	$ 12.47 per share
02/07/02	$ 15.56 per share
02/08/02	$ 18.71 per share
02/11/02	$ 17.94 per share
02/12/02	$ 17.49 per share
02/13/02	$ 18.36 per share
02/14/02	$ 18.04 per share
02/15/02	$ 18.00 per share
02/19/02	$ 17.84 per share
02/20/02	$ 17.72 per share
02/21/02	$ 16.00 per share
02/22/02	$ 16.24 per share
02/25/02	$ 16.45 per share
02/26/02	$ 16.72 per share
02/27/02	$ 18.55 per share
02/28/02	$ 17.81 per share
03/01/02	$ 19.02 per share
03/04/02	$ 22.21 per share

Date	Amount
03/05/02	$21.17 per share
03/06/02	$22.17 per share
03/07/02	$23.00 per share
03/08/02	$23.94 per share
03/11/02	$23.94 per share
03/12/02	$23.37 per share
03/13/02	$22.86 per share
03/14/02	$21.87 per share
03/15/02	$22.69 per share
03/18/02	$22.93 per share
03/19/02	$22.77 per share
03/20/02	$21.93 per share
03/21/02	$22.23 per share
03/22/02	$22.39 per share
03/25/02	$21.06 per share
03/26/02	$21.66 per share
03/27/02	$21.80 per share
03/28/02	$21.25 per share
04/01/02	$21.68 per share
04/02/02	$21.52 per share
04/03/02	$20.53 per share
04/04/02	$21.39 per share
04/05/02	$22.28 per share
04/08/02	$23.24 per share
04/09/02	$23.16 per share
04/10/02	$23.23 per share
04/11/02	$21.73 per share
04/12/02	$22.40 per share
04/15/02	$22.24 per share
04/16/02	$23.65 per share
04/17/02	$23.94 per share

Date	Amount
04/18/02	$23.94 per share
04/19/02	$23.94 per share
04/22/02	$23.94 per share
04/23/02	$23.94 per share
04/24/02	$23.94 per share
04/25/02	$23.94 per share
04/26/02	$23.94 per share
04/29/02	$22.70 per share
04/30/02	$23.34 per share
05/01/02	$22.61 per share
05/02/02	$21.92 per share
05/03/02	$21.64 per share
05/06/02	$21.00 per share
05/07/02	$20.25 per share
05/08/02	$21.83 per share
05/09/02	$21.26 per share
05/10/02	$19.64 per share
05/13/02	$20.72 per share
05/14/02	$21.31 per share
05/15/02	$20.03 per share
05/16/02	$19.24 per share
05/17/02	$18.40 per share
05/20/02	$18.19 per share
05/21/02	$17.54 per share
05/22/02	$17.74 per share
05/23/02	$17.87 per share
05/24/02	$17.85 per share
05/28/02	$17.98 per share
05/29/02	$17.89 per share
05/30/02	$16.88 per share
05/31/02	$16.26 per share

Date	Amount
06/03/02	$16.67 per share
06/04/02	$16.66 per share
06/05/02	$17.91 per share
06/06/02	$19.83 per share
06/07/02	$19.06 per share
06/10/02	$18.58 per share
06/11/02	$19.54 per share
06/12/02	$18.92 per share
06/13/02	$17.44 per share
06/14/02	$17.62 per share
06/17/02	$18.20 per share
06/18/02	$18.08 per share
06/19/02	$17.24 per share
06/20/02	$16.02 per share
06/21/02	$16.16 per share
06/24/02	$16.50 per share
06/25/02	$15.68 per share
06/26/02	$16.25 per share
06/27/02	$16.78 per share
06/28/02	$16.19 per share
07/01/02	$14.84 per share
07/02/02	$14.94 per share
07/03/02	$15.76 per share
07/05/02	$16.69 per share
07/08/02	$16.28 per share
07/09/02	$14.58 per share
07/10/02	$12.48 per share
07/11/02	$13.14 per share
07/12/02	$14.69 per share
07/15/02	$14.17 per share
07/16/02	$15.01 per share

Date	Amount
07/17/02	$ 11.59 per share
07/18/02	$ 12.56 per share
07/19/02	$ 11.33 per share
07/22/02	$ 10.38 per share
07/23/02	$ 9.30 per share
07/24/02	$ 11.68 per share
07/25/02	$ 10.57 per share
07/26/02	$ 8.68 per share
07/29/02	$ 9.19 per share
07/30/02	$ 9.55 per share
07/31/02	$ 11.49 per share
08/01/02	$ 10.63 per share
08/02/02	$ 9.59 per share
08/05/02	$ 8.11 per share
08/06/02	$ 10.06 per share
08/07/02	$ 8.28 per share
08/08/02	$ 9.60 per share
08/09/02	$ 8.73 per share
08/12/02	$ 8.29 per share
08/13/02	$ 7.06 per share
08/14/02	$ 6.39 per share
08/15/02	$ 7.61 per share
08/16/02	$ 5.76 per share
08/19/02	$ 5.22 per share
08/20/02	$ 4.65 per share
08/21/02	$ 4.98 per share
08/22/02	$ 8.14 per share
08/23/02	$ 5.85 per share
08/26/02	$ 6.77 per share
08/27/02	$ 5.58 per share
08/28/02	$ 5.22 per share

Date	Amount
08/29/02	$ 4.69 per share
08/30/02	$ 4.33 per share
09/03/02	$ 2.96 per share
09/04/02	$ 3.53 per share
09/05/02	$ 2.87 per share
09/06/02	$ 3.10 per share
09/09/02	$ 5.02 per share
09/10/02	$ 4.16 per share
09/11/02	$ 4.57 per share
09/12/02	$ 3.73 per share
09/13/02	$ 4.35 per share
09/16/02	$ 3.35 per share
09/17/02	$ -0.17 per share
09/18/02	$ 0.41 per share
09/19/02	$ 0.73 per share
09/20/02	$ 0.64 per share
09/23/02	$ -0.85 per share
09/24/02	$ -0.35 per share
09/25/02	$ -0.24 per share
09/26/02	$ 0.34 per share
09/27/02	$ -0.56 per share
09/30/02	$ -0.10 per share
10/01/02	$ -1.12 per share
10/02/02	$ -1.13 per share
10/03/02	$ -0.66 per share
10/04/02	$ -1.87 per share
10/07/02	$ -2.45 per share
10/08/02	$ -3.17 per share
10/09/02	$ -4.66 per share
10/10/02	$ -0.68 per share
10/11/02	$ 0.00 per share

EXHIBIT E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter came before the Court pursuant to the Order Preliminarily Approving Settlement and Providing for Notice ("Order") dated June 24, 2016, on the application of the parties for approval of the settlement set forth in the Stipulation of Settlement dated as of June 17, 2016 (the "Stipulation"). Due and adequate notice having been given to the Class as required in said Order, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation, unless otherwise set forth herein.

2. This Court has jurisdiction over the subject matter of the Litigation and over all parties to the Litigation, including all Members of the Class.

3. Pursuant to Federal Rule of Civil Procedure 23, the Court hereby approves the settlement set forth in the Stipulation and finds that:

(a) said Stipulation and the settlement contained therein, are, in all respects, fair, reasonable, and adequate and in the best interest of the Class;

(b) there was no collusion in connection with the Stipulation;

(c) the Stipulation was the product of informed, arm's-length negotiations among competent, able counsel; and

(d) the record is sufficiently developed and complete to have enabled the Plaintiffs and the Defendants to have adequately evaluated and considered their positions.

4. Accordingly, the Court authorizes and directs implementation and performance of all the terms and provisions of the Stipulation, as well as the terms and provisions hereof. Except as to any individual claim of those Persons (identified in Exhibit 1 attached hereto) who have validly and timely requested exclusion from the Class, the Court hereby dismisses the Litigation and all Released Claims of the Class with prejudice. The Settling Parties are to bear their own costs, except as and to the extent provided in the Stipulation and herein.

5. Upon the Effective Date, the Plaintiffs shall, and each of the Class Members shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Persons, whether or not such Class Member executed and delivered the Proof of Claim form or shares in the Settlement Fund. Claims to enforce the terms of the Stipulation are not released.

6. All Class Members are hereby forever barred and enjoined from prosecuting any of the Released Claims against any of the Released Persons.

7. Upon the Effective Date, each of the Released Persons shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished, and discharged Plaintiffs, each and all of the Class Members, and Plaintiffs' counsel from all claims (including Unknown Claims) arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims. Claims to enforce the terms of the Stipulation are not released.

8. The Notice of Proposed Settlement of Class Action given to the Class was the best notice practicable under the circumstances, including the individual notice to all Members of the Class who could be identified through reasonable effort. Said notice provided the best notice practicable under the circumstances of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Stipulation, to all Persons entitled to such notice, and said notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process.

9. Any Plan of Allocation submitted by Lead Counsel or any order entered regarding any attorneys' fee and expense application shall in no way disturb or affect this Final Judgment and shall be considered separate from this Final Judgment.

10. Neither the Stipulation nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of the Defendants or their respective Related Parties, or (b) is or

may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Defendants or their respective Related Parties in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. The Defendants and/or their respective Related Parties may file the Stipulation and/or this Judgment from this action in any other action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

11. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of this settlement and any award or distribution of the Settlement Fund, including interest earned thereon; (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, interest, and expenses in the Litigation and any dispute related to the allocation of attorneys' fees; and (d) all parties hereto for the purpose of construing, enforcing, and administering the Stipulation.

12. The Court finds that during the course of the Litigation, the Settling Parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11.

13. In the event that the settlement does not become effective in accordance with the terms of the Stipulation, or the Effective Date does not occur, or in the event that the Settlement Fund, or any portion thereof, is returned to the Defendants' insurers, then this Judgment shall be rendered null and void to the extent provided by and in accordance with the Stipulation and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Stipulation.

14. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

IT IS SO ORDERED.

11/10/16

Jorge L. Alonso
United States District Judge

EXHIBIT 1

Jaffe v. Household Int'l Inc., No. 02-5893 (N.D. Ill.) – List of Opt-Outs

OptOutNo	First Name	Last Name	Name1	City	State	Zip	Received Date
HSHD1-EXCL00001	ILDEFONSO A	BAEZ		SAN DIEGO	CA	92102	2/24/2006
HSHD1-EXCL00002	NANCY J	KERNAN		BETHLEHEM	PA	18018	2/28/2006
HSHD1-EXCL00003	PATRICIA A	HEFNER		DAYTON	OH	45431	2/28/2006
HSHD1-EXCL00004	WILLIAM H	SIMS		COLUMBUS	OH	43202	2/28/2006
HSHD1-EXCL00005	ROSALIE J	DYKES		SALISBURY	MD	21804	2/28/2006
HSHD1-EXCL00006	ELIZABETH M	ASHTON		ARLINGTON HTS	IL	60005	2/28/2006
HSHD1-EXCL00007	MARY A	VOSS		KALAMAZOO	MI	49008	2/28/2006
HSHD1-EXCL00008	FLOYD E	HUMPHREY		NINEVEH	NY	13813	3/2/2006
HSHD1-EXCL00009	CATHERIN L	CALLAHAN		JACKSONVILLE BCH	FL	32250	3/7/2006
HSHD1-EXCL00010	PATRICIA M	KORTHALS		MILWAUKEE	WI	52219	3/13/2006
HSHD1-EXCL00011	BETSY E	HINAU	LAWRENCE E JAFFE PENSION PLN V	KEAAU	HI	96749	3/14/2006
HSHD1-EXCL00012	EDWINA	BURKETT		MILFORD	DE	19963	3/10/2006
HSHD1-EXCL00013	MARION	DREIFUREST		MILWAUKEE	WI	53209	3/15/2006
HSHD1-EXCL00014	CHARLOTTE L	ANDERSON ESTATE	GERTRUDE L ANDERSON	CALUMET CITY	IL	60409	3/17/2006
HSHD1-EXCL00015	ALICE M	ADAMS		TUCUMCARI	NM	88401	3/21/2006
HSHD1-EXCL00016	CELESTE	MURPHY		LAKE FOREST	IL	60045	3/21/2006
HSHD1-EXCL00017	MARILYN	FLEETWOOD	CHAUNCEY FLEETWOOD	SOUTHLAKE	TX	76092	3/22/2006
HSHD1-EXCL00018	ORTELIN	BOWSER		JENKINTOWN	PA	19046	3/24/2006
HSHD1-EXCL00019	PHILIP R	GIRARD		MEQUON	WI	53092	3/28/2006
HSHD1-EXCL80001	PAUL H	DENKE	BERYL A DENKE	PALOS VERDES EST	CA	90274	3/27/2006
HSHD1-EXCL80002	JOHN F	BATES	MARGUERITE H NIEZNAY	HEMET	CA	92543	3/28/2006
HSHD1-EXCL80003	JERRY J	UNITT REV TRUST		SAN DIEGO	CA	92105	3/27/2006
HSHD1-EXCL80004	ANNE E	MEHU		GAITHERSBURG	MD	20877	3/29/2006
HSHD1-EXCL80005	DANIEL J	SULLIVAN		TOLEDO	OH	43606	3/28/2006
HSHD1-EXCL80006	ELLEN	MEHU		GAITHERSBURG	MD	20877	3/29/2006
HSHD1-EXCL80007	MURRAY J	SMIDT		MARTINSVILLE	IN	46151	3/30/2006
HSHD1-EXCL80008	BRUCE Q	MEEK	HELEN G LAMAR	ST GEORGE	UT	84790	4/4/2006
HSHD1-EXCL80009	GILBERT	BENAZZI		FLUSHING	NY	11358	4/5/2006
HSHD1-EXCL80010	MAURICE	VERALLI		LONGVIEW	TX	75605	4/5/2006
HSHD1-EXCL80011	CLAYTOR W	ALLRED	JOAN D ALLRED	SALT LAKE CITY	UT	84121	4/4/2006
HSHD1-EXCL80012	JOYCE B	DROST		BALTIMORE	MD	21221	4/4/2006
HSHD1-EXCL80013	DIANE F	FUGEL	CGM IRA	MONTROSE	PA	18801	4/10/2006
HSHD1-EXCL80014	DIANE F	FUGEL	CGM IRA	MONTROSE	PA	18801	4/10/2006
HSHD1-EXCL80015	DIANE F	FUGEL		MONTROSE	PA	18801	4/10/2006
HSHD1-EXCL80016	KEN	YAMAGUCHI		HUNTINGTON BEACH	CA	92646	4/14/2006
HSHD1-EXCL80017	ALICE C	HUMPHREY		BEL AIR	MD	21014	4/14/2006
HSHD1-EXCL80018	PATRICIA J	FUDER		HOLLAND	MI	49423	5/26/2011

EXHIBIT F

2017 WL 5247928
United States District Court, N.D. Illinois, Eastern Division.

KLEEN PRODUCTS LLC, et al., individually and on behalf of all those similarly situated, Plaintiffs,
v.
INTERNATIONAL PAPER COMPANY, et al., Defendants.

Case No. 1:10-cv-05711
|
Signed 10/17/2017

Attorneys and Law Firms

Daniel E. Gustafson, Daniel C. Hedlund, Gustafson Gluek PLLC, Vincent J. Esades, Heins Mills & Olson, P.L.C., Robert J. Schmit, Heidi M. Silton, W. Joseph Bruckner, Brian D. Clark, Devona Lynn Wells, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN, Amelia Igo Pelly Frenkel, Ethan Padilla Fallon, Gregory G. Rapawy, Steven F. Benz, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC, Amy Thomas Brantly, David Wayne Kesselman, Trevor Vincent Stockinger, Kesselman Brantly Stockinger LLP, Manhattan Beach, CA, Anthony D. Shapiro, Jeffrey Sprung, Hagens Berman Sobol Shapiro LLP, Seattle, WA, Carl Nils Hammarskjold, Geoffrey C. Rushing, Richard Alexander Saveri, William J. Heye, Saveri & Saveri, Inc., San Francisco, CA, Charles P. Goodwin, Law Offices of Charles P. Goodwin, Dianne M. Nast, Erin C. Burns, Nastlaw LLC, Edward A. Diver, Howard Langer, Peter E. Leckman, Langer Grogan & Diver, P.C., H. Laddie Montague, Martin I. Twersky, Berger & Montague, P.C., Jennifer E. MacNaughton, City of Philadelphia Law Department, Steven J. Greenfogel, Lite Depalma Greenberg, LLC, Philadelphia, PA, Christopher M. Burke, Kristen M. Anderson, Walter W. Noss, Scottscott LLP, Daniel Jay Mogin, Moginrubin LLP, Jodie Michelle Williams, The Mogin Law Firm, P.C., San Diego, CA, Daniel A. Bushell, Berman DeValerio, Manuel Juan Dominguez, Cohen Milstein Sellers & Toll, Palm Beach Gardens, FL, Donald Lewis Sawyer, Keogh Law, Ltd., Daniel J. Kurowski, Hagens Berman Sobol Shapiro LLP, Chicago, IL, Joseph Goldberg, Goldberg Ives & Duncan, PA, Albuquerque, NM, Michael Jerry Freed, Michael E. Moskovitz, Robert J. Wozniak, Steven A. Kanner, Freed Kanner London & Millen, LLC, Bannockburn, IL, Robert G. Eisler, Grant & Eisenhofer P.A., Wilmington, DE, Richard Frank Lombardo, Shaffer Lombardo Shurin, Kansas City, MO, Brian Philip Murray, Lee Albert, Glancy Binkow & Goldberg LLP, New York, NY, for Plaintiffs.

James T. McKeown, Andrew John Barragry, Trent M. Johnson, Brett H. Ludwig, Foley & Lardner LLP, Milwaukee, WI, Amber D. Floyd, Kacey L. Faughnan, Wyatt, Tarrant & Combs, LLP, Robert L. Crawford, McDonnell, Boyd, Smith and Solmson, Memphis, TN, Nathan P. Eimer, Susan M. Razzano, Eimer Stahl LLP, Peter James O'Meara, Joanne Lee, Foley & Lardner LLP, Scott M. Mendel, John Edward Susoreny, Lauren Nicole Norris, K&L Gates LLP, Michelle S. Lowery, Chelsea L. Black, Stephen Yusheng Wu, Lauren Britt Salins, McDermott, Will & Emery LLP, James R. Figliulo, Stephanie D. Jones, William G. Cross, Figliulo & Silverman, P.C., Andrew Stanley Marovitz, Britt Marie Miller, Courtney Lynn Anderson, Joshua Aaron Faucette, Matthew David Provance, Sean Patrick McDonnell, Mayer Brown LLP, James Franklin Herbison, Kevin Fitzgerald Wolff, Matthias A. Lydon, Michael P. Mayer, Winston & Strawn LLP, Jeffrey Scott Torosian, DLA Piper LLP, Abigail A. Clapp, Greenberg Traurig, LLP., Chicago, IL, Michael D. Leffel, Foley & Lardner LLP, Madison, WI, Margaret H. Warner, McDermott Will & Emery, LLP, Rakesh Nageswar Kilaru, Alexandra M. Walsh, Beth A. Wilkinson, Brant W. Bishop, Wilkinson Walsh Eskovitz PLLC, D. Bruce Hoffman, Ryan A. Shores, Hunton & Williams LLP, Jaime Singer Kaplan, Quinn Emanuel Urquhart & Sullivan LLP, Washington, DC, Kyle R. Taylor, Marc L. Greenwald, Michael B. Carlinsky, Sami Husayn Rashid, Stephen R. Neuwirth, Deborah Kay Brown, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY, for Defendants.

ORDER GRANTING MOTION FOR FINAL APPROVAL OF SETTLEMENT, INTERIM AWARD OF ATTORNEYS' FEES, AND PLAN OF DISTRIBUTION

Harry D. Leinenweber, United States District Court Judge

***1** WHEREAS, Plaintiffs Kleen Products LLC, R.P.R. Enterprises, Inc., Mighty Pac, Inc., Ferraro Foods, Inc., Ferraro Foods of North Carolina, LLC, MTM Packaging Solutions of Texas, LLC, RHE Hatco, Inc., and TransPak, Inc. (collectively, "Plaintiffs"), on behalf of the Certified Class, by and through their counsel of record, have asserted claims for damages against Defendants Packaging Corporation of America, International Paper Company, Cascades Canada, Inc./Norampac Holdings U.S. Inc., Weyerhaeuser Company, Georgia Pacific LLC, Temple-Inland Inc., TIN Inc.,

and Smurfit-Stone Container Corporation (collectively, "Defendants") resulting from alleged violations of federal antitrust laws;

WHEREAS, the Class, consisting of all direct purchasers of Containerboard Products for use or delivery in the United States between February 15, 2004 through November 8, 2010, was certified and Freed Kanner London & Millen LLC and MoginRubin LLP (formerly The Mogin Law Firm, P.C.) were appointed Co-Lead Counsel for the Class on March 26, 2015;

WHEREAS, Plaintiffs have entered into and executed a Settlement Agreement with Defendants International Paper Company ("IP"), Temple-Inland Inc., now known as Temple-Inland LLC, and TIN Inc., now known as TIN LLC (collectively, "TIN"), and Weyerhaeuser Company ("WY"), collectively referred to herein as "Settling Defendants", in the amount of $354,000,000, which will resolve all claims against Settling Defendants;

WHEREAS, the Settlement was preliminarily approved on July 13, 2017;

WHEREAS, Defendants Packaging Corporation of America ("PCA") and Cascades Canada, Inc./Norampac Holdings U.S. Inc. ("Norampac") previously settled their claims for a combined $22,400,000;

WHEREAS, Settling Defendants deny any wrongdoing or liability for any of the allegations made by Plaintiffs, and it is agreed between and among the parties that the Settlement Agreement shall not constitute, and shall not be construed as or deemed to be evidence of, an admission of any fault, wrongdoing or liability by the Settling Defendants or any other person or entity;

WHEREAS, Settling Defendants have agreed that up to two-hundred-thousand dollars ($200,000) of the Settlement Amount will be allocated for the costs of Notice and Administration of the Settlement as further consideration;

WHEREAS, Settling Defendants have agreed to provide cooperation to Plaintiffs in furtherance of the continuing prosecution of this action as provided in Section F, Paragraph 19, of the Settlement Agreement; [1]

[1] On September 25, 2017, the Settling Defendants and Plaintiffs agreed to suspend negotiations over the scope of cooperation under Section F, Paragraph 19, of the Settlement Agreement pending resolution of the appeal of the Court's August 3, 2017 Memorandum Opinion & Order (Dkt. No. 1375) regarding certain Defendants' motions for summary judgment. *See* Dkt. Nos. 1403-1405

WHEREAS, Notice of the Settlement was issued to the Class through direct mail and publication in a timely manner and Class Members were afforded the opportunity to object or otherwise comment on the Settlement;

***2** WHEREAS, on August 28, 2017, Plaintiffs sought approval of the proposed Plan of Distribution and moved for an interim award of attorneys' fees, seeking 30 percent of the Settlement Funds in accordance with the Settlement Agreement;

WHEREAS, the response by the Class to the Settlement was overwhelmingly positive.

WHEREAS, Plaintiffs and the Settling Defendants have agreed to the entry of this Final Approval Order (hereinafter, the "Order") other than Section V and the last sentence of Section VI.3, as to which Settling Defendants take no position;

WHEREAS, an opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's orders; the Court has reviewed and considered the terms of the Settlement, the submissions of the parties in support thereof and any comments received in Response to the Notice, and after holding a hearing on October 17, 2017; and

WHEREAS, this is no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

1.1 This Court has jurisdiction over this action and each of the parties to the Settlement Agreement.

II. DEFINITIONS

2.1 As used in this Order, the same definitions shall apply as set forth in Plaintiffs' Motion for Final Approval of (A) Settlement with Defendants International Paper Company, Temple-Inland, Inc., and Weyerhaeuser Company;

(B) Interim Award of Attorneys' Fees; and (C) Plan of Distribution (Dkt. No. 1409).

III. FINAL APPROVAL OF SETTLEMENT

3.1 The Court has considered the eight factors bearing upon whether the Settlement is fair, reasonable and adequate: (1) the strength of Plaintiffs' case, balanced against the amount offered in settlement; (2) the Defendants' ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching the settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *See Armstrong v. Bd. Of Sch. Dirs. Of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980). For reasons discussed below, the Court finds that these factors weigh in favor of granting final approval.

3.2 **Strength of the Case Balanced Against Amount Offered.** The $354,000,000 Settlement represents a substantial recovery for the Class. The Settlement does not limit Plaintiffs' potential for full recovery since Settling Defendants' sales remain in the case and Non-Settling Defendants remain jointly and severally liable for any judgment entered in Plaintiffs' favor. Absent this Settlement, the Class is at risk of receiving a total recovery limited to the $22,400,000 recovered from prior settlements with PCA and Norampac absent the Settlement. For these reasons, the Court finds that this factor weighs in favor of final approval.

3.3 **Defendants' Ability to Pay.** Although Defendants collectively have substantial ability to pay, the size of the potential recovery weighs in favor of the Settlement for any judgment entered against them in this case.

3.4 **Complexity, Length, and Expense of Further Litigation**. Approving the Settlement eliminates IP, TIN, and WY from the case, thereby significantly reducing the complexity, length and expense of further litigation efforts. The Court finds that this factor weighs in favor of granting final approval.

***3** 3.5 **Opposition to the Settlement and Reaction of Class Members**. Out of 158,500 Class Members notified of the Settlement, only one Class Member responded by sending a letter regarding allocation of the Settlement Funds. This demonstrates that Class Members support the Settlement and attests to its fairness, particularly since the majority of Class Members are sophisticated businesses with the necessary resources and counsel to analyze the Settlement and make their own determination of its merits. *See Slaughter v. Wells Fargo Advisors, LLC*, No. 13-cv-06368, 2017 U.S. Dist. LEXIS 123535 *5, 7-8 (N.D. Ill. Aug. 4, 2017) (Leinenweber, J.); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, 07 CV 2898, 2012 WL 651727, at *6–8, 2012 U.S. Dist. LEXIS 25265, at *28-33 (N.D. Ill. Feb. 28, 2012), appeal dismissed, 710 F.3d 754 (7th Cir. 2013); *In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 631, 640 (E.D. Pa. 2003). The Court finds that this factor supports final approval as well.

3.6 **Absence of Collusion**. The Settlement was the product of lengthy, contentious and intense arm's length negotiations among skilled counsel, well-versed in the strengths and weaknesses of the case, over a protracted period of time. The Court finds that these negotiations do not indicate collusion and the Settlement is entitled great deference. *See Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. Oct. 10, 1995).

3.7 **Opinion of Competent Counsel.** The Settlement was negotiated by highly skilled and experienced antitrust and class action lawyers, who have held leadership positions in some of the largest class actions around the country. Counsel for both parties considered the numerous legal issues the case presented, as well as the relative strengths and weaknesses of the litigation. These competent lawyers endorse the Settlement, and the Court finds that this factor supports final approval.

3.8 **Stage of the Proceedings.** At the time the Settlement was signed, this litigation had been pending for nearly seven years. Discovery was extensive, the Class had been certified, the certification was affirmed by the Seventh Circuit and the Supreme Court considered and denied certiorari. *Daubert* and summary judgment motions were fully briefed. By all accounts, the case was in an advanced stage with trial near, and the record exceptionally well-developed at that time. The Court finds that the stage of the proceedings at which the Settlement was reached, in combination with the factors discussed above, demonstrates that final approval is warranted.

3.9 Plaintiffs have submitted two declarations confirming that mail and publication notice were given to the Class conforming to the requirements set forth in the Preliminary Approval Order.

3.10 The Court finds that the Notice and Notice Plan constituted the most effective and best notice practicable under the circumstances of the Settlement Agreement and the fairness hearing and constituted due and sufficient notice for all other purposes to all persons and entities entitled to receive notice.

3.11 For all of the reasons stated above, the Settlement is fair, adequate and reasonable and satisfies the requirements of Federal Rules of Civil Procedure 23(c)(2) and 23(e) and due process. The Court hereby finally approves of the Settlement.

IV. APPROVAL OF PLAN OF DISTRIBUTION

4.1 The Court finds that the proposed Plan of Distribution is fair and reasonable. The proposed mechanism for distributing Settlement Funds, *pro rata* to all Allowed Claimants based on the Allowed Purchases, is recommended by experienced and competent Co-Lead Counsel, and has a reasonable rational basis having been approved for use by District Courts in this Circuit and elsewhere in similar cases. *See In re Ready-Mixed Concrete Antitrust Litig.*, No. 1:05-cv-00979-SEB-JMW, 2009 U.S. Dist. LEXIS 132343, *17-18 (S.D. Ind. Mar. 31, 2009) (collecting cases).

***4** 4.2 The Court likewise approves the proposed Claim Forms. The Claim Forms are relatively simple for Class Members to complete, with Class Members receiving pre-populated Claim Forms based on transactional data obtained from Defendants, and a general Claim Form being available for download on the Class website (www.containerboardproducts.com) as well. Class Members may simply sign the release on the pre-populated Claim Form under penalty of perjury and return it to the Settlement Administrator to receive the Payment Amount. Alternatively, Class Members may submit proof of purchase documentation and either (1) correct information directly on the Claim Form, or (2) complete a general Claim Form. The proposed cover letter further explains to Class Members how to obtain payment. In exchange for receiving their respective Payment Amount, Allowed Claimants will reaffirm their release of Settling Defendants from the Released Claims. This is fair and reasonable. *Id.* at 18-22. The Court therefore approves the Claim Forms and cover letter as submitted as Exhibits 4-A, 4-B, and 4-D to Plaintiffs' Motion for Final Approval of Settlement.

4.3 All Claim Forms shall be submitted to and reviewed by the Settlement Administrator in the manner described in the Plan of Distribution. This level of review is designed to eliminate duplicative or fraudulent claims, further lending support to the reasonableness and fairness of the Plan of Distribution.

4.4 In addition, the Plan of Distribution provides for payment of costs for providing notice to the Class, taxes and related expenses, Court-approved attorneys' fees, and any other Court-ordered payment, which is fair and reasonable.

4.5 Based on the foregoing, the Court approves the Plan of Distribution and Claim Forms. Co-Lead Counsel are to issue the pre-populated Claim Forms to Class Members and post the general Claim Form on the Class website by December 5, 2017. To be considered a Qualifying Claim, the completed Claim Form must be returned to the Settlement Administrator, postmarked by February 6, 2018. By August 3, 2018, the Settlement Administrator shall complete all work to allow or deny a claim and issue a report to Co-Lead Counsel identifying the number of approved claims and the total amount of Allowed Purchases. Co-Lead Counsel are then to distribute the Settlement Funds to Class Members in the manner described in the Plan of Distribution, without further order of the Court. Payment of costs for providing notice to the Class, taxes and related expenses, attorneys' fees as approved in this Order, and any other payments as provided in this Order may be made immediately, without further order of the Court.

V. ATTORNEYS' FEES

5.1 The Court finds that the request for an interim award of attorneys' fees is fair, adequate and reasonable. The relevant factors used to determine the reasonableness of the requested fee award in common fund cases such as this are the market rate, fee awards in similar matters, the nature of this case—including the risk of non-recovery, and amount and quality of Class Counsel's work. The Court finds that all of these factors support awarding the interim fee request of 30 percent of the Settlement Funds.

5.2 **Market Rate.** The requested fees are fair and reasonable under the two approaches used to award attorneys' fees, the "percentage of recovery" and the "lodestar" approach. The percentage of recovery method is used in this District and in many class actions. The requested 30 percent recovery is well-within the range of acceptable fees and is less than the 33 1/3 % referenced in the Settlement Agreement. As a cross-check, using the lodestar method produces a very low, less than a 1.1 multiplier calculated using Class Counsel's historical hourly rates. This Circuit permits counsel to seek fees based on current hourly rates as well; had Class Counsel submitted

current rates, the multiplier would have been less than one. In addition, a portion of Class Counsel's awarded fees will remain in escrow until the Reduction Clause resolves, and the amount is proportionate to the Settlement Funds withheld from distribution to the Class under the same Reduction Clause. This is another indicium of fairness. The Court therefore approves the hourly rates Class Counsel submitted as reasonable and finds that the 30 percent requested recovery is within the market rate for fee requests.

***5** 5.3 In support of their request for an interim fee award, Class Counsel submitted declarations of two respected attorneys, Paul E. Slater and Marc M. Seltzer. Both attorneys demonstrate that the requested fee percentage is reasonable and within the range of fees sought in their non-contingent cases. The Court finds these declarations persuasive, and supportive of 30 percent as within the market rate.

5.4 **Fee Awards in Similar Matters.** The Court further finds that the requested 30 percent is within range of the market rates approved in other complex antitrust cases, demonstrating the reasonableness of the request. *See, e.g., City of Greenville v. Syngenta Crop Prot., Inc.*, 904 F.Supp.2d 902, 909 (S.D. Ill. 2012) (collecting cases and awarding one-third from common fund settlement as fees).

5.5 **Nature of the Case and Risks.** The Court finds that the risk of nonpayment in this case further justifies the requested 30 percent fee award. Antitrust cases are particularly complex and risky, and this case proved no different. Notwithstanding, Class Counsel vigorously represented their clients against substantial motion practice, including motions to dismiss, numerous discovery-related motions, significant opposition to class certification including related appeals, summary judgment and motions to exclude expert testimony under *Daubert.* If the case proceeded to trial, Plaintiffs would likely face additional evidentiary challenges, trial risks on liability and damages, post-trial motions, appeals, and more. These risks, several of which were successfully navigated, combined with the fact that Class Counsel litigated this case for nearly seven years without compensation but while contributing significant of their own funds up front, support the requested 30 percent award.

5.6 **Amount and Quality of Class Counsel's Work.** Finally, the Court finds that the amount and quality of the work performed by Class Counsel in this case justifies the requested interim fee request. This case was a massive undertaking, with Class Counsel litigating the case for nearly seven years and more than 220,000 hours. However, the amount of work performed was proportionate to the complexity of the case and risks assumed by Class Counsel. Unlike many other antitrust cases, this case was developed solely by counsel, without the aid of government investigations or indictments. Class Counsel argued their case professionally and effectively at each stage of the litigation. The Court finds that Class Counsel's representation was vigorous, efficient and effective, and the facts and theory developed were key in achieving the Settlement, an outstanding result for the Class.

5.7 Based on the foregoing factors, the Court finds that the requested interim fee award of 30 percent of the Settlement Funds is fair and reasonable, and hereby grants Plaintiffs' motion. Co-Lead Counsel may, without further Court approval, allocate the attorneys' fee award among Class Counsel based on Co-Lead Counsels' determination of the Class Counsels' relative contribution to the litigation.

VI. RESPONSE BY CLASS MEMBERS

6.1 The Court finds that the response by Class Members to the Settlement, Plan of Distribution and Request for Interim Payment of Attorneys' fees supports the decision in this Order.

6.2 The response by Class Members to the Settlement, Plan of Distribution, and Request for an Interim Award of Attorneys' Fees has been overwhelmingly positive.

***6** 6.3 One Class Member sent a letter regarding allocation of the Settlement Funds. Co-Lead counsel subsequently corresponded with this Class Member explaining the allocation. [2] The Court has been advised that only one opt-out case has been filed and there were 51 requests to be excluded from the Class, [3] approximately half of which were non-U.S. companies. This further demonstrates that the Settlement, Plan of Distribution and Interim Award of Attorneys' Fees are fair and reasonable. *See Slaughter*, 2017 U.S. Dist. LEXIS 123535, at *5, 7-8.

2 *See* Declaration of Michael J. Freed In Support of Plaintiffs' Motion for Final Approval of: (A) Settlement with Defendants International Paper Company, Temple-Inland Inc., and Weyerhaeuser Company; (B) Interim Award of Attorneys' Fees; and (C) Plan of Distribution. Dkt. No. 1409-1, ¶ 6.

3 The Court certified the Class in March 2015, and notice of pendency of the litigation was properly

issued to the Class in 2016, with all requests for exclusion to be postmarked by December 5, 2016, subject to limited exceptions approved by this Court. For this reason, Class Members were not provided with an additional opportunity to opt-out of the Settlement. If Class Members did not wish to be bound by the Settlement or other actions taken in this case, they should have requested to be excluded from the Certified Class by December 5, 2016.

VII. DISMISSAL OF ACTION AND RELEASE OF CLAIMS

7.1 As to the Settling Defendants and other Releasees only, any and all currently pending class action lawsuits directly related to the subject matter of this litigation are dismissed with prejudice and in their entirety, on the merits, and without costs, except as provided for in the Settlement Agreement. This dismissal shall not affect, in any way, Releasors' right to pursue claims, if any, outside the scope of the Release set forth in the Settlement Agreement.

7.2 The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that Final Judgment should be entered and further finds that there is no just reason for delay in the entry of Judgment, as a Final Judgment, as to the parties to the Settlement Agreement. Accordingly, the Clerk is hereby directed to enter Judgment forthwith as to the Settling Defendants.

7.3 Upon the occurrence of the Effective Date, Releasees shall be completely released, acquitted and forever discharged from the Released Claims by Releasors.

7.4 This Final Judgment does not settle or compromise any claims by Plaintiffs or the Class against the Settling Defendants or other persons or entities other than the Released Claims against Releasees by Releasors, and all rights against Releasees or any other Defendant or other person or entity are specifically reserved.

7.5 Without affecting the finality of this Final Judgment, the Court retains exclusive jurisdiction for the purposes of: (a) enabling any of the Settling Parties to apply to this Court at any time for such further orders and directions as may be necessary and appropriate for the construction or carrying out of the Settlement Agreement and this Final Judgment, (b) for the enforcement or compliance herewith, and (c) for Co-Lead Counsel to apply to the Court for further payment of fees or to obtain a disbursement for payment of expenses from the Settlement Fund as provided in the Settlement Agreement. SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 5247928, 2017-2 Trade Cases P 80,167

End of Document

EXHIBIT G

2009 WL 1709050
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

In re ORACLE CORPORATION SECURITIES LITIGATION.

No. C 01–00988 SI.
|
Related Cases Nos. C 01–01237–SI, C 01–01263–SI.
|
June 19, 2009.

West KeySummary

1 **Securities Regulation** Causation; existence of injury

Software company shareholders failed to present evidence sufficient to establish that alleged misrepresentations of company and certain of its officers and executives about new software product were a substantial cause of the decline in value of company's stock, as required to establish loss causation under Rule 10b–5. Although the day before software company's stock price dropped software company disclosed an earnings miss, there was no evidence that, through the earnings miss disclosure, company revealed previously concealed information about the new product or that analyst reports about the announcement linked the miss in company's applications earnings to previously concealed deficiencies with the new software. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5.

6 Cases that cite this headnote

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

SUSAN ILLSTON, District Judge.

***1** On February 13, 2009, the Court heard oral argument on defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. Having considered the arguments of the parties, their papers, the cases submitted after oral argument, and for good cause shown, defendants' motion is GRANTED and plaintiffs' motion is DENIED.

BACKGROUND

1. Procedural Background

This action was filed in March of 2001. Plaintiffs, a number of purchasers of Oracle stock, allege that Oracle Corporation and three of its top executive officers [1] violated section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b–5, promulgated thereunder. Plaintiffs further allege control person liability against the individual defendants under section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), and that Henley and Ellison are liable for contemporaneous trading under section 20A of the Exchange Act, 15 U.S.C. § 78t–1(a). After certification and consolidation of related actions, a series of dismissals and filings of amended complaints ensued until, in March 2003, this Court [2] dismissed the revised second amended complaint with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), finding that the allegations did not create a strong inference that allegedly false statements were known to be false when made. [Docket No. 166] Plaintiffs appealed, and in November of 2004, the Ninth Circuit reversed the dismissal, holding that the operative complaint met the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"). *See Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226 (9th Cir.2004).

1 Lawrence J. Ellison (Chief Executive Officer), Jeffrey O. Henley (Executive Vice President and Chief Financial Officer), and Edward J. Sanderson (Executive Vice President).

[2] This case was originally assigned to the Honorable Martin J. Jenkins. It was reassigned to this Court after Judge Jenkins' resignation in April of 2008.

On September 2, 2008, this Court issued an order denying plaintiffs' motion for partial summary judgment on the question of whether defendants made false or misleading statements regarding Suite 11i and the company's financial results for 2Q01. The Court also granted in part and denied in part plaintiffs' motion for sanctions. The Court held that plaintiffs are entitled to adverse inference instructions with regard to two categories of evidence: defendant Ellison's email files, and materials created during preparation for the book *Softwar.* The Court determined that it is appropriate to infer that the emails and *Softwar* materials would demonstrate Ellison's knowledge of, among other things, problems with Suite 11i, the effects of the economy on Oracle's business, and problems with defendants' forecasting model.[3] The Court held that it would take these adverse inferences into account when deciding the parties' summary judgment motions and directed the parties to revise their briefs in light on this ruling.

[3] The Court noted that these inferences alone would not assist plaintiffs on all elements of their § 10(b) claims, including particularly the element of loss causation. *See* Sept. 2, 2008 Order, at 12. [Docket No. 1478]

Now before the Court are defendants' revised motion for summary judgment, plaintiffs' revised motion for partial summary judgment against defendant Ellison, and seven *Daubert* motions to preclude expert testimony.

2. Factual Background[4]

[4] The word "voluminous" does not do justice to the record in this case. Defendants have numbered their exhibits sequentially. For ease of reference, the Court refers to their exhibits as DX___. Plaintiffs have used a variety of different numbering systems. The Court refers to exhibits filed in support of plaintiffs' motion for summary judgment against Ellison as PSJM ___, to the exhibits filed in support of plaintiffs' reply as PReply___, and to the exhibits filed in support of plaintiffs' opposition to defendants' motion for summary judgment as POpp.___.

***2** Oracle is the second largest software company in the world. This case arises from plaintiffs' claims that Oracle and certain of its officers and executives made false and misleading statements about a new product, issued inflated earnings reports for the second quarter of fiscal year 2001, issued a false and misleading forecast about the company's financial condition for the third quarter of fiscal year 2001, and falsely stated during the third quarter that the company was not being affected by the slowing economy. The four quarters of Oracle's 2001 fiscal year were: from June 1 to August 31, 2000 ("1Q01"); from September 1 to November 30, 2000 ("2Q01"); from December 1, 2000 to February 28, 2001("3Q01"); and from March 1 to May 31, 2001 ("4Q01").

A. Oracle's statements about the functionality of Suite 11i.

In May 2000, Oracle released its Applications Suite 11i ("Suite 11i"). "Enterprise applications" are computer programs used to help companies automate their business processes. Enterprise resource planning ("ERP") applications perform functions such as accounting, human resources, and manufacturing. Customer relationship management applications ("CRM") perform functions such as managing call centers. Through the late 1990s, businesses that used enterprise applications software could not obtain ERP and CRM applications from the same vendor. Customers generally followed the "best of breed" strategy, buying different applications from several vendors. They would achieve "systems integration" by hiring software engineers to write custom code that would allow their applications to run together. Suite 11i was marketed as a product that would combine ERP and CRM applications. *See generally,* Decl. of Lawrence J. Ellison in Supp. of Defs. Mot. for Summ. J. ¶¶ 15, 16 ("Ellison Decl."). [Docket No. 932]

Suite 11i was first available for sale in 1Q01. In 1Q01 and 2Q01, Oracle reported a total of $435 million in revenue from applications licenses, marking increases of 42% and 66% over the same quarters in the prior year (the "year over year" comparison). DSJM 25 at 973930, 26 at 976820. In 3Q01, Oracle reported $249 million from applications licenses, a year over year increase of 25%. DSJM 27 at 977030. Plaintiffs contend that Oracle released Suite 11i prematurely, that the parts were neither designed nor engineered to work together, that it did not work in multiple different languages, and that it generally did not work correctly. According to plaintiffs, Oracle officials who knew of these deficiencies nonetheless made repeated statements to the public that misrepresented the functionality of Suite 11i. In the complaint and in the various memoranda concerning the summary judgment motions, plaintiffs cite to the following statements

as constituting material misrepresentations about Suite 11i by officers of Oracle.

- On November 29, 2000, Ellison made the following comments at a conference:

***3** The right model for enterprise software is "Here are all the pieces. They've all been engineered to work together. No systems integration required. *You can install it in a matter of months in the largest and most complex operations. All the pieces are there:* marketing, sales, web store, service, internet procurement, auctioning, supply chain automation, manufacturing, human resources, everything. *And all the pieces fit together."*

...

So in the early stages—the very early stages of this release 11i, we're saying, "We're right. The rest of the world is wrong;" where there's all this controversy where we can't show lots and lots of companies up and running—big companies up and running—they're just beginning to come live now, already we're getting tremendous traction in the market. And *it will be far and away the biggest success in the history of our company, much bigger than the database* .

...

We're trying to make this very, very simple. *You engineer all the pieces to fit together, they come out of the box, and all the pieces fit together.* It's still hard to install. You still have to convert your data and train people and do stuff. It's still not 15 minutes. It's still a real project to install this. This is taking us 6 months to get just the first factory up and running at General Electric. It [is] still not like you just walk in—it's not like installing a new word processor. It's still pretty complicated stuff.

...

[A]nd we're very close. At some time over the next few months, it'll click. I'm serious. *We'll win every deal.* Every deal.

...

[Y]ou can get a small team to build an auctioning system over at Commerce One. You get a small team to build internet procurement over at Ariba. But you can't get a large team to build all of those things such that all of the pieces fit together. And it is a bigger job—you know, building each one of those separately is a smaller job than building each one of those together that work together. That's a much bigger job. But we are bigger.... Our engineering teams are larger. And we've done it. *The pieces actually work together.* And the barrier to entry, I think, is insuperable. I don't think anyone else can do it.

POpp. 405 at 12–14, 37–38, 40, 43–44 (quoted in Plaintiffs' Opposition at 12; plaintiffs cite only the underlined portions of these statements).

- At the December 14, 2000 conference call with analysts, Ellison said, *"[Y]ou can buy our complete E–Business Suite, where all the pieces are designed and engineered to fit together, and no systems integration is required. It's up and running in months. You get the savings in months. It costs you less, and it takes less time to install."* "Demonstrations, we're still tweaking those, we got those all ready now. We finished up all the training ... we're working on partner training. So, yes, I think where we sit right now we're in pretty darn good shape."[5] POpp. 26, 234430, 234436 (quoted in Plaintiffs' Opposition at 13).

[5] The speaker of the latter quote is identified only as "Male."

***4** - Mark J. Barrenechea said at a presentation on February 6, 2001, "I think our applications are written in 23 languages. So not only do we have, you know, for example, an E-business Suite, which I'll tell you more about. But it's *basically ERP and CRM all integrated together.... But we also have taken care of the localization requirements of all these countries around the world as well."* POpp. 156, 3285 (quoted in Plaintiffs' Opposition at 13).

- An Oracle "Technical White Paper" by Mark J. Barrenechea, dated February 6, 2001, reads, *"To install the Oracle CRM suite, no systems integration is required. And because the CRM suite consists of true Internet applications, every application works in every country, every major language, and every major currency."* POpp. 155 at 106691 (quoted in RSAC ¶ 63).

- On February 13, 2001, Sanderson said at a conference, "I think our applications are written in 23 different languages. So not only do we have, you know, for example, an E–Business suite ... but it's *basically ERP and CRM all integrated together.*

> But it's written in 23 different languages, including Spanish Spanish and Latin American Spanish, Portugal Portuguese and Brazilian Portuguese, as being four languages. *But we also have taken care of the localization requirements of all these countries around the world as well."* POpp. 156 (quoted in Plaintiffs' Opposition at 13).

- On February 21, 2001, Ellison said at the "AppWorld" Conference: *"In fact, we recommend that you start with, you try a component of the suite and then you add it in. Now the nice thing is it's like Lego blocks. Once you have one piece in. the other pieces just snap together. There's no systems integration required.... You just basically turn it on or snap it together." "It is absolutely, all the pieces within the suite are literally plug and play."* POpp. 438, 14:54:52 (quoted in Plaintiffs' Opposition at 13).

B. Defendants' statements about Oracle's financial results for 2Q01.

In a December 14, 2000 press release, Oracle announced 2Q01 earnings of $0.11 per share and 66% growth in sales of Suite 11i applications. POpp. 105, 019764. According to plaintiffs' expert D. Paul Regan, Oracle arrived at the $0.11 figure for per share earnings through an improper accounting method. Decl. of Shawn A. Williams in Supp. of Expert Report of D. Paul Regan, ("Regan Report") ¶ 39. In Regan's opinion, the accurate figure for Oracle's earnings per share was $0.10. *Id.* ¶ 41. By inflating its earnings by a penny, Oracle was able to "beat Wall Street," i.e. exceed the $0.10 earnings per share that analysts had projected. *Id.* Regan also opines that Oracle fabricated the 66% figure for growth in Suite 11i applications. In his opinion, the correct figure was 54%. *Id.* ¶ 62.

C. Oracle's forecast for 3Q01

On December 14, 2000, Oracle also issued its public forecast (or "guidance") for 3Q01. Oracle predicted total license revenue growth of 25%, database revenue growth of 15%–20%, applications revenue growth of 75%, and earnings per share ("EPS") of $0.12. PSJM 1 at 3221–22.

***5** Oracle based its 3Q01 guidance on its internal forecasting method. Oracle used what it calls a "bottom-up" method for deriving its internal forecasts. It began with information from Oracle's salespeople, which was incorporated into a summary of all deals Oracle was working on at a given time. DX 59 at 74.[6] Using a computer program called Oracle Sales Online ("OSO"), salespeople would enter the account names of all ongoing deals, the potential dollar amount of each potential sale, and their predictions for when each sale would likely close. *Id.* at 75. The sum of all sales that could close in a quarter—including those that are about to close and those that are still just leads—are referred to as the "pipeline." DX 60 at 93. Regional managers reported information entered by sales representatives in their regions to their supervisors. DX 59 at 75–76. Supervisors recognized that salespeople had a tendency to "sandbag," i.e. significantly underestimate the size of their projected sales in order to ensure that they would meet or exceed expectations. DX 63 at 566–67; 64 at 101. The forecasting method therefore allowed supervisors to take into account, in addition to data in OSO, their own judgment of what sales were likely to be. *Id.* at 565–67. Their judgment was based on direct contact with regional managers, sales representatives, and customers. *Id.* Information was relayed in this way up to the heads of Oracle's business units, each of which would make a forecast for its unit. (For software licensing, those units were North American Sales ("NAS"), Oracle Product Industries ("OPI"), and Oracle Services Industries ("OSI").) The business units would submit their forecasts to Oracle's financial department, which would consolidate them. DSJM 65 at 102–3.

6 Plaintiffs obiect that defendants' characterization of this and other deposition testimony is misleading. The Court has relied on the underlying deposition testimony, not defendants' characterization.

Jennifer Minton, Senior Vice President of Global Finance and Operations, played a central role in the forecasting process by consolidating all the field forecasts into a single report. *Id.* 104–05. Minton then adjusted the consolidated field report to create the "Upside" report, which was Oracle's consolidated or "potential" forecast. *Id.* She arrived at the Upside report by adjusting the field data based on her own judgment, which was informed by her weekly meetings with business unit representatives and her conversations with field finance representatives. *Id.* at 123–23. Another factor Minton considered when preparing the Upside report was the "conversion ratio" (the percentage of the pipeline that was actually converted into sales) from the corresponding quarter in the prior year. *Id.* at 122. Although Minton's adjustment was referred to as "Upside," she would also adjust the consolidated report downward if necessary (for example, if she found out that there had been error in the forecasts submitted to her, or if the historical conversion ratio suggested

that the conversion rate for the current quarter would be lower than projected). *Id.* at 137.

***6** During the time period at issue here, Oracle's method for generating the potential forecast had been a reliable but conservative predictor for the company's performance: in the seven quarters before 3Q01, Oracle had met or exceeded its forecast and analyst projections for quarterly earnings per share ("EPS"): [7]

[7] *See* evidence summarized at DX 42, 43. Plaintiffs object to these exhibits as improper summaries of voluminous evidence under Federal Rule of Evidence 1006. The Court disagrees. The declarations of Ivgen Guner [Docket No. 934] and Bruce Deal [Docket No. 931] lay sufficient foundation for these exhibits to be admissible as summaries of voluminous evidence. Plaintiffs' objection is OVERRULED.

Quarter	Date of Estimate	Oracle Internal Forecast EPS	Analyst Forecast EPS	Actual EPS
4Q99	Mar.1999	0.0693	0.080	0.090
1Q00	June 1999	0.0401	0.040	0.040
2Q00	Sept.1999	0.0495	0.050	0.065
3Q00	Dec.1999	0.0553	0.070	0.085
4Q00	Mar.2000	0.1375	0.130	0.155
1Q01	July 2000	0.0761	0.070	0.085
2Q01	Sept.2000	0.0966	0.090	0.110 [8]

FN8. As noted, the accurate figure for Oracle's 2Q01 earnings per share is disputed.

Another dynamic which affected Oracle's ability to forecast its sales is a phenomenon called the hockey-stick effect. [9] Knowing that software vendors report their earnings on a quarterly basis, purchasing customers expect that they can extract the lowest possible price for the product by waiting until late in the quarter to finalize deals. DX at 70. This effect is even more exaggerated at the end of the fiscal year, so the most prominent hockey stick effect occurs in the forth quarter. *Id.* Consequently, Oracle generates most of its new license revenue in the last days of each quarter. *Id.*

[9] Imagine quarterly sales plotted on a chart with a sharp upswing at the end of the quarter. The shape resembles a hockey stick.

Returning to the public guidance for 3Q01 issued on December 14, 2000, Minton's Upside report for December 11, 2000 reflected potential total license revenue growth of 33% and potential EPS of $0.1282. *See* DX 1 at 213092. Oracle's policy was to round earnings to the nearest penny, *see* DX 68 at 329:1–4, so the public guidance from the Upside report should have been $0.13. Instead, Oracle issued a more conservative estimate: earnings per share of $0.12 and total license revenue growth of 25%. Oracle's December 11 "pipeline report" indicated that its total software pipeline was 52% larger than the previous year. DX 11.

D. The Trades

Between January 22 and 31, 2001 Ellison sold 29 million shares of Oracle stock. This amounted to 2.09% of his Oracle holdings. On January 4, 2001, Henley sold 1 million shares of Oracle stock, about 7% of his total Oracle shares. Ellison has filed a declaration stating that he sold his stock in order to exercise options that were going to expire within nine months and could only be sold during certain trading windows within that period. *See* Ellison Deck ¶¶ 9–13 [Docket No. 932]

E. The Crash

On February 25, 2001, three days before 3Q01 ended, Oracle officials received notification that major deals scheduled for 3Q01 had been lost. For example, Oracle's General Business West area reported that it had lost 70 transactions, worth about $10 million, in the past few days. NAS and OSI similarly reported that they were failing to close major deals. Defendants contend that the news of failed sales was a surprise and that until the very last days of the quarter, they had expected Oracle to meet its guidance. According to defendants, the hockey stick effect led them to expect that the majority of 3Q01 deals would be closed at the end of the quarter; the shortfall was caused when major customers decided at the last minute to postpone their purchases. Plaintiffs vigorously dispute defendants' version of the facts. According to plaintiffs, Oracle's internal indicators alerted officials throughout the quarter that it would miss its guidance and that the likelihood of a shortfall was apparent to insiders, but not disclosed to the public.

F. The March 1, 2001 announcement

***7** In a press release dated March 1, 2001, Oracle made the following disclosures "based upon preliminary financial results" for the third quarter of fiscal year 2001: Oracle's earnings per share would be $0.10 (as opposed to the $0.12 it had predicted on December 14, 2000) and applications growth would be 50% (the prediction was 75%). POpp. 196. The press release quoted Ellison as saying "License growth was strong in this first two months of Q3, and our internal sales forecast looked good up until the last few days of the quarter. However, a substantial number of our customers decided to delay their IT spending based on the economic slowdown in the United States. Sales growth for Oracle products in Europe and Asia Pacific remained strong. The problem is the U.S. economy." *Id.* Also on March 1, 2001, Ellison and Henley held a conference call with investors in which they discussed Oracle's earnings miss.

G. The drop in Oracle's stock price

On March 2, 2001, Oracle's stock price dropped to a closing price of $16.88 per share from a closing price of $21.38 per share on March 1, 2001. POpp. 168, ¶ 43. Relying on the expert opinion of Bjorn I. Steinholt, plaintiffs characterize the drop as "highly statistically significant." *Id.* [10]

10 The Court recognizes that defendants move to exclude the expert report and testimony of Steinholt on damages and loss causation.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving party need only demonstrate to the Court that there is an absence of evidence to support the non-moving party's case. *See id.* at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In deciding a summary judgment motion, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment." *Id.* The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir.1979).

DISCUSSION

1. Defendants' Motion for Summary Judgment

***8** Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Pursuant to this section, the Securities and Exchange Commission promulgated Rule 10b–5, which makes it unlawful "[t]o make any untrue statement of fact or to omit to state a material fact necessary to make the statements made, in light of all the circumstances in which they were made, not misleading." 17 C.F.R. § 240.10b–5. "The scope of Rule 10b–5 is coextensive with the coverage of § 10(b)." *SEC v. Zandford,* 535 U.S. 813, 815 n. 1, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002). "In atypical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta,* 552 U.S. 148, 128 S.Ct. 761, 768, 169 L.Ed.2d 627 (2008) (citing *Dura*

Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)).

Plaintiffs claim that defendants violated § 10(b) by: (1) falsely reporting Oracle's financial results for 2Q01; (2) misrepresenting the functionality of Suite 11i; (3) issuing forecasts for 3Q01 that had no reasonable basis; (4) repeating the 3Q01 forecast despite their knowledge of facts seriously undermining that forecast; and (5) denying the effects of the slowing economy on Oracle's business.

A. Objections to evidence [11]

[11] The parties raise numerous objections to evidence submitted in support of the instant motions. Unless otherwise discussed in this order, the Court has either not relied on the disputed evidence or has not used it for the purposes to which either party objects.

Plaintiffs rely on analyst reports and newspaper articles to prove that defendants made false statements about Suite 11i, repeated their 3Q01 forecast throughout the third quarter, and denied that the economic downturn was affecting Oracle. These documents constitute hearsay as they are out of court statements offered to prove the truth of the matter asserted: that Oracle officials made specific fraudulent statements to analysts. *See* Fed.R.Evid. 801(c). They are thus inadmissible and cannot be considered in support of plaintiffs' opposition at summary judgment unless they fall within a hearsay exception. *See In re Cirrus Logic Sec. Litig.,* 946 F.Supp. 1446, 1469 (N.D.Cal.1996) ("It is plainly unfair to hold defendants liable for the reporting of their statements by third parties without independent corroboration of the accuracy of the reported statements."); *see also In re Cypress Semiconductor Sec. Litig.,* 891 F.Supp. 1369, 1374 (N.D.Cal.1995) (excluding newspaper articles and analyst reports offered in securities litigation to prove that defendants made purportedly false statements) (citing *Larez v. City of Los Angeles,* 946 F.2d 630, 643 (9th Cir.1991) (holding that newspaper article offered to prove that defendant made statement quoted in article was hearsay)).

***9** Plaintiffs have failed to respond to defendants' objections to this category of evidence and have suggested no hearsay exception whereby the statements by Oracle officials contained in newspaper and analyst reports could be admitted. Accordingly, defendants' objections to the following statements are SUSTAINED:

i. Statements about Suite 11i

- After Oracle Executive Vice President Sandy Sanderson visited the offices of Salomon Smith Barney, the investment firm reported on January 10, 2001 that Suite 11i *"is pre-integrated and fully interoperable out of the box, helping to lower consulting costs and time-to-value."* POpp. 211 (quoted in RSAC ¶ 58) (Plaintiffs also offer this exhibit to prove that Sanderson reiterated the 3Q01 guidance. It is also inadmissible for that purpose.)

  - On February 9, 2001, *Bloomberg News* reported, in an article headlined "Oracle Shares Fall on Concern Economic Earnings Outlook May Turn Grim," *"Oracle is still upbeat about its prospects for earnings growth, which will be fueled by a new suite of Internet-friendly business software dubbed Oracle 11i. spokeswoman Jennifer Glass said. 'We haven't changed our projections at all.' Glass said. 'This slowdown is going to provide new opportunities for Oracle as companies need to streamline and be more strategic about the technology they buy.' "* POpp. 377, 141679 (quoted in RSAC ¶ 65(c)). (Plaintiffs also offer this exhibit, labeled PSJM 3, at ex. D, to prove that Glass stated that the economy was not having a negative effect on Oracle's business. It is also inadmissible for that purpose.)

ii. Statements about the effects of the economy on Oracle's business

- *Bloomberg News* included the following quote in an article that ran on December 14, 2000, *"The economy is slowing.' Henley said in an interview. 'It's just not having a negative impact on our business.' "* PMSJ 3 at ex. A.

  - A December 15, 2000 *Bloomberg* article reported: *"The economic slowdown isn't hurting Oracle,* said Oracle Chief Executive Larry Ellison, *because the company has spent the past three years updating its product line to focus on software that helps companies use the Internet to cut costs and boost efficiency."* PMSJ 3 at ex. B (quoted in RSAC ¶ 45(d)).

  - A January 10, 2001 report by Salomon Smith Barney: *"Oracle sees robust demand for both its database and applications business.... Oracle says it is also seeing sustained demand for its*

database product, despite industry-wide concern over contracting IT budgets." PMSJ 7.

• January 10, 2001RealMoney.com interview quoting Sanderson as responding to question about whether Oracle could repeat its performance on applications sales, "You know, it's a big hill to climb. Every year we climb that hill. I expect we'll do it again. *Our pipelines are strong, we're well positioned from a products perspective, and so it's all about execution."* POpp. 208 (also PMSJ 6 at 141677).

***10** • A January 11, 2001 *Bloomberg* article reported, *"Company spokeswoman Stephanie Aas today said Oracle has yet to see any signs that its business is being hurt by the economic slowdown or reported cuts to information-technology budgets."* PSJM 3 at ex. C (also POpp. 207 at ex. C) (quoted in RSAC ¶ 60).

• A February 7, 2001 First Union Securities report stating, *"Oracle is not seeing the effects of a slowing economy at this point, but next several weeks will be critical."* POpp. 215 (quoted in RSAC ¶ 65(a)).

• A February 8, 2001 First Union Securities report that stated, *"Oracle is not seeing the effects of a slowing economy* at this point, but next several weeks will be critical. *CFO* Henley commented that *Oracle is not seeing a decline in sales at this point as a result of reduced corporate spending, although this issue has plagued several other large technology companies. While the sales pipeline apparently shows no signs of weakness at this point,* we note the next several weeks will be critical for the company as many potential customers will likely make decisions to buy or defer purchase during the activity-intensive final weeks of 3Q01." POpp. 209 at 91531–32 (also PSJM 5).

• Deutsche Banc reported on February 8, 2001, after a meeting with Henley, *"According to management, it has yet to see macro-related weakness in its business.* That said, the full impact of the current macro environment may not be evident until the end of the quarter, as revenue is typically back-end loaded for Oracle." *"Barring a severe economic downturn, management sees continued growth driven by strong demand in key segments such as supply chain, customer relationship management, and collaboration."* POpp. 208 (also PSJM 4 at 91536) (quoted in RSAC ¶ 65(b)).

• Portions of various reports on comments made by Henley at the AppsWorld conference in New Orleans on February 21, 2001. *See* PSJM 8 (POpp.216), 10 (POpp.213), 11 (POpp.214), POpp. 212 (PSJM 9). [12]

12 Portions of this exhibit would be admissible; this is discussed in more detail *infra.*

iii. Intra-quarter repetitions of the 3Q01 forecast

• January 10, 2001RealMoney.com interview (described above: POpp. 208 / PMSJ 6 at 141677).

• Salomon Smith Barney report dated January 10, 2001 (described above: POpp. 211).

• January 11, 2001 and February 9, 2001 *Bloomberg* articles (described above: PSJM 3 at ex. C / POpp. 207 at ex. C).

• February 7, 2001 First Union Securities report (described above: POpp. 215).

• February 8, 2001 Deutsche Banc report (described above: PSJM 4 at 91536 / POpp. 208).

• February 8, 2001 First Union Securities report (described above: POpp. 209 at 91531–32 / PSJM 5).

• Portions of various reports on comments made by Henley at the AppsWorld conference in New Orleans on February 21, 2001. *See* PSJM 8 (POpp.216), 10 (POpp.213), 11 (POpp.214), POpp. 212 (PSJM 9).

B. Functionality of Suite 11i

i. Falsity

It was no secret before and during 3Q01 that Suite 11i was an imperfect product. The following problems were discussed by analysts and reported in financial publications: [13]

13 These reports are not hearsay to the extent they are offered not for their truth but to prove the reports were made.

***11** • *The inherent instability of a new, untested product, see* DX 127 at 307330 (May 8, 2000 *Business Week* article: "Even after the suite ships, consultants such as Gartner Group Inc. warn corporate customers that it probably won't be stable enough to handle the most crucial jobs until the end of the year."); DX 207 (November 15, 2000 *Business Wire* press release entitled "Oracle Applications Users Ask Oracle Corp. Executives about Quality, Customer Support, Functionality and Pricing:" "11i is not yet working optimally."); DX 130 at 5916 (December 13, 2000 CIBC Markets Corp: "We also expect that customers would prefer not to be among the early adopters, waiting until some of the initial bugs get worked out of the software, which may take a quarter or so."); DX 210 at 309148 (February 22, 2001 CIBC World Markets report: "[T]he current version of 11i is noted to have many [ ] bugs (close to 5,000).... We think that the delays in the upgrade cycle pose a near-term risk for applications sales");

- *Unfavorable comparisons with best of breed products, see* DX 245 at 85851 (September 15, 2000 Deutsche Banc report: "some 11i modules still may fall short on functionality compared with best-of-breed rivals");

- *Lack of references, see* DX 149 at 419950 (November 8, 2000 Robertson Stephens, Inc: "Although the company has announced a number of 11i customer wins, none of the bigger names, including BellSouth, GE, and Lucent, have gone live yet. We believe it will take several more quarters for the company to implement these customers and to use them as references to win additional business."); DX 208 at 419977 (December 12, 2000 J.P. Morgan Equity Research: "We believe Oracle's 11i e-business suite continues to have bugs thereby limiting the number of notable customer references for the new product.");

- *Lack of integration, see* DX 140 at 9467 (December 4, 2000 GartnerGroup report: "Release of Oracle Applications r.11i has prompted inquiries about its robustness ... [Oracle's] track record of facilitating integration between multiple products is not strong, nor is Oracle building its ERP and ERP-complimentary applications ... for easy integration with other products.... 11i as a complete ERP suite remains suitable primarily for risk-tolerant, early-adopter-oriented enterprises.").

The fact that problems with Suite 11i were known to the market raises a serious question as to whether plaintiffs can show that any of defendants' purportedly false statements about the product were materially misleading. In a fraud-on-the-market case such as this, "an omission is materially misleading only if the information has not already entered the market." *In re Convergent Techs. Sec. litig.,* 948 F.2d 507, 513 (9th Cir.1991) (citing *In re Apple Computer Sec. Litig.,* 886 F.2d 1109, 1114 (9th Cir.1109)). "If the market has become aware of the allegedly concealed information, 'the facts allegedly omitted by the defendant would already be reflected in the stock's price' and the market 'will not be misled.' " *Id.* (quoting *In re Apple Computer Securities litig.,* 886 F.2d at 1114).

***12** The Court need not decide this issue, however, because the Court agrees with defendants that there is not a genuine factual dispute on loss causation.

ii. Loss causation

The parties dispute plaintiffs' burden at summary judgment in demonstrating the existence of a factual dispute on loss causation, the sixth element of a private § 10(b) action. Loss causation is the causal connection between the defendant's material misrepresentation and the plaintiff's loss. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.,* 540 F.3d 1049, 1062 (9th Cir.2008) (citing *Dura,* 544 U.S. at 342). "A plaintiff bears the burden of proving that a defendant's alleged unlawful act 'caused the loss for which the plaintiff seeks to recover damages.' " *In re Gilead Sciences Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir.2008) (quoting 15 U.S.C. § 78u–4(b)(4)). Put another way, "[t]o establish loss causation, 'the plaintiff must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the plaintiff.' " *Id.* (citing *In re Daou Sys., Inc.,* 411 F.3d 1006, 1025 (9th Cir.2005)); *see also Metzler,* 540 F.3d at 1063 (the plaintiff must show that "the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses") (discussing *Daou*). "The misrepresentation need not be the sole reason for the decline in value of the securities, but it must be a 'substantial cause.' " *Gilead,* 536 F.3d at 1055 (citing *Daou,* 411 F.3d at 1025).

Analysis of loss causation calls on courts to perform a "balancing act" between allowing plaintiffs to link "each and every bit of negative information about a company to an initial

misrepresentation that overstated that company's chances for success" and exacting such a high standard as to "eliminate the possibility of 10b–5 claims altogether." *In re Williams Sec. Litig.,* 558 F.3d 1130, 1140 (10th Cir.2009). At one end of the spectrum, it is clear that the plaintiff need not prove that the defendant admitted a fraud. *Metzler,* 540 F.3d at 1064. At the other extreme, it is equally clear that the plaintiff must do more than show that the market was "merely reacting to reports of the defendant's poor financial health generally." *Id.* at 1063.

Plaintiffs argue that Oracle officials' misrepresentations that Suite 11i was fully functional led to unrealistically high earnings expectations, which were corrected when the market recognized the true state of Oracle's flagship product on March 1, 2001. According to plaintiffs, the March 1 analyst call "disclosed the negative effects of 11i" and "communicated to investors that issues concerning the functionality, i.e., bugs and lack of stability of Suite 11i ..., had not in fact been cured as defendants had reported at the end of 2Q01." Pl. Opp. to Def. Mot. for Summ. J. at 46.

This is not an accurate characterization of the content of the phone call. In fact, Ellison repeatedly told analysts that the miss in applications sales was caused by nervousness about the slowing economy, not problems with Oracle's products:

> ***13** It really appears to be economic factors, where people actually need the database, where actually they were getting ready to sign deals, people just delayed. Where there is no question they were going to buy, they were going to go ahead and buy but they are trying to push it out as long as possible.... [T]his was not a matter of they're not going to buy; they would just like to wait 30 days or 60 days. They're just looking at the economy. Everyone is trying to get a read on this economy and everyone is being slow to act in light of the economy.

DX 393, 419804–05. Later in the call, Ellison said:

> I do know that some of these transactions can only be deferred for a short period of time. Because these are projects that are going through an implementation cycle where they actually are using the software, or about to start using the software so they have to buy. On the other hand, there are, you know, other projects that can be deferred for three or six months.

Id. at 419807–08. He repeated that applications sales were delayed only temporarily: "They can only delay so long ... [ ] because they're actually using the software and the applications are growing." *Id.* at 419808. And once more:

> All the indications that we have are that people want to do these projects. People want to put in the e-business suite. They're actually—if you look at budgets, the database budgets, are going up with the exceptions of the dot.coms. The database budgets are going up everywhere. So all of that looks very, very good. It's just this umbrella of uncertainty that is causing people to defer decisions.

Id. at 419812. When asked for his impression for now long it was taking for CEOs to decide whether to buy the "suite" (presumably Suite 11i), Ellison responded:

> Well, again, some of these guys are moving incredibly fast. So we have an example of going from the first meeting to deal in 30 days or 60 days. We've got several examples of those. We got, you know, my favorite example which I cited, GE Power, from contract to live on manufacturing financial e-business suite, redoing all the business processes in five months.

> So we are moving very, very quickly with a variety of customers.

Id. at 419814. Ellison also emphasized that Oracle had failed to close deals because of the economy, not because the company was losing out to competitors: "[T]hese were not cases of deals that we lost competitively, or deals are going away. They're just being shut down. At some point they're you know, the customers are going to have to buy." *Id.* at 419815. He repeated this point at the close of the conversation: "These are not deals that we lost competitively. These are not deals where they decided not to buy. These are literally deferrals because of economic uncertainty.... [A]s we wear on in Q4 a bunch of these deals should come in." *Id.* at 419817. At no point during the phone call did Henley or Ellison say that there was anything wrong with the Suite 11i or suggest that the cancelled sales were due to anything other than customers' fear of making a big investment at a time when the economy was uncertain.

***14** Plaintiffs also claim that analyst reports after the March 1 conference call demonstrate that the market understood the announcement to have revealed problems with Suite 11i. Defendants respond with overwhelming evidence that the market understood the announcement as disclosing that the earnings shortfall was caused by the economic downturn. *See* DX 406 (Banc of America Securities), 407 (Bloomberg), 410 (Salomon Smith Barney), 409 (Lehman Brothers), 465 (FAC/Equities), 466 (Prudential), 467 (Wit SoundView). [14] Defendants also cite evidence that because analysts interpreted the earnings to be a bad "omen" for other applications vendors, *see* DX 410 at 91361, they downgraded their ratings across the enterprise software industry. *See* DX 451–57.

14 The analyst reports are not hearsay if offered to prove merely that the reports were made.

For the most part, plaintiffs do not accurately describe the evidence they cite in support of their argument that the market recognized the March 1 announcement as revealing problems with Suite 11i. Plaintiffs refer to a March 2, 2001 *Wall Street Journal* article as evidence that analysts attributed the miss to problems with Suite 11i. In fact, the article did not discuss Oracle's applications sales. The relevant portion reads:

> The reasons for the shortfall were at least as troubling to analysts as its magnitude. Oracle's database software, a mainstay product line used as the foundation for many other business programs, had flat to negative growth over the year-earlier period. While database sales have been slowing at Oracle for many quarters, analysts were surprised by the abruptness of the latest downturn.

POpp. 436. That is, the shortfall was "troubling" because it was due to slower sales in Oracle's "mainstay product line" of database software, not because there were problems with Oracle's new applications product.

The same article also reported that Oracle's application software had grown 50%, rather than the 75%–100% predicted. As Ellison and Henley did the day before, the writers attributed the shortfall to the slowdown in the dot.com sector:

> Oracle had already been hurt by a falloff in orders from dot-com start-ups, many of which used Oracle databases to build new Web services. The company had been counting on conventional companies taking up the slack, using Oracle software to develop new electronic-business applications and improve their internal efficiency.
>
> Still, the CEOs held off signing the purchase orders. "That was true, even where it was acknowledged that this deal would save the company money," Mr. Ellison said. "We have a lot of nervous senior executives looking at this economy and being very cautious."
>
> Bob Austrian, a Banc of America Securities analyst who had cut his numbers for Oracle earlier this week, said the announcement showed that "the economic downturn has become severe enough that it has become a shock. And shocks always impair purchasing decisions."

Id.

Plaintiffs' citation to a March 2, 2001 *Los Angeles Times* article is similarly unhelpful. Reporting on the earnings miss, the article repeated Ellison's representations that the shortfall

was due to the economy. It concluded, "In December, the company said it wasn't being hurt by the slowdown because corporations were buying its applications software to cut costs and boost efficiency." PReply 173. The writers did not comment on the functionality of Suite 11i.

***15** Out of the flurry of news and analyst reports on Oracle's earnings miss, plaintiffs cite only two that discussed problems with Oracle's applications products. The first is a March 2 report by the financial firm UBS Warburg. The writers thought that Oracle's announcement the day before had put too much emphasis on the economic slowdown and stated, "we believe there may have been further contributors." POpp. 426. According to UBS Warburg, the "major shortfall" came from the "flat to slightly negative" growth in Oracle's database business. *Id.* After a discussion of various factors other than the economy that might have contributed the database shortfall, the writers suggested that problems with Oracle's applications products could been a contributing factor:

> On a somewhat more positive note, the applications business did considerably better than the database business. Granted, the applications business missed our estimates as well, but growth for these products came in around 50% year over year.... We also believe that the weakness in Oracle's applications business is because the company's applications are not yet ready for prime time. At Oracle's applications conference last week, we learned that over 200 patches had been developed for the CRM product for the latest version. Furthermore, many customers we talked with indicated that although the CRM product showed promise, the SCM [15] products are not even on the radar. Although [f]eedback from these customers suggested that they were impressed with the idea of a fully integrated suite, we were unable to find any that had fully integrated and gone live on the suite.

15 Presumably "supply chain management."

POSJM 426. The second report is a March 16 market research summary by Banc of America Securities. Under the subheading "Are Oracle's problems entirely the economy? We don't think so," the writers state, "[o]n the applications side, especially in light of Oracle's weaker than expected 3Q applications growth, we believe the economy may only explain 20–30% of the weakness. The rest, in our view, is a result of the product set not yet reaching a competitive level of functionality, relative to best-of-breed vendors." PSJM 113 at 2710. [16]

16 As evidence that the market linked the shortfall to Suite 11i, plaintiffs also cite an e-mail from Oracle employee Karen Houston stating, "Over the past couple of weeks, several stories have been published on 11i product quality issues.... Additionally, we have seen several stories recently in the U.S. that link our lower than expected apps sales to quality issues of 11i." POpp. 420 at 158596. Defendants object that Houston's statement is hearsay to the extent that it is offered to prove the truth of what the news reports said. *See* Docket No. 1586. The Court agrees that Houston's repetition of the out of court statements in the news reports is inadmissible hearsay. In any event, the e-mail is dated March 21, 2001 and therefore is not evidence of how the market reacted to the March 1 disclosures. In addition, the e-mail does not indicate that the market learned of "product quality issues" with Suite 11i through the March 1 disclosures.

Plaintiffs also cite to the following passage from *Softwar: An Intimate Portrait of Larry Ellison and Oracle,* a profile by Matthew Symonds: "It didn't take a genius to see that not everything that was going on could be explained by the weakening economy and edgy CEOs waiting for 'visibility' to return. For anyone who wanted to see, there was mounting evidence that it wasn't only the economy that prospective Oracle applications customers wanted to see stabilize." PSJM 12 at 201. Defendants object that Symonds' book is hearsay. *See* Docket No. 1585. The Court agrees. Plaintiffs repeatedly cite to *Softwar* for the truth of the matters asserted

> therein but offer no basis for the admissibility of these statements. The Court also notes that Symonds' statement about what analysts said is hearsay within hearsay.
>
> Finally, plaintiffs cite what purports to be an e-mail chain (dated March 22, 2001) of Oracle employees commenting on a draft of an article. The cited portion of the article reads, "Oracle blamed the economic slowdown in the United States for affecting its business, with many of its enterprise customers deferring purchases. However its lowered sales performance across the board also stems from several factors unique to Oracle: database pricing, 11i quality and the suite approach to selling applications." PReply 177. Defendants object that Oracle e-mails about news reports are hearsay. *See* Docket No. 1586 at 5. The Court agrees that the e-mail is hearsay to the extent it is offered to prove what an article stated. In addition, it is also not evident when, if ever, the article was published. In any event, an article from March 22 is not probative of what the market learned from the March 1 disclosures. Defendants' objections to these documents are SUSTAINED.

These two reports, neither of which indicates that the writers learned new information about the functionality of Suite 11i through the March 1 conference call, are the closest plaintiffs come to citing evidence that the market recognized that quality problems with Suite 11i contributed to the miss in Oracle's applications forecast. The Court will assume for the sake of argument that a rational factfinder could conclude from these two reports that the market linked Oracle's miss to the following problems with Suite 11i: that it was "not yet ready for prime time" because it still required patches, that SCM products were not available, that customers had not yet "gone live" with Suite 11i, and that it was not competitive with "best of breed" products. The problem for plaintiffs is that none of these issues had been hidden from the market. As discussed above, defendants have cited abundant evidence that beginning with the release of Suite 11i and continuing through late February of 2001, public reports had discussed these deficiencies with the product. Thus, even those analysts who linked the miss to deficiencies with Suite 11i did not do so on the basis of information that had previously been hidden from the market.

***16** In sum, there is no evidence that on March 1, Oracle revealed previously undisclosed facts about Suite 11i to the market or that the market recognized the earnings miss as being caused by previously undisclosed problems with this product. Plaintiffs' only possible loss causation theory for Suite 11i is therefore that Oracle revealed the truth about Suite 11i on March 1 by announcing that the year over year growth in applications would be 50%, not the 75% the company had projected. Ninth Circuit precedent is clear, however, that an earnings miss *alone* is not sufficient proof of loss causation.

The missing causal link here is similar to that in *Metzler,* in which the alleged fraud involved the manipulation of student enrollment figures to obtain federal funding. The Ninth Circuit held that the plaintiffs had not pled loss causation because they had not alleged facts in support of their claim that a press release revealed the purportedly improper financial aid practices. *See* 540 F.3d at 1063 (plaintiffs must allege that the market learned of and reacted to the fraud, "as opposed to merely reacting to reports of the defendant's poor financial health generally."). It was not sufficient for the plaintiffs to point to a euphemistic reference in a press release to "higher than anticipated attrition" and allege that the market understood this statement to reveal that the defendant company had overstated its enrollments: "So long as there is a drop in a stock's price, a plaintiff will always be able to contend that the market 'understood' a defendant's statement precipitating a loss as a coded message revealing the fraud.... Loss causation requires more." *Id.* at 1064. Here, Henley and Ellison did not make even a euphemistic reference to problems with Suite 11i during the March 1 call. Instead, they repeatedly assured analysts that the only problem was the economy. As a matter of logic, Oracle cannot have revealed the fraud by repeating the purported misrepresentations about the functionality of Suite 11i.

The Ninth Circuit's decisions in *Gilead* and *Daou* confirm that loss causation requires more than a company's announcement of a missed financial projection. The fraud alleged in *Gilead* involved off-label marketing of a drug, a practice that purportedly accounted for 75% to 95% of the defendant company's revenue from the drug and inflated the company's stock price. 536 F.3d at 1058. The plaintiffs pled loss causation through their allegations that the company released an FDA warning letter that disclosed the off-label marketing, causing physicians to write fewer prescriptions for the drug, which in turn led to decreased revenues and ultimately to the company's announcement of lower than expected revenues, after which the stock price dropped. *Id.*

In *Daou,* the alleged fraud was that the company was reporting revenues before they were earned. *Daou* held that loss causation was established through the allegations that the defendants revealed "figures showing the company's true financial condition," including (1) that its operating expenses and margins were deteriorating, (2) that it would have to report a loss of $0.17 a share, and (3) the existence of $10 million in unbilled receivables in its work in progress account. 411 F.3d at 1026. Notably, the $10 million appeared as "the direct result of prematurely recognizing revenue." *Id.* After these revelations, an analyst noted, "You have got to question whether they are manufacturing earnings." *Id.* Thus, the plaintiffs properly alleged that the market recognized the disclosures as revealing the defendants' allegedly improper accounting practices.

***17** In conclusion, there is an absence of evidence that on March 1, Oracle revealed previously concealed information about Suite 11i or that analyst reports about the March 1 announcement linked the miss in Oracle's applications earnings to previously concealed deficiencies with Suite 11i. Plaintiffs' only possible theory for loss causation is that the earnings miss itself revealed the truth about Suite 11i to the market, but plaintiffs cite no case in which an earnings miss alone was sufficient to prove loss causation. Thus, the Court concludes that plaintiffs have not identified evidence that could lead a juror to conclude that defendants' alleged misrepresentations about Suite 11i were a "substantial cause" of the decline in value of Oracle's stock. *See Gilead,* 536 F.3d at 1055. The Court GRANTS defendants' motion for summary judgment on this issue.

C. Oracle's financial results for 2Q01

Plaintiffs contend that Oracle violated Generally Accepted Accounting Principles ("GAAP") in 2Q01 through two accounting frauds. The first alleged accounting fraud involved Oracle's method of accounting for customer overpayments.[17] According to plaintiffs' expert D. Paul Regan,[18] by 2Q01, Oracle had accumulated at least $144 million in "unapplied cash"—cash receipts that the company could not apply to an invoice. A significant amount of the unapplied cash was from overpayments made by Oracle's customers. Regan opines that Oracle improperly inflated its 2Q01 financial results by transferring the unapplied cash to its bad debt reserve and subsequently applying the overpayments to "debit memo" invoices. The debit memos made the overpayments appear to be refunded or "applied," creating the impression that Oracle had reduced its bad debt reserve by $20 million. The end result was that, in Regan's opinion, Oracle made an improper adjustment of $20 million to its revenue and pre-tax earnings, allowing the company to overstate its earnings per share by $0.01. *See* Regan Report.

17 Customer overpayments are caused by mistakes such as duplicate payments of an invoice, payments on amounts that were credited, amounts paid where the debt had been cancelled, and payments of unnecessary tax.

18 Defendants have not moved to exclude this expert opinion.

The second purported 2Q01 accounting fraud involved a deal with computer company Hewlett Packard ("HP"). According to Regan, Oracle improperly recognized $19.9 million in revenue and pretax earnings on November 30, 2000 (the last day of 2Q01). Regan opines that HP agreed to buy software that it did not need from Oracle and that it did so pursuant to an agreement that Oracle would buy $30 million in hardware from HP over the following quarter. In Regan's opinion, the evidence shows that products sold to HP under the agreement lacked a valid business purpose. This arrangement, according to Regan, allowed Oracle to overstate its 2Q01 earnings per share by $0.01. *Id.*

In sum, Regan opines that each of the two accounting frauds—overstatement of earnings related to the transfer of customer overpayments and the deal with HP—independently allowed Oracle to overstate its 2Q01 earnings per share by $0.01. Eliminating either one of these improper practices would have caused Oracle to report earnings per share of $0.10, rather than the $0.11 that it did report. *Id.*

i. Pleading

***18** As an initial matter, defendants argue that plaintiffs did not plead these theories of accounting fraud in the operative complaint and may not introduce them into the case at summary judgment. In their revised second amended complaint ("RSAC"), plaintiffs allege that in 2Q01, defendants "created phony sales invoices and improperly recognized revenue from past customer credits and overpayments it had held in reserve without informing its customers.... Oracle held the money in what it called its 'unapplied account.' " RSAC ¶ 8. Plaintiffs also allege that Oracle's practice was to not refund customer overpayments, or to do so only at the request of the customer. *Id.* ¶ 36. The Court finds that plaintiffs sufficiently pled debit memo

accounting fraud though these allegations. Defendants point out that the plaintiffs did not specifically allege that the customer overpayments were moved to Oracle's bad debt reserve. This distinction is not dispositive, however, as it can be expected that some details of an accounting fraud will materialize during discovery. The crux of plaintiff's theory was that Oracle created the appearance of revenue through improperly accounting for customer overpayments. This theory was alleged in the RSAC.

In contrast, the Court agrees with defendants that plaintiffs did not allege their second accounting fraud theory—the RSAC is devoid of any reference to HP. Plaintiffs do not dispute that they did not allege the fraudulent HP swap. Instead, they argue that defendants have "been fully aware of the HP allegations for years of litigation" and that plaintiffs detailed this theory in their contention interrogatory responses. Pl. Opp. at 10 n. 15.

The PSLRA amended the Exchange Act to apply a heightened pleading standard to private class actions. *See Oracle,* 380 F.3d at 1230. "To avoid dismissal under the PSLRA, the Complaint must 'specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which the belief is formed.' " *Id.* (quoting 15 U.S.C. § 78u–4(b)(1)). Permitting plaintiffs to add an unpled fraud theory to the case now, when the case is at summary judgment, would effectively dispense with the "formidable" pleading requirements of the PSLRA.[19] *See Metzler,* 540 F.3d at 1055; *see also In re Stratosphere Corp. Sec. Litig.,* 66 F.Supp.2d 1182, 1201 (D.Nev.1999) ("To allow [p]laintiffs to amend their [complaint] at this late stage of the proceedings would render the particularity requirement for pleading securities fraud a nullity.").

19 Plaintiffs do not dispute defendants' contention that allowing plaintiffs to amend their complaint at this juncture would be futile in light of the five year statute of repose for § 10(b) claims. *See* 28 U.S.C. § 1658.

Plaintiffs cite *In re JDS Uniphase Corp. Sec. Litig.,* 2007 WL 2429593 (N.D.Cal. Aug.24, 2007) for the proposition that if defendants cannot show undue delay, bad faith, or dilatory motive, this Court may consider plaintiffs' unpled allegations at summary judgment. *JDS Uniphase* is inapt because the unpled allegations in that case consisted of nineteen purportedly false statements. There was no suggestion that the plaintiffs had failed to allege a fraudulent scheme at issue in the case. Here, the unpled allegation concerns an entirely new theory of accounting fraud. Accordingly, the Court agrees with defendants that the HP swap accounting fraud is unpled and GRANTS defendants' motion for summary judgment on this claim.

ii. Loss causation

***19** Plaintiffs argue that Oracle's debit memo accounting fraud, which purportedly allowed the company to overstate its 2Q01 earnings per share by $0.01, was revealed to the market on March 1 when Oracle reported its earnings miss. According to plaintiffs, the accounting fraud allowed Oracle to conceal the problems with Suite 11i by overstating its applications sales. Importantly, Regan opines that the HP fraud (*not* the debit memo fraud) allowed Oracle to report its 2Q01 applications business growth rate as 66%, while the accurate figure was 54%. *See* Decl. of Shawn Williams in Supp. of Expert Report of D. Paul Regan, ex. 2 (Regan Rebuttal Report) at 6–7. Oracle disclosed this fraud, according to plaintiffs, when it revealed the truth about Suite 11i on March 1.[20]

20 Plaintiffs also argue that the false 2Q01 earnings were the basis for Oracle's 3Q01 forecast and rendered the forecast unreliable. According to plaintiffs, the fraud was revealed to the market on March 1 when Oracle announced its earnings miss. The Court considers this theory in more detail in conjunction with plaintiffs' argument that there was no reasonable basis for the 3Q01 forecast.

This theory of loss causation fails for several reasons. First, as discussed above, there is no evidence that the market recognized the March 1 disclosures as revealing previously undisclosed information about Suite 11i. Second, plaintiffs' expert links the inflated applications growth rate to the deal with HP, not the debit memo fraud. As the debit memo fraud is the only 2Q01 accounting fraud that remains in the case, there is no evidence that Oracle misstated its applications revenues in 2Q01. Third, there is no evidence that the market understood the March 1 earnings miss as revealing that Oracle had misstated its earnings for 2Q01. To the contrary, in their post-March 1 reports, analysts continued to report that Oracle's 2Q01 earnings per share were $0.11, not the $0.10 that plaintiffs claim is the accurate figure. *See* DX 465, 466,

473, 475, 478, 480, 482, 483, 484, 485, 486.[21] There is no evidence that Oracle has ever restated its 2Q01 earnings.

21 The analyst reports are not hearsay if offered to prove that the reports were made.

None of the cases cited by plaintiffs support their argument that Oracle's 3Q01 earnings miss revealed the 2Q01 accounting fraud. For example, the plaintiffs in *In re Impax Labs., Inc. Sec. Litig.* pled loss causation by alleging that the company revealed the accounting fraud that led to its erroneous revenue statements for 1Q04 and 2Q04 by announcing its actual financial results for those quarters. *See* 2007 U.S. Dist. LEXIS 52356 (N.D.Cal. July 18, 2007) (Ware, J.). The disclosure "explicitly pertained" to the company's results for 1Q04 and 2Q04. *Id.* at *17–18. Here, in contrast, the March 1 disclosure made no mention of Oracle's 2Q01 results.

Accordingly, the Court finds that plaintiffs have failed to establish that there is a triable issue as to whether the inflation of Oracle's 2Q01 earnings per share through the purported debit memo fraud was a substantial cause of plaintiffs' loss. Defendants' motion for summary judgment on this issue is GRANTED.

D. Oracle's December 14, 2000 public guidance for 3Q01[22]

22 For the purposes of this discussion, the Court assumes that this projection was not accompanied by meaningful cautionary language and therefore does not fall within PSLRA's "safe harbor" provision for forward looking statements. *See* 15 U.S.C. § 78u–5(c); *see also Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir.2004).

Plaintiffs argue that Oracle's December 14, 2000 public forecast of its 3Q01 earnings was materially false. In order for a financial projection to give rise to 10b–5 liability, the plaintiff must prove that "(1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy." *Provenz v. Miller,* 102 F.3d 1478, 1487 (9th Cir.1996) (citation omitted); *see also In re Adobe Systems, Inc. Sec. Litig.,* 787 F.Supp. 912, 919 (N.D.Cal.1992) ("10b–5 liability for a projection requires that there be either no reasonable basis for believing that the projection was accurate or the awareness of undisclosed facts tending *seriously* to undermine the accuracy of that projection.") (emphasis in original).

***20** Defendants contend that Oracle's December 14, 2000 public guidance was based on its internal forecast, as compiled by Minton. This forecasting method had proven to be consistently reliable at predicting Oracle's quarterly performance—in the seven quarters before 3Q01, Oracle had met or exceeded the forecast. Defendants argue that because the public guidance was based on Oracle's proven internal forecasting method, there can be no factual dispute that Oracle had a reasonable basis for its public guidance. Plaintiffs respond with five theories for why Oracle had no reasonable basis for the public guidance. The Court will consider each in turn.

i. Defendants' failure to take into account the end of the dot .com boom

Plaintiffs argue that by December of 2000, the speculative period known as the "dot.com bubble" had burst and that the U.S. economy was slowing. Plaintiffs claim that the beginnings of the dot.com bust rendered Oracle's forecast fundamentally unreliable because it was based on the unreasonable assumption that Oracle would convert as much of its pipeline in 3Q01 as it had in the boom economy of 3Q00.

The first point of contention is whether, as plaintiffs claim, the 3Q00 conversion ratio was the "foundation" of Oracle's 3Q01 public guidance. *See* Pl. Reply at 4. Defendants contend that the historical conversion ratio was only one of several factors that Oracle used to arrive at its forecast. They cite Minton's testimony that she considered the conversion ratio in conjunction with conversations with heads of Oracle's business units, field forecasts, and information she received about the status of especially large potential deals. *See* DX 333 at 122–26. Plaintiffs concede that the field reports were a factor that Oracle used in arriving at its internal forecast. *See* Pl. Mot. at 4. The evidence plaintiffs rely on for their characterization of the conversion ratio as the "foundation" of the forecast does not support this point.[23]

23 Plaintiffs cite Minton's deposition testimony at 122:1–24, 132:11–136:3 and 157:14–159:17 (PSJM A) in support of their contention that the upside adjustment was entirely based on the prior year's conversion ratio. In fact, in each of the cited portions of her deposition, Minton testified that the historical conversion ratio was one of a variety of

> factors she considered—"a number of data points," as she put it. PSJM A at 159:17.

Next, the parties dispute how Oracle used the 3Q00 conversion ratio in calculating its 3Q01 public guidance. Plaintiffs contend that Oracle "mechanically" applied the prior year's ratio to the current year's data. Again, plaintiffs' basis for this contention is not clear. The conversion ratio for 3Q00 was 53%, while the conversion ratio Oracle applied on December 11, 2000 was 48%. DSJM 1 at 213095. Plaintiffs do not explain why, if Oracle mechanically applied the prior year's conversion ratio, there was a five percentage point difference between the ratios applied at this point in 3Q00 and 3Q01.

Plaintiffs cite an Oracle e-mail chain from January 8, 2002 that forwarded a message from Jennifer Minton with the following statement:

> forecast co[n]version ratios—forecast as a % of pipeline. We track this for every forecast period within a quarter. This enables us to evaluate conversion rates. The conversion rates have been declining over historical periods due to the economic recession. When we were going through the dot.com bubble the field would generally "sandbag" their forecast. By evaluating historical trends, Jeff and I would be able to determine what the true forecast was by applying historical conversion rates to the pipeline. As a side note, my upside analysis was usually spot on!

***21** POpp. 226 at 132078–79.[24] This description of the forecasting process gives no information about *how* Minton applied "historical conversion rates" to the pipeline. She does not state, as plaintiffs contend, that she mechanically applied the exact same conversion rate from the prior year without regard to any other factors. There is therefore no factual dispute that the 3Q00 conversion ratio was just one of several factors that Oracle used to determine the 3Q01 public guidance.[25]

24 Defendants object to that this document is hearsay to the extent it is offered to prove that the forecast was inaccurate. Defendants' objection is OVERRULED. An internal e-mail chain written by Oracle employees is admissible as an admission by a party opponent. *See* Fed.R.Evid. 801(d)(2).

Plaintiffs also cite exhibit 14, which purports to be notes taken in conjunction with Oracle's Special Litigation Committee investigation: "Minton explained that prior to Q3 of FY 2001, Oracle thought that it could model out its business, but with the current economic downturn, no analytical models can predict one quarter to the next." PSJM 14 at 609541. The Committee's notes are inadmissible hearsay because plaintiffs rely on them to prove the truth of what Minton said.

25 The Court recognizes that plaintiffs' expert Alan Goedde opines that the historical conversion ratio was the basis for Minton's forecast. The reliability of Goedde's opinion will be addressed presently.

The parties also dispute whether the end of the dot.com boom necessarily rendered Oracle's forecasting system unreliable. Plaintiffs focus on a statement Ellison made in Matthew Symonds' profile *Softwar:* "LE writes: As I've said before, our forecasting system is not clairvoyant. Our forecasting does statistical extrapolations based on historic trends. If something that's outside our mathematical model of the business changes, like a war in the Middle East, our forecasting becomes inaccurate." POpp. 17 at 226, fn. Ellison was questioned about this statement at his deposition, as follows:

> Q: [Y]ou stand by that?
>
> A: Absolutely.
>
> Q: Now, it wouldn't—a war in the Middle East is just one example. There could be who knows how many examples; right?
>
> A: Price of oil goes over a hundred dollars a barrel, lots of things.
>
> Q: And the point you are making is that while your forecasting system does extrapolations based on historic trends, if something is happening that would suggest that the historical trend is not necessarily reliable, then your forecasting will not be reliable; is that right?

> A: Right. Major macroeconomic change; sudden—sudden growth in the economy or sudden shrinkage in the economy would cause—you can't extrapolate anymore.

POpp. J at 384:16–385:7.

Plaintiffs argue that it was evident in December 2000 that the end of the dot.com boom constituted a "major macroeconomic change." According to plaintiffs, Ellison has therefore admitted that Oracle's 3Q01 forecasting system was unreliable.

Plaintiffs' argument fails for several reasons. First, Ellison did not define the term "major macroeconomic change." The examples he gave were war in the Middle East and oil prices rising to over a hundred dollars a barrel. There is no evidence that he also meant that Oracle's forecasting system became unreliable during an economic slowdown.

Second, the evidence shows that when it issued its 3Q01 forecast, Oracle had a reasonable basis for believing it could ride out the economic downturn. Plaintiffs cite several indicators that show the economy was slowing, including the precipitous decline of the NASDAQ between 4Q00 and 3Q01 and the Federal Reserve's reduction of the federal funds rate twice in one month (an action it had not taken in ten years). *See* PSJM at exs. 23 & 15 at 15–16 (citing Federal Reserve Board press releases); 16 at ex. 6 (Yahoo! Finance chart showing NASDAQ drop from approximately 5,000 to approximately 2,100). Plaintiffs also cite evidence that Oracle's sales to dot.coms were diminishing. Oracle had already sold its database to the larger dot .coms, so the remaining customers were smaller companies—a "fishing hole [that was] drying up." PSJM E at 78:7–79:24.[26] The difficulty with plaintiffs' focus these indicators is that between 3Q00 and 2Q01, Oracle's license sales had increased despite the declines in the NASDAQ and the declines in revenues from dot.com customers, as summarized in the following table:

26 Plaintiffs argue that assistant vice presidents "in NAS 'began to voice concern' in December and in January 'were reluctant to raise their forecast' as 'deals began to shrink and get delayed." Pl. Mot. at 8. They cite exhibit 31, which appears to be a slideshow prepared for a managers' meeting on April 2, 2001. The slide emoted by plaintiffs reads "Month of December ... AVPs beginning to voice concern; Month of January—AVPS reluctant to raise their forecast." PSJM 13 at 179337. This statement is hearsay to the extent plaintiffs rely on it for the truth of what assistant vice presidents were saying in December, 2000 and January, 2001. Defendants' objection to this evidence is SUSTAINED.

Quarter	NASDAQ average for quarter	Percentage of Oracle revenues from dot.coms	Increase in license growth over prior year
1Q00	3253.25	6.82%	8.2%
2Q00	3951.26	6.37%	17%
3Q00	4044.59	10.63%	29%
4Q00	3385.98	9.56%	21%
1Q01	2727.92	6.61%	30%
2Q01	2413.08	6.01%	24%
3Q01	2091.54	2.89%	5.3%

***22** *See* PSJM 135. As this evidence shows, the pattern did not hold true in 3Q01, but at issue is what Oracle officials knew at the time they issued the forecast. Plaintiffs do not explain why Minton's forecast had been accurate in the first two quarters of 2001, when the economy was already weakening. In addition, Oracle intentionally gave a conservative forecast, projecting earnings per share of $0.12, rather than the $0.1282 (which per Oracle's policy, would have been rounded to $0.13) that Minton had projected.
Finally, plaintiffs do not explain why Oracle's internal forecasting system *should* have taken the end of the dot.com boom into account when applying the 3Q00 conversion ratio to the pipeline. Minton's bottom up analysis began with data from sales representatives and direct contact with potential customers. This approach could reasonably have been expected to account for larger economic changes through the direct input of sales representatives, and in the past had proved effective at doing so.

In sum, plaintiffs have not cited evidence from which a rational factfinder could conclude that the end of the dot.com boom rendered Oracle's internal forecasting system so unreliable that there was no reasonable basis for the forecast Oracle provided to the public on December 14, 2000. Contrary to plaintiffs' assertion, the 3Q00 conversion ratio was only one of several factors that Oracle used to determine its forecast, plaintiffs have not cited evidence that the 3Q00 conversion ratio was "mechanically" applied in 3Q01, Oracle's record leading up to 3Q01 suggested that it

would outperform NASDAQ despite its decrease in dot.com customers, and Oracle's bottom up method of forecasting provided a means of taking into account effects that larger economic factors would have on sales.

ii. Defendants' failure to take into account changes in Oracle's products

Plaintiffs claim that Oracle's December 14, 2000 public forecast had no reasonable basis because Oracle failed to take account of the fact that it was selling different products than it had in 3Q00. Specifically, plaintiffs point to evidence that in 3Q00, "applications" products made up 18.6% of Oracle's pipeline (with "technology" making up the remainder); in 3Q01, Oracle predicted that applications would make up 31.5% of its pipeline—an increase of 13%. PSJM 15 at 85. Plaintiffs also cite evidence that Oracle historically had been less successful at selling applications, which consequently had a lower conversion ratio than technology products. PSJM 15 at ex. 7. According to plaintiffs, the larger percentage of applications in the pipeline meant that the 3Q00 conversion ratio was not a reliable predictor of 3Q01 performance.

Plaintiffs' argument suffers from the same flaw as their contention that the dot.com bust rendered the 3Q00 conversion ratio unreliable: plaintiffs have not put forward evidence that the conversion ratio was the "foundation" of the internal forecasting system or that it was applied "mechanically" by Minton. In addition, defendants note that plaintiffs' evidence shows that applications also made up a greater percentage of the pipeline in 1Q01 and 2Q01 than it had the previous year. PSJM 15 at ex. 6. Plaintiffs do not explain why, if an increase in applications made the internal forecast unreliable, Oracle exceeded its internal forecast in 1Q01 and 2Q01 despite the increase in applications. Plaintiffs also do not cite evidence that Oracle *ever* analyzed its pipeline data by applying different conversion rates to its projected applications and technology sales. As discussed above, Oracle's internal forecasting system had proved consistently reliable, even though it did not separate its projections for applications and technology. Plaintiffs cannot create a factual dispute about whether there was any reasonable basis for the December 14 forecast by arguing, with the benefit of hindsight, that Oracle should have used a different formula for analyzing its sales data.

iii. Defendants' failure to take into account deficiencies with Suite 11i

***23** Plaintiffs argue that the December 14 public guidance was fundamentally unreliable because Oracle failed to take into account problems with Suite 11i that indicated that this product would be difficult to sell. According to plaintiffs, Oracle therefore should not have used the 3Q00 conversion rate to project applications sales in 3Q01.

Defendants do not dispute that before and during 3Q01, there were problems with Suite 11i. *See* Def. Opp. to Pls. Mot. for Summ. J. at 22 (citing analyst reports of bugs, the need for patches, functional gaps, advice not to buy the product, and the lack of positive customer references). Plaintiffs' contention that these problems made Oracle's forecast fundamentally unreliable nonetheless fails for at least two reasons. First, according to plaintiffs, Oracle had difficulty selling Suite 11i throughout 1Q01 and 2Q01, but, as noted above, the internal forecasting system for those quarters proved accurate. Second, the Court again returns to the point that the historical conversion ratio was not the only factor that Oracle used to arrive at its internal forecast. If the problems with Suite 11i made it less likely that sales representatives would close deals in 3Q01, the bottom up forecasting process provided a mechanism for Oracle to take that information into account.

iv. Ellison's directive to increase risk

Plaintiffs contend that the December 14, 2000 public guidance had no reasonable basis because of a change Ellison made to Oracle's forecasting system. According to plaintiffs, on October 4–5, 2000, Minton assigned Patricia McManus and James English, both finance personnel, to provide training in a new forecasting technique that radically changed Oracle's forecasting method. PSJM 154. On October 6, 2000, McManus sent the following e-mail to English:

> Jim, we can talk through the recommendation, let me know your thoughts ... [27]

[27] All ellipses in original.

> Recently Larry [28] has changed the way that he is interpreting our forecast. He would like us to reflect our numbers as follows ...

[28] Ellison stated at deposition this refers to him. PSJM D at 423:24–425:1.

> Worst—this is our bottom threshold—minimum 80% probability for opportunity—our old thinking of "commit."
>
> Forecast—some risk included, potentially 50% of the time you make it and 50% of the time you don't—minimum 60% probability for an opportunity
>
> Best—the top threshold for the quarter—minimum 40% probability for an opportunity This is a change from our current thinking in that our forecast has not usually had a significant amount of judgment. It was the amount that you believed you could deliver at a minimum. That emphasis has shifted to "worst" and now our forecast is a number that includes more risk than in the past. Best case should not be our entire quarter pipeline. As deals cross the 40% win probability threshold, they enter our best case. The win probabilities are guidelines and should be adjusted as you move through the quarter. [ ] Obviously, a 60% win probability the last week of the quarter is probably not a "forecast" item. Common sense has to prevail. The win probabilities are in OSO and should be reviewed for accuracy with the reps. The win probabilities have to be updated on a timely basis.
>
> ***24** We will incorporate this in our OSO IIi training that is tentatively scheduled the week of 10/23.
>
> Please let me know if you have any questions!

PSJM 17. According to plaintiffs, the McManus e-mail is evidence of a company-wide directive from Ellison for sales people to add "risk" to their forecast—that is, report less conservative sales projections. While divisions had formerly just given their "worst" (or "commit") number, they would now be required to give their "worst," their "forecast" (which would be based on their judgment) and their "best" estimate.[29] Plaintiffs contend that the directive rendered the 3Q01 public guidance unreliable because Minton continued to add upside to her reports to account for sandbagging, even though sales representatives' tendency to underestimate their sales had now already been accounted for through the new method articulated in the McManus e-mail.

29 Defendants contend that no such directive was issued or followed, pointing out that the e-mail itself is the only document which mentions such a directive. Plaintiffs present no evidence that the trainings referred to took place, or what their content was. The Court will assume for the purposes of this discussion that Ellison did issue a directive for sales representatives to include three figures in their forecast and that the directive was followed.

Plaintiffs' argument fails because they cite no evidence that the new system in fact introduced more risk into the forecasts. Plaintiffs do not cite evidence of how Minton used these numbers (e .g. that she made the forecast less reliable by including only the "best" estimates).[30] In addition, in eight of the nine weeks of 3Q01 that Minton projected a conversion rate, her prediction was equal to or lower than the conversion rate from the same point in 3Q00. DSJM 143. If plaintiffs are correct that Ellison's directive caused sales representatives to report inflated projections, Minton's 3Q01 weekly reports should have shown higher conversion rates than those from 3Q00. Accordingly, plaintiffs' evidence that by October of 2000, Ellison had directed sales representatives to begin reporting their "worst," "forecast," and "best" figures does not create a triable issue on whether Oracle's forecast had no reasonable basis.[31]

30 Plaintiffs contend that Minton "took no account of the directive," implying that she proceeded to add upside to the field forecast despite the new reporting, redundantly correcting for sandbagging. Plaintiffs' characterization of the evidence is not accurate. In support of their claim that she specifically ignored the directive, plaintiffs cite a portion of her deposition testimony in which she stated that the "criteria for the forecast column" in her internal forecasting reports did not change during fiscal years 2000 and 2001. *See* PSJM B 19:17–19. Plaintiffs do not cite deposition testimony on the issue of whether she was aware of or responded to a directive from Ellison.

31 The Court recognizes that plaintiffs' expert Alan Goedde opines that Ellison's directive had an effect on the field forecasts. The reliability of Goedde's opinion will be addressed presently.

v. Fraudulent 2Q01 accounting

Plaintiffs argue that Oracle's overstatement of its reported revenue in 2Q01 rendered the 3Q01 forecast unreliable. According to plaintiffs, "the falsely reported $0.11 EPS for 2Q01 was undisputedly the false basis for 3Q01 projections of $0.12 EPS[.]" Pls. Opp. to Defs. Mot. for Summ. J., at 47. Plaintiffs point out that in a conference call with analysts

discussing the December 14 forecast, Henley linked Oracle's 3Q01 projection of $0.12 cents per share to the company's 2Q01 results:

> In the area of per share, we think it would be 12 cents. Now, again, that's based on some models, and I think most of the people's estimates are around that. And also, just historically, the third quarter is slightly better than the second quarter. That's the way, sequentially, it's worked here. And if you look back at the last three years, sequentially, the third quarter, split adjusted, has been one cent a share better than the second quarter. So we did 11 cents in the second quarter. So I would assume, 12 cents would be a reasonable number at this point. I don't think history is going to be a lot different, here.

***25** PSJM 1 at 3222.

Plaintiffs are correct that Henley told analysts that Oracle's 3Q01 earnings per share projection of $0.11 was reasonable because, based on historical patterns, the company could be expected to exceed its 2Q01 earnings per share of $0.11 by a penny. This statement does not demonstrate, however, that Oracle had no other basis for its forecast. In fact, the full quote shows that Henley first stated that the 12 cents projections was "based on some models." To establish the existence of a triable issue as to whether the 3Q01 forecast is actionable, plaintiffs would have to cite evidence showing that those models were without a reasonable basis, which they have failed to do.

vi. Expert opinion of Dr. Alan G. Goedde

Defendants move to exclude the expert testimony and reports of Dr. Alan G. Goedde, who opines that Oracle's 3Q01 forecast lacked a reasonable basis. [32] Specifically, they seek to exclude his opinions that (1) "Oracle failed to make adjustments to its forecast process to account for the negative impact of the changes in the economy and the market for Oracle's products in violation of accepted forecast principles" and (2) in 2Q01, "Larry Ellison directed significant changes to Oracle's forecast process that resulted in more 'risk' being included in future Field Forecasts and rendered Jennifer Minton's upside adjustments unreliable." *See* Goedde Report 1, at 4. [33]

32 Defendants also move to exclude Goedde's opinion that "Oracle was facing a major macroeconomic change heading into Q3 2001 resulting in a decline in the market for its products." Goedde's opinion about the economy in 3Q01 does not create a factual dispute on the issue of whether there was a reasonable basis for Oracle's 3Q01 public guidance. Assuming that Goedde is correct that the economy was changing in 3Q01, he does not explain why these changes would not be accounted for in Minton's "bottom up" forecasting process. In addition, he does not explain how Oracle's forecasting process had proven accurate in previous quarters even though the NASDAQ had already begun to decline.

33 All references to Goedde Report 1 are to exhibit 1 to the declaration of Douglas R. Britton in support of the expert report of Alan G. Goedde. The Goedde Rebuttal Report (Goedde Report 2) is attached as exhibit 3 to the same declaration.

Federal Rule of Evidence 702 provides that expert testimony is admissible if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. Expert testimony under Rule 702 must be both relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). When considering evidence proffered under Rule 702, the trial court must act as a "gatekeeper" by making a preliminary determination that the expert's proposed testimony is reliable. *Elsayed Mukhtar v. Cal. State Univ.,* 299 F.3d 1053, 1063 (9th Cir.2002), amended by 319 F.3d 1073 (9th Cir.2003). As a guide for assessing the scientific validity of expert testimony, the Supreme Court provided a nonexhaustive list of factors that courts may consider: (1) whether the theory or technique is generally accepted within a relevant scientific community, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory or technique can be tested. *Daubert,* 509 U.S. at 593–94; *see also Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

a. Timeliness

Goedde's expert opinions became more refined as litigation progressed. On August 26, 2007, after filing his expert report (on May 27, 2007) and his rebuttal report (on June 22, 2007), he supplied a supplemental declaration in which he stated that he had used erroneous calculations when he generated exhibit 4 to his rebuttal report.[34] *See* Goedde Report 3. [Docket No. 1030] In conjunction with the August 26 declaration, he submitted a new graph (exhibit 1) and opined that it supported his conclusion that "the prior year conversion rate was the basis for Ms. Minton's Potential Forecast and therefore Oracle's guidance in 3Q F. Y01." Goedde Report 3 at ¶ 4 & ex. 1.

34 Per the parties' stipulation, expert and rebuttal reports were exchanged on May 25, 2007 and June 22, 2007, respectively.

***26** Goedde's third report went beyond merely correcting a computational error in his rebuttal report, however. He also "performed additional analysis to test the correlation" between Minton's forecast and the historical conversion ratio. Goedde Report 3 at exs. 2, 3. To that end, he included two new graphs that purported to prove Minton arrived at her guidance by applying the prior year's conversion ratio to the pipeline. Goedde Report 3 at exs. 2, 3.

Goedde also used his third report to supplement his opinion about how Ellison's purported directive changed Oracle's forecasting method. He stated, "Based upon my review of defendants' rebuttal expert reports, I learned for the first time that defendants are denying that Oracle's sales force actually followed Mr. Ellison's directive." Goedde Report 3 ¶ 7. He therefore performed additional analysis that he claimed supported his conclusion that Oracle's U.S. license division forecasts changed after the directive because more managerial judgment was inserted into the field reports.

On November 6, 2007, Goedde filed a fourth declaration, which contained "more detailed statistical analysis" to supplement his August 26 declaration and address arguments raised in the rebuttal report of defendants' expert. Goedde Report 4 ¶ 5. [Docket No. 1403–2] Specifically, he performed a new computation in his analysis of Minton's forecast that purported to correct for seasonal patterns.

Finally, in conjunction with the renewed summary judgment motions, Goedde filed a fifth declaration, on November 16, 2008, in which he consolidated his opinions from the prior four reports into a single declaration. Goedde Report 5. [Docket No. 1542]

The Court agrees with defendants that Goedde's augmentation of his opinion after he submitted his rebuttal report was not proper. Federal Rule of Civil Procedure 26(e)(1) provides that "[f]or an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition." Thus, after realizing that Goedde's rebuttal report analysis contained a computational error, plaintiffs had a duty to correct the mistake through a supplemental disclosure. Plaintiffs exceeded the permissible scope of a supplemental disclosure, however, by including additional analysis to shore up Goedde's original opinion. Rule 26(a)(2)(B) requires that expert witnesses disclose a report containing "a *complete* statement of all opinions the witness will express and the basis and reasons for them ." *See* Fed. R. Civ. Pro. 26(a)(2)(B)(i) (emphasis added). The expert report therefore defines the metes and bounds of an expert's trial testimony. Here, Goedde's additional analysis vastly complicated his opinion of how Minton arrived at her upside adjustment, with each supplemental declaration containing more involved discussion of his statistical analysis than the last. Rule 26's expert disclosure requirements would be obviated if experts could continually refine their opinions in this manner.

***27** Goedde's additional analysis regarding Ellison's directive is similarly problematic. Originally, Goedde did not use statistical analysis of the field forecasts to support his conclusion that the directive inflated the forecasts; this dimension of his analysis was introduced after the rebuttal reports were exchanged. It is simply not plausible that he did not realize until reading the rebuttal reports of defendants' experts that defendants contend Ellison did not issue a company-wide directive. Goedde's initial report anticipates that the existence of this directive will be disputed. *See* Goedde Report 1 at 22 ("There is no evidence that I have reviewed to indicate that the field did not follow Ellison's directive. To the contrary, there is reason to believe that it did."[35]) There is no reason that Goedde could not have performed these computations in his initial analysis.

35 In support of this contention, Goedde cited the McManus e-mail and Ellison's deposition testimony that he wanted all three forecast figures

(worst, forecast, best) in the system in order to have "more data to work with." Goedde Report 1 at 22.

Accordingly, the Court finds that the new opinions offered in Goedde's third, fourth, and fifth reports are untimely. All of these opinions are STRICKEN, to the extent they include analysis that was extends beyond the analysis Goedde performed in his initial and rebuttal reports. Exhibit 1 to Goedde's third report, which corrected the erroneous exhibit in his rebuttal report, is not stricken.

b. Goedde's opinion that Oracle's 3Q01 forecast was unreliable because Minton did not take economic factors into account

Turning to the elements of Goedde's reports that were timely, the overarching problem is that his opinion is based on a selective reading of the record. A premise of Goedde's analysis is that "[a]ccording to Ms. Minton's testimony, the week 2 conversion rate for [3Q00] multiplied by the Pipeline at week 2 of [3Q01] was the underlying basis for the 'upside' portion of the [3Q01] revenue forecast that formed the basis of Oracle's Public Guidance." Goedde Report 1 at 20. In other words, Goedde relies on Minton's testimony for his conclusion that Minton arrived at her upside by applying the conversion ratio from the prior year. As the foregoing discussion demonstrated, plaintiffs cite no testimony by Minton that the conversion ratio was the *basis* for her upside or that she mechanically applied the conversion ratio from the prior year. Goedde proceeds to opine that "the application of this historical conversion ratio" was flawed because 3Q00 was a boom economy while the economy was in decline in 3Q01, *see* Goedde Report at 20, but provides no further basis for his conclusion about how Minton used the historical conversion ratio or what role this factor played in her upside.

In his rebuttal report (and exhibit 1 of his third report), Goedde for the first time attempted to substantiate his conclusion that the historical conversion ratio was the foundation of Minton's upside. He provided a graph that purports to compare her actual forecasts throughout 3Q01 with what her forecasts would have been if she had used only the historical conversion ratio. *See* Goedde Report 2 at 76 & Goedde Report 3, ex. 1. Tellingly, the graph shows that throughout 3Q01, Minton's actual forecast was *different* from the forecast that Goedde claims she would have arrived at had she mechanically applied the 3Q00 conversion ratio. *See id.* Goedde provides no analysis in his initial or rebuttal reports in support of his conclusion that this chart shows that Minton's upside "was based almost exclusively on historical conversion analysis." Goedde Report 2 at 76. To the contrary, the graph shows that some factors other than the historical conversion ratio must have played a role in Minton's upside.

***28** The Court finds that Goedde's opinion on how Minton used prior year conversion ratios and the importance of this factor in her upside is not reliable because Goedde ignored deposition testimony by Minton that contradicted his conclusion and because his statistical analysis does not support his conclusion. Accordingly, the Court GRANTS defendants' motion to exclude Goedde's expert reports and testimony on this issue. *See Brooke Group, v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

c. Goedde's opinion that the 3Q01 forecast was unreliable as a result of Ellison's directive

Defendants move to exclude Goedde's opinion that Ellison's directive for sales representatives to designate their worst, forecast, and best figures (assuming for the sake of argument that the directive was issued) rendered the 3Q01 forecast unreasonable. The Court agrees with defendants that Goedde's opinion on this issue is unreliable. In his initial report, he opines that Minton adjusted for Ellison's change by decreasing and then eliminating her upside adjustment between January 15, 2001 and February 5, 2001. Goedde Report 1 at 23. According to Goedde, Minton's forecast was unreliable before she made these changes. Goedde does not provide any basis for his conclusion that Minton made changes to the upside because of Ellison's directive, rather than because of her own judgment that the additional upside was not warranted. Second, Goedde assumes that Ellison's directive resulted in "the virtual removal of 'sandbagging,' " by sales representatives, thereby rendering Minton's upside redundant. *Id.* at 24; *see also* Goedde Report 2 at 83 ("Mr. Ellison directed the sales force to submit forecasts which exceeded their comfort levels, effectively changing Oracle's forecasting process from a 'bottom-up' process to a 'top-down' process."). Goedde points to no evidence supporting this conclusion that the directive had an effect on the field forecast. He therefore assumes what he sets out to prove: that a directive from Ellison changed the behavior of the field.

For these reasons, the Court finds that Goedde's opinions on the effect of Ellison's directive is not based on discernible

"methods and methodology" and therefore is not reliable. *Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1316 (9th Cir.1995). Defendants' motion to strike Goedde's expert reports and exclude his testimony on this issue is GRANTED.

Without Goedde's expert report, there is no factual dispute as to whether any of the factors identified by plaintiffs rendered the 3Q01 forecast without a reasonable basis. Defendants' motion for summary judgment on this issue is GRANTED.

E. Intra-quarter repetitions of the 3Q01 forecast [36]

[36] Again, the Court assumes without deciding that these statements were not accompanied by meaningful cautionary language and therefore were not subject to PSLRA's safe harbor.

***29** Plaintiffs claim that Oracle repeated the December 14 forecast during 3Q01. *See* POpp. 217 at 3279–80. [37] They argue that these repetitions of the forecast were materially false because defendants were "aware of undisclosed facts tending seriously to undermine the [forecast's] accuracy." *Provenz,* 102 F.3d at 1487. Plaintiffs identify three categories of facts that were allegedly known to defendants. The Court will consider each in turn.

[37] This transcript of a speech by George Roberts is not dated. Plaintiffs have submitted sufficient other evidence to support a finding that Roberts gave this speech in mid-February 2001. *See* PSJM v. at 341:20–343:6; *see also* PSJM 218.

i. Actual results from flash reports

Plaintiffs contend that Oracle officials learned information from "flash reports"—snapshots of key financial indicators—in 3Q01 that alerted them that the company was likely to miss its public guidance. The first flash report, which reported actual data from December 2000, was issued internally on January 17, 2001. POpp. 277. It reported license revenue growth of 35%; the public guidance had forecast license growth of 25%. *Id.* The January 17 report also showed that in December, Oracle had achieved 19% of the quarterly forecast for license revenue. *Id.* This figure was in line with prior quarterly results: in 3Q00, Oracle had achieved 16% of its forecast license revenue by December; in 3Q99, it had achieved 19% of the forecast license revenue by December. *Id.*

The parties dispute whether the relevant figures in the January 17 flash report should have been adjusted to eliminate the revenue from a deal with internet trading site Covisint. In the first few days of December 2000, Oracle executed a $60 million applications deal with Covisint—the largest transaction in Oracle's history. Plaintiffs argue that the January 17 figures should be adjusted to eliminate revenue from the Covisint deal. According to plaintiffs, quarterly trends were only apparent after Covisint was eliminated from the December data. They cite, for example, deposition testimony by Minton stating that considering the underlying license revenue without the Covisint deal provided another "data point" for analyzing the December results. POpp. GGG at 312:23–313:4.

Although removing an aberrant transaction may allow for a more accurate comparison with historical data, the inquiry here is whether the January 17 flash report confirmed or undermined the 3Q01 public guidance concerning anticipated revenues. There is no question that the Covisint deal, even though it was unusual, would be "booked" as 3Q01 revenue and would therefore help Oracle meet its forecast.

Plaintiffs also note that the January 17 flash report indicated that two of the three U.S. divisions showed negative year over year revenue growth: NAS and OSI reported revenue growth of –24% and –81%, respectively. A second flash report, reporting actual results from January 2001, was issued February 8, 2001. POpp. 281. It indicated that NAS and OSI were still reporting negative revenue growth: –33% and –17% respectively. Both flash reports also reported, however, that OPI, the third U.S. division, was reporting significant growth: 243% in December and 235% in January. Plaintiffs do not explain why negative growth in two U.S. divisions should have alerted Oracle that it would miss its 3Q01 guidance, particularly when a third U.S. division was reporting significant growth.

***30** In sum, if Covisint is not excluded from the flash reports, plaintiffs point to no evidence that the actual results for December and January alerted Oracle that it would miss its 3Q01 forecast. On the contrary, these reports indicate that license revenues were in line with prior years as a percentage of quarterly results and that in December, license revenue growth was exceeding the forecast by 10%.

More fundamentally, plaintiffs' focus on the flash reports does not take into account the hockey-stick effect. Given that Oracle was known to earn the vast majority of its quarterly

revenue in the final weeks of a given quarter, it is not apparent that the results from the first or second months of the quarter are good indicators of how the quarter would turn out.

For these reasons, the Court finds that there is no factual dispute as to whether the reports of Oracle's performance in December 2000 and January 2001 contained information that seriously undermined the 3Q01 forecast.

ii. Pipeline growth

Plaintiffs argue that throughout 3Q01, Oracle received weekly data showing that pipeline growth was declining, and that this information warned officials that the company would not meet its forecast. Oracle had forecast license revenue growth of 30% (constant dollars). Oracle's actual pipeline growth (i.e. year over year percentage increase) in the weeks comprising the third quarter is summarized as follows: [38]

38 *See* PMSJ 16 at ex. 20. Plaintiffs provided the actual dollar amounts of the pipeline. The Court has divided plaintiffs' figures for 3Q01 by their figures for 3Q00 to determine the percentage growth over the prior year. *See also* PSJM 69 at 440076, PSJM 70 at 440093.

12/11/00	12/25/00	1/15/01	1/22/01	1/29/01	2/5/01	2/12/01	2/19/01	2/26/01	3/27/01	4/28/01
52%	34%	34%	31%	31%	32%	29%	28%	34%	34%	34%

Plaintiffs pay particular attention to the figures from December 25 and February 5, pointing out that pipeline growth had dropped from a high of 52% at the beginning of the quarter to 34% and 32%, respectively. *See* Pl. Mot. for Summ. J. at 23. In other words, plaintiffs argue that Oracle officials should have known that the company would miss its guidance when they learned that the pipeline was growing at 4% and 2% above their projection for license growth. This does not make sense.

Plaintiffs focus on the "comfort gap," which is the difference between the forecasted revenue growth and the pipeline growth. The comfort gap was narrow in 3Q01, particularly between December 25 and January 29, when it did not exceed 4%. Plaintiffs point out that this is a much smaller figure than the average comfort gap for the five quarters prior to 3Q01, which was 13.4%. *See* PSJM 16, ex. 13.

The Court agrees with defendants that plaintiffs do not cite evidence from which a rational factfinder could conclude that a narrow comfort gap alerted Oracle officials that they would miss their guidance. Plaintiffs rely on testimony from Ellison's deposition as evidence that the comfort gap was a figure that Oracle officials relied on to evaluate the reliability of the forecast. Ellison, however, stated only that the relevant information is whether the pipeline exceeds the forecast, not that he used the difference between these figures to assess the accuracy of the forecast. *See, e.g.,* PMSJ C at 420:12–14 ("I would say as long—as long as the pipeline growth is greater than—than the revenue growth, you should be able to meet your numbers.").

***31** Accordingly, the Court finds that there is no triable issue as to whether Oracle's pipeline growth, which exceeded the forecast for all but two weeks of the quarter, provided defendants with information that seriously undermined the 3Q01 forecast.

iii. Pipeline information and forecasts from the U.S. license divisions

Plaintiffs argue that intra-quarter reports from the U.S. license divisions informed Oracle that it would miss its guidance. Plaintiffs cite considerable evidence that NAS and OSI reported negative trends during 3Q01 and that their 4Q01 forecasts showed year over year declines. [39] Plaintiffs do not explain, however, why the declines in NAS and OSI would necessarily undermine the 3Q01 forecast, especially in light of the major Covisint deal reported in OPI. In addition, each of the U.S. divisions continued to stick by their forecasts despite reporting declines. *See, e.g.,* POpp. 329(1/17/01 email from OPI finance director to Minton that OPI's forecast "holding at $150M but I'll be a bit more aggressive and say a likely of $150–$170."); POpp. 240 (1/11/01 email from NAS's finance director to Minton, discussing pipe shrinkage, lack of big deals, and drop in technology spending, but stating "[o]ur Q3 forecast of $346M has not changed" and revising only NAS's upside); POpp. 305 (1/18/01 email from OSI finance director saying Nussbaum "still confident in the 225, as long as none of the very large opportunities drop out" and "[M]y sense still is that we'll come out around 210 as it stands today"); POpp. 327 (2/14/01 email from OSI finance director reaffirming that she still thought OSI would come in between $210 and $220 million).

39 Defendants object that exhibit 236, a slideshow apparently presented at a meeting on April 1, 2001, is hearsay to the extent it is offered for the truth of what assistant vice presidents in NAS

said in December of 2000. The Court agrees and SUSTAINS defendants' objection.

Defendants also object that POpp. 315, a summary of "lost big deals" in 3Q01, is an improper summary of voluminous exhibits under Federal Rule of Evidence 1006. The Court agrees. The Court agrees that the chart is an improper summary because it contains attorney argument. Defendants' objection is SUSTAINED.

For these reasons, the Court concludes that a reasonable juror could not infer from the data showing losses in OSI and NAS that defendants had information seriously undermining the 3Q01 projection.

Accordingly, the Court finds that plaintiffs have failed to identify the existence of a triable dispute as to whether the Oracle officials had knowledge of actual facts seriously undermining their 3Q01 forecast when they repeated the forecast in 3Q01. Defendants' motion for summary judgment on this issue is GRANTED.

F. Statements about the effect of the economy on Oracle

During 3Q01, defendants made the following statements, which plaintiffs characterize as misrepresentations that the slowing economy was not affecting Oracle:

- In the December 14, 2000 conference call with analysts, Henley said, *"And then lastly .... the economy ... [a]t this point we see no impact or slowing in our business.* We have seen no slowing of our business. We believe that (the U.S. economy) is slowing down, from what we can tell." "So, you know, if we were to have a—I guess, a hard landing, a recession, depression, I mean, certainly, that could have some impact. But as long as we're simply slowing and going into more of a soft landing, we continue to believe that our business should do quite well." POpp. 26 at 234423–24.

***32** • In a December 15, 2000 interview with *Radio Wall Street,* Henley said: *"[T]he economy right now even though it's slowing doesn't seem to be affecting us. We see no difference in demand for our upcoming third fiscal quarter....* If the economy got really really bad then obviously that would probably have some effect on all of us. But so far we look pretty hard at indicators. *We're seeing no softening in our business."* DX 163 at 141660–61.

- In an e-mail dated February 26, 2001, Oracle spokeswoman Stephanie Aas sent an internal e-mail after the AppsWorld conference in New Orleans on February 21, 2001 stating, *"Analysts closely monitored comments on the economy which were consistent with recent statements: we do not expect the slowing economy, barring a serious slide to a recession, to significantly impact near term guidance. These comments were met with a degree of relief, as some analysts were anticipating the event to be an opportunity to take down guidance." See* POpp. 212 (PSJM 9). [40]

40 Defendants object that Aas's repetition of analysts' reports of what Henley said constitutes hearsay within hearsay. The Court agrees that the portion of the e-mail that summarizes analyst reports is inadmissible hearsay if offered to prove the truth of what the reports say Henley said. The portion of the e-mail cited above, however, is admissible as proof of Oracle's public statements about the company's financial outlook in February of 2001.

Defendants contend that their statements about the effects of the economy on Oracle's business were forward looking and were therefore subject to the PSLRA safe harbor. According to defendants, the statements about the economy were so "intertwined" with statements about Oracle's ability to make its forecast that they constituted projections. The Court disagrees. Forward-looking statements include statements "containing a projection of revenues, income ..., earnings ... per share," and statements "of future economic performance." 15 U.S.C. § 78u–5(i)(1)(A) & (C). While the statements were made in the context of discussions of the 3Q01 forecast, the speakers were conveying information about whether Oracle was being affected by the slowing economy in the present. [41]

41 The Court notes that in the prior round of summary judgment briefs, defendants stated that these were *not* forward-looking statements. *See* Def. Nov. 9, 2007 Mot. at 32. [Docket No. 1406]

As these are not forward-looking statements, plaintiffs must "demonstrate that a particular statement, when read in light of all the information then available to the market, or a failure to disclose particular information, conveyed a false or misleading impression." *In re Convergent Tech. Sec. Litig.,* 948 F.2d 507, 512 (9th Cir.1991). They must also show that defendants engaged in "knowing" or "intentional" conduct or acted with "deliberate recklessness." *See South Ferry LP,*

No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir.2008). In the securities context, "an actor is reckless if he had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary effort." *Howard v. Everex Sys., Inc.,* 228 F.3d 1057, 1063 (9th Cir.2000) (citation and alterations omitted).

The Court finds that plaintiffs have failed to cite evidence from which a reasonable juror could conclude that Henley was deliberately reckless in making these statements. Although plaintiffs cite ample evidence showing that certain sectors in Oracle were losing revenue as a result of dot.coms going out of business, Henley had a basis for believing that Oracle's overall business would be immune from the downturn. As discussed above, Oracle had continued to see substantial year over year increases in license revenue even as NASDAQ and dot.com sales steadily declined. Plaintiffs have failed to show that any of the internal data available to defendants through 3Q01 seriously undermined their forecast for that quarter.

2. Defendants' Motion for Summary Judgment on Plaintiffs' Control Person Claim

***33** Defendants move for summary judgment on plaintiffs' § 20(a) claim against Ellison, Henley, and Sanderson. Plaintiffs do not dispute that § 10(b) liability is a prerequisite for controlling person liability under § 20(a). *See Paracor Finance, Inc. v. General Elec. Capital Corp.,* 96 F.3d 1151, 1161 (9th Cir.1996) ("To establish 'controlling person' liability, the plaintiff must show that a primary violation was committed and that the defendant' directly or indirectly' controlled the violator.") (citation omitted). Accordingly, defendants' motion for summary judgment on this claim is GRANTED.

3. Defendants' Motion for Summary Judgment as to Ellison and Henley

Defendants move for summary judgment on plaintiffs' third cause of action, violation of section 20A of the Exchange Act, which provides a cause of action against "[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information." 15 U.S.C. § 78t–1(a). The elements of a section 20A violation are "(1) trading by a corporate insider; (2) a plaintiff who traded contemporaneously with the insider; and (3) that the insider traded while in possession of material nonpublic information, and thus is liable for an independent violation of the Securities Exchange Act of 1934." *Simon v. American Power Conversion Corp.,* 945 F.Supp. 416, 435 (D.R.I.1996) (citing *Inre VeriFone Sec. Litig.,* 11 F.3d 865, 872 (9th Cir.1993)). "Claims under Section 20A are derivative and therefore require an independent violation of the Exchange Act." *Johnson v. Aljian,* 490 F.3d 778, 781 (9th Cir.2007). Defendants Ellison and Henley argue that if the Court grants summary judgment on plaintiffs' § 10(b) claim, they are also entitled to summary judgment on plaintiffs' § 20A claim because plaintiffs cannot establish an independent violation of the Exchange Act.

Plaintiffs contend that they can demonstrate the "independent violation" required for their § 20A claim by showing that Henley and Ellison engaged in insider trading in violation of Rule 10b–5. Defendants argue that insider trading cannot serve as a predicate offense for section 20A purposes. In *Johnson,* however, the Ninth Circuit held that the plaintiffs had met the "independent violation" requirement of § 20A by alleging that the defendants engaged in illegal insider trading in violation of § 10(b) of the Exchange Act. *See* 490 F.3d at 779; *see also In re JDS Uniphase Corp. Sec. Litig.,* No. C 02–1486, U.S. Dist. LEXIS 76936 *13 (N.D.Cal. Sept. 27, 2007) (holding § 10(b) insider trading claims were sufficient to serve as predicate violation). Defendants therefore are not entitled to summary judgment solely on the basis that plaintiffs' § 10(b) claim for false statement fails.

Henley and Ellison also argue that they are entitled to summary judgment on plaintiffs' § 20A claim because there is no factual dispute that they did not possess "material, nonpublic information" at the time of their trades. *See United States v. O'Hagan,* 521 U.S. 642, 651–52, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997). Plaintiffs argue that Henley and Ellison possessed the following insider information: (1) data from Oracle's U.S. divisions rendered the 3Q01 forecast unreliable; (2) Oracle's pipeline had "collapsed;" (3) Oracle's 3Q01 forecast had no reasonable basis because of economic changes, Ellison's directive to add risk, the overstatement of 2Q01 financial returns due to the debit memo fraud, the higher mix of applications in the pipeline, and Minton's mechanical application of the historical conversion ratio to the 3Q01 pipeline; and (4) problems with Suite 11i were affecting applications sales.

***34** The foregoing discussion has established that plaintiffs have failed to establish the existence of a genuine factual dispute on the first three categories of information. Assuming

for the sake of argument that there are disputed facts about whether Henley and Ellison had material insider information about Suite 11i at the time of their trades, plaintiffs would have to prove that the revelation of the concealed information about Suite 11i was a substantial cause of plaintiffs' loss. *See Johnson,* 490 F.3d at 782 (citing *Ambassador Hotel Co., Ltd. v. Wei–Chuan Inv.,* 189 F.3d 1017, 1025 (9th Cir.1999) ("To prove violation of either Section 10(b) or Rule 10b–5, the private plaintiff must demonstrate that the alleged fraud occurred 'in connection with the purchase or sale of a security'. Once this foundational requirement has been met, the plaintiff must prove five elements: (1) misrepresentation (or omission, where there exists some duty to disclose); (2) materiality; (3) scienter (intent to defraud or deceive); (4) reliance; and (5) causation. The plaintiff must prove both actual cause ('transaction causation') and proximate cause ('loss causation')."). As discussed above, defendants have demonstrated that there is no triable issue as to loss causation for the purportedly concealed information about Suite 11i.

Accordingly, the Court GRANTS defendants' motion for summary judgment on plaintiffs' § 20A claim against Henley and Ellison.

4. Adverse Inference

The Court rejects plaintiffs' argument that the Court should apply the adverse inference broadly. If plaintiffs had been able to establish the existence of a factual dispute on the issue of whether the 3Q01 forecast had a reasonable basis, for example, the adverse inference would have helped plaintiffs prove that Oracle officials were aware of those problems. The inference cannot help plaintiffs with the absence of evidentiary support for plaintiffs' allegations.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants' motion for summary judgment on plaintiffs' § 10(b), § 20(a), and § 20A claims and DENIES plaintiffs' motion for partial summary judgment. The Court also GRANTS defendants' motion to exclude the expert report and testimony of Alan Goedde. All other evidentiary objections are DENIED as moot unless discussed in this order.

IT IS SO ORDERED.

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End of Document

EXHIBIT H

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United States District Court, N.D. Illinois, Eastern Division.

RETSKY FAMILY LIMITED PARTNERSHIP, Plaintiff,
v.
PRICE WATERHOUSE LLP, Defendant.

No. 97 C 7694.
|
Dec. 10, 2001.

MEMORANDUM OPINION AND ORDER

DARRAH, J.

***1** Plaintiff the Retsky Family Limited Partnership ("Plaintiff" or "Retsky") seeks approval of a settlement for a class of all persons who purchased or otherwise acquired common stock of System Software Associates, Inc. ("SSA") during a period from December 15, 1994 through January 7, 1997, and thereby suffered damages. Plaintiff also seeks an award of attorney's fees and reimbursement of expenses from the proceeds of the proposed settlement. For the reasons that follow, the proposed class settlement, award of attorney's fees and reimbursement of expenses to be paid from the proceeds of the settlement and special award are approved.

The Proposed Class Settlement

LEGAL STANDARD

A class settlement will be approved if it is fair, reasonable and adequate. *Isby v. Bayh,* 75 F.3d 1191, 1196 (7th Cir.1996). A court will consider the following factors in determining whether a proposed settlement is fair, reasonable and adequate: "(1) 'the strength of the case for the plaintiffs on the merits, balanced against the amount offered in settlement'; (2) '[T]he defendant's ability to pay'; (3) '[T]he complexity, length and expense of further litigation'; (4) '[T]he amount of opposition to the settlement' '; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery to be completed. *Armstrong v. Bd. of Sch. Dirs.,* 471 F.Supp. 800, 804 (E.D.Wis.1979) (citing Manual for Complex Litigation § 1.46 at 56 (1977) (supplement to Charles Alan Wright & Arthur Miller, Federal Practice and Procedure (1969-1985)); 3B Moore's Federal Practice ¶ 23.80(4) (2d ed.1978)). However, the court is not to convert the settlement hearing into a trial on the merits. *See Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.,* 834 F.2d 677, 684 (7th Cir.1987), *aff'd en banc,* 880 F.2d 928 (7th Cir.1989).

BACKGROUND

On October 31, 1997, Plaintiff filed a complaint against Price Waterhouse LLP ("PW"), the predecessor firm to PriceWaterhouse Coopers LLP, on behalf of all persons who purchased or otherwise acquired SSA common stock between December 15, 1994 and January 7, 1997, thereby suffering damages. Days before trial, the parties agreed to settle the case through a four-day arbitration. The agreement to settle the case through arbitration was reached after extensive negotiations between Plaintiff's counsel and PW's counsel.

At completion of arbitration, the plaintiff class was awarded $14,000,000 to settle its claims. This amount has been earning interest for the plaintiff class since June 29, 2001. This amount, less taxes, approved costs, attorney's fees and expenses, will be distributed to members of the plaintiff class who submit valid, acceptable Proofs of Claim. Pursuant to order of the Court, Plaintiff arranged for the mailing and publication of notice to the class. Plaintiff then filed its request that this Court approve the settlement as fair, reasonable and adequate.

DISCUSSION

***2** The strength of Plaintiff's case balanced against the amount offered in settlement favors a determination that the proposed settlement is fair, reasonable and adequate. The instant case involves securities litigation. Many cases like this one have been lost at trial, on post-trial motion or appeal. *See, e.g., Backman v. Polaroid Corp.,* 910 F.2d 10 (1st Cir.1990) (reversing jury finding of liability in suit brought under section 10(b) of the Securities Exchange Act of 1934).

It is not certain that Plaintiff would have been able to obtain a favorable monetary result against PW at trial. A jury may have found PW's witnesses to be more credible. PW would have presented evidence that its conduct had not caused

any monetary damages to Plaintiffs. A determination as to whether the plaintiff class had sustained monetary damages would have required extensive expert testimony as set out below. No one knows whose experts would have been more persuasive to a jury. The settlement provides certainty of recovery that was not available with litigation.

Furthermore, any judgment obtained at trial, however substantial, may not be distributed to the plaintiff class for many years due to post-trial motions and appeals. The plaintiff class has received a $14,000,000 cash settlement. This immediate and substantial recovery favors a determination that the proposed settlement is fair, reasonable and adequate.

Second, PW is able to pay the proposed settlement. Thus, this factor also favors approval of the settlement as fair, reasonable and adequate.

The complexity, length and expense of further litigation favor approval of the settlement. Securities fraud litigation is long, complex and uncertain. *See Trief v. Dun & Bradstreet Corp.,* 840 F.Supp. 277, 281 (S.D.N.Y.1993); *Hoffman Elec., Inc. v. Emerson Elec. Co.,* 800 F.Supp. 1289, 1295 (W.D.Pa.1992). In this case, each side had identified multiple trial experts to testify on the issues in the case. In fact, at least five experts were expected to testify at trial. In the final pretrial order submitted to the Court, the parties identified over 1,000 exhibits, forty witnesses and indicated that they anticipated that the trial would last fifteen to twenty-eight days. This evidence supports the conclusion that the case is very complex.

Furthermore, the settlement avoids the expense of continuing the litigation. Continued litigation would require significant attorney and expert time, use of computer graphics and technical support in the courtroom, as well as the usual cost of trial, such as travel or copying. Thus, the cost of litigation is quite high and is significantly reduced by settlement.

The procedure that was used clearly demonstrates the absence of collusion between the parties and favors approval of the settlement as fair, reasonable and adequate. Settlement negotiations that are conducted at arm's length and in good faith demonstrate that a settlement is not the product of collusion. *Scholes v. Stone, McGuire & Benjamin,* 839 F.Supp. 1314, 1318 (N.D.Ill.1993). Here, the arbitration was conducted over a four-day period. (Dumain Aff. ¶ 33.) Plaintiff's counsel was permitted to give opening and closing statements, conduct direct and cross-examination of witnesses and present legal arguments concerning loss causation to the Arbitrator. (Dumain Aff. ¶ 33.) This evidence is sufficient to establish that the negotiations were conducted at arm's length and in good faith. Thus, there was no possibility of collusion between the parties.

***3** Plaintiff's counsel deem the settlement to be fair, reasonable and adequate. The Court can consider the opinion of competent counsel in determining whether a settlement is fair, reasonable and adequate. *Isby,* 75 F.3d at 1200. Plaintiff's counsel are "experienced and skilled practitioners in the securities litigation field, and are responsible for significant settlements as well as legal decisions that enable litigation such as this to be successfully prosecuted." (Dumain Aff. ¶ 69.) Thus, Plaintiff's counsel are competent. Therefore, their opinion that the settlement is fair, reasonable and adequate also favors approval of the settlement.

The absence of objection to a proposed class settlement is evidence that the settlement is fair, reasonable and adequate. *Ressler v. Jacobson,* 149 F.R.D. 651, 656 (M.D.Fla.1992); *Schwartz v. Novo Indus.,* 119 F.R.D. 359, 363 (S.D.N.Y.1988). Pursuant to the Court's order, Plaintiff caused to be mailed more than 17,786 copies of the Notice to Class Members, and a summary notice of the proposed settlement and hearing was published in the Wall Street Journal. (Dumain Aff. ¶ 46.) The deadline for filing objections was October 29, 2001, and no objections have been received. Thus, the absence of objection to the settlement is evidence that the settlement is fair, reasonable and adequate.

Finally, the stage of litigation at which the settlement was reached also favors approval of the settlement. In *Armstrong,* the court found that this factor weighed in approving the proposed settlement because the litigation had progressed to a stage where the court and counsel could evaluate the merits of the case and the probable course of future litigation. 471 F.Supp. at 805, 806. Likewise, here, the settlement was reached after four years of litigation and the completion of fact and expert discovery, while parties were actively preparing for trial. The final pretrial order as well as a motion for summary judgment had been filed. It is clear that, in this case, both counsel and the Court have evaluated the merits of the case and the course of future litigation. It is also clear that counsel have a firm basis on which to assess the proposed settlement.

Therefore, based on the foregoing, the Court finds that the proposed settlement is fair, reasonable and adequate. Accordingly, the proposed settlement is approved. The Court also approves the proposed Plan of Allocation. The same standards of fairness, reasonableness and adequacy that apply to the settlement apply to the Plan of Allocation. The Court finds that these standards have been met with respect to the Plan of Allocation.

Attorney's Fees

Plaintiff requests attorney's fees of 33 1/3 % of the settlement amount, or $4,666,667.67, plus interest, and counsel's out-of-pocket expenses of $996,343.66. (Dumain Aff. ¶ 56.) Under either the percentage method or the lodestar method, Plaintiff's requested attorney's fees are reasonable.

***4** "When a case results in the creation of a common fund for the benefit of the plaintiff class, the common fund doctrine allows plaintiffs' attorneys to petition the court to recover its fees out of the fund." *Florin v. Nationsbank, N.A.,* 34 F.3d 560, 563 (7th Cir.1994). A court may determine reasonable attorney's fees as either a percentage of the fund or the lodestar amount, i.e. the number of hours worked multiplied by the attorney's hourly rate. *Florin,* 34 F.3d at 563. "[C]ourts may not enhance a fee award above the lodestar amount to reflect risk of loss or contingency." *Florin,* 34 F.3d at 564. "[T]he decision whether to use a percentage method or a lodestar method remains in the discretion of the district court." *Florin,* 34 F.3d at 566.

Courts try to approximate the market in determining reasonable attorney's fees. "The class counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client." *Steinlauf v. Continental Ill. Corp. (In re Continental Ill. Sec. Litig.),* 962 F.2d 566, 572 (7th Cir.1992). A customary contingency fee would range from 33 1/3% to 40% of the amount recovered. *See, e.g., Kirchoff v. Flynn,* 786 F.2d 320, 324 (7th Cir.1986); *In re Sell Oil Refinery,* 155 F.R.D. 552, 572 (E.D.La.1993) ("The customary contingency fee is between 33 1/3% and 40%."). Thus, the requested one-third of the common fund constitutes a reasonable attorney's fee.

Plaintiff's counsel worked 14,085.18 hours on this case. Under the lodestar method, this would amount to $4,842,573.55 in attorney's fees. (Dumain Aff. ¶ 57.) Attorney's fees determined by the percentage method amount to $4,666,667.67. This amount is lower than the amount determined by the lodestar method, which suggests that one-third of the common fund is a reasonable attorney's fee. Furthermore, no member of the plaintiff class has objected to the request for attorney's fees. This also suggests that the requested attorney's fees are reasonable. *See Ressler,* 149 F.R.D. at 656. Therefore, the Plaintiff's request for attorney's fees and costs is granted.

In *Cook v. Niedert,* 142 F.3d 1004, 1016 (7th Cir.1998) (citing *Spicer v. Chicago Bd. Options Exchange, Inc.,* 844 F.Supp. 1226, 1267 (N.D.Ill.1993)), the Seventh Circuit held that a court may grant a special award to the named plaintiff in a class action based on "the actions the plaintiff had taken to protect the interests of the class, the degree to which the class benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." Based on the representations of counsel as to the services rendered by the Retsky Family Limited Partnership in the prosecution of the class action, as more fully set out in the transcript of the proceedings of November 19, 2001, the Court finds that a special award is appropriate and that the sum of $7,500 is reasonable compensation.

CONCLUSION

***5** For the reasons stated herein, the proposed settlement is approved, and Plaintiff's request for an award of attorney's fees, reimbursement of expenses and a special award is granted.

IT IS SO ORDERED.

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EXHIBIT I

2015 WL 8329916
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Mark ROBERTI
v.
OSI SYSTEMS, INC. et al.

Case No. CV-13-09174 MWF (MRW)
|
Signed 12/08/2015

Attorneys and Law Firms

Lionel Zevi Glancy, Robert Vincent Prongay, Lesley F. Portnoy, Glancy Prongay and Murray LLP, Los Angeles, CA, Michael M. Goldberg, Goldberg Law PC, Marina Del Rey, CA, Jeremy A Lieberman, Pomerantz LLP, New York, NY, for Mark Roberti.

Peter Allen Wald, Latham and Watkins LLP, San Francisco, CA, Anita P. Wu, James H. Moon, Latham & Watkins LLP, Los Angeles, CA, Erica Lyn Swoyer Anderson, Michele D. Johnson, Latham & Watkins LLP, Costa Mesa, CA, for OSI Systems, Inc., et al.

Proceedings (In Chambers): ORDER GRANTING LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION [84]; LEAD COUNSEL'S MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES [85]

The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court are Lead Plaintiff Arkansas State Highway Employees Retirement System's Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Motion for Final Approval") (Docket No. 84) and Motion for Award of Attorney's Fees and Reimbursement of Litigation Expenses ("Motion for Attorney's Fees") (Docket No. 85), both filed on November 2, 2015. No objections to either Motion have been filed with the Court. On November 30, 2015, Lead Plaintiff filed a Reply in support of both Motions ("Reply") (Docket No. 88).

On December 7, 2015, the Court held a Settlement Hearing. Having reviewed and considered the briefs and oral argument at the hearing, the Court **GRANTS** the Motion for Final Approval. The proposed Settlement and Plan of Allocation are fair, reasonable, and adequate to serve the interests of the Settlement Class members. The Court also **GRANTS** the Motion for Attorney's Fees. The attorney's fees and litigation expenses sought are also reasonable to compensate Lead Counsel fairly.

I. BACKGROUND

A. *Procedural History*

On December 12, 2013, Plaintiff Mark Roberti initiated a federal securities class action on behalf of a putative class consisting of all persons other than Defendants who purchased or otherwise acquired OSI Systems, Inc. ("OSI") securities between January 24, 2012, and December 6, 2013, both dates inclusive. (Docket No. 1, ¶ 1). The Complaint sought recovery for damages caused by Defendants' violations of federal securities laws and to pursue remedies under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5, 17 C.F.R. § 240.10b–5, promulgated thereunder. (*Id.*).

Defendant produces medical monitoring and anesthesia systems, security and inspection systems, and lasers, optics, and optoelectronic components. (*Id.* 2). One of OSI's largest customers is the United States Department of Homeland Security ("DHS") and the Transportation Security Administration ("TSA"), who use OSI's security imaging products at security checkpoints and screenings in United States airports. (*Id.* ¶ 3). According to the Complaint, "Defendants made materially false and misleading statements regarding [OSI's] business, operational and compliance policies." (*Id.* ¶ 4). After these materially false and misleading statements were revealed by various news sources, the market value of OSI securities suffered a precipitous decline, thereby injuring the financial interest of putative class members holding OSI securities. (*Id.* ¶¶ 5–13).

On March 17, 2014, the Court granted Plaintiff Arkansas State Highway Employees Retirement System's Motion for Appointment of Counsel and Appointment as Lead Plaintiff. (Docket No. 35). On May 20, 2014, Lead Plaintiff filed a First Amended Complaint ("FAC"). (FAC, Docket No. 44). The FAC provided additional details behind OSI's allegedly materially false and misleading statements concerning OSI's development of software to transform "naked body" images

to more generic images of travelers undergoing security screening. (*Id.* 3). The FAC also alleged additional materially false and misleading statements regarding the financial health of OSI. (*Id.* ¶ 11).

***2** On August 29, 2014, Defendants filed a Motion to Dismiss Plaintiff's Amended Class Action Complaint. (Docket No. 51). On February 27, 2015, the Court issued an Order denying Defendants' Motion to Dismiss. (Docket No. 60).

On June 30, 2015, Lead Plaintiff filed a Motion to Certify Class. (Docket No. 74). On August 21, 2015, however, Lead Plaintiff filed an Ex Parte Application for Preliminary Approval of Class Action Settlement. (Docket No. 80). The Court issued an Order preliminarily approving the proposed settlement and setting a Settlement Hearing for December 7, 2015. (Docket No. 82). On November 2, 2015, Lead Plaintiff filed a Motion for Final Approval of Class Action Settlement and Plan of Allocation. (*See generally* Motion for Final Approval). On the same day, Lead Plaintiff also filed a Motion for Attorney's Fees and Reimbursement of Litigation Expenses. (*See generally* Motion for Attorney's Fees). On November 30, 2015, Lead Plaintiff filed a Reply with an accompanying Notice of Non–Opposition to both the Motion for Final Approval and Motion for Attorney's Fees. (*See generally* Reply).

B. *Settlement*

The Settlement applies to the Settlement Class, as defined as: "All persons and entities that purchased or otherwise acquired OSI common stock between January 24, 2012, and December 6, 2013, inclusive, and were damaged thereby." (Motion for Final Approval at 1 n.2). Expressly excluded from the Settlement Class are Defendants and their related persons, as well as "putative Settlement Class Members that exclude themselves by submitting a request for exclusion." (Stipulation and Agreement of Settlement, Docket No. 81 Ex. 1, at 17).

Under the Settlement, Defendant shall make a total payment of $15 million in cash to be held in escrow. (*Id.* at 11, 17). This amount, with interest, will cover taxes, notice and administration costs, any litigation expenses awarded by the Court, and any attorney's fees awarded by the Court. (*Id.* at 23). The balance remaining shall be distributed to authorized Settlement Class Members with valid claims as determined by the Claims Administrator. (*Id.* 23, 28–29). In return, Settlement Class Members agree to release claims "that are based upon, arise from, are in connection with, or relate to: (a) Lead Plaintiff's or the Settlement Class's purchase, acquisition or sale of OSI common stock for the time period between January 24, 2012, and December 6, 2013, inclusive; (b) the subject matter of the Action for the time period between January 24, 2012, and December 6, 2013, inclusive; or (c) the facts alleged or that could have been alleged in any complaint for the time period between January 24, 2012, and December 6, 2013, inclusive." (*Id.* at 15–16). Pursuant to the Settlement, Lead Counsel moved for attorney's fees and litigation expenses. (*See generally* Motion for Attorney's Fees).

C. *Notice and Response*

Notice was sent to the Settlement Class members pursuant to the method approved by the Court. "Lead Plaintiff, through the Claims Administrator, disseminated over 35,407 copies of the Court-approved Notice to potential Settlement Class members and their nominees who could be identified with reasonable effort." (Motion for Final Approval at 22). In addition, the Court-approved Summary Notice was published in the *Investor's Business Daily* and *PR Newswire* on September 24, 2015. (*Id.*). Information regarding the Settlement was also made available through a toll-free telephone number, posted on the website created by the Claims Administrator specifically for this Settlement, and on Lead Counsel's website. (*Id.*). To date, the Court has received only two letters indicating that the notices to Rock Creek MB, LLC and Credit Suisse First Boston Corporation could not be delivered.

***3** The Settlement Class members had until November 16, 2015, to object to the proposed Settlement and Plan of Allocation or request that they be excluded from the Settlement Class. (Reply at 2). As of November 30, 2015, no objections have been received by the Claims Administrator or filed with the Court. (*Id.*). Furthermore, only one individual has requested exclusion. (*Id.* n.2). This individual indicated that he bought, and sold for a profit, a total of 600 shares during the relevant time period. (*Id.*).

II. LEGAL STANDARD

Before approving a class-action settlement, Rule 23 of the Federal Rules of Civil Procedure requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed.R.Civ.P. 23(e)(2). "To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: [1] the strength

of plaintiffs' case; [2] the risk, expense, complexity, and likely duration of further litigation; [3] the risk of maintaining class action status throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery completed, and the stage of the proceedings; [6] the experience and views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.,* 327 F.3d 938, 959 (9th Cir.2003) (internal citation and quotation marks omitted) (applying the factors announced in *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir.1998)).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n,* 688 F.2d 615, 625 (9th Cir.1982). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton,* 327 F.3d at 960 (quoting *Hanlon,* 150 F.3d at 1026). "The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair." *Linney v. Cellular Alaska P'ship,* Nos. C–96–3008 DLJ, C–97–0203 DLJ, C–97– 0425 DLJ, C–97–0457 DLJ, 1997 WL 450064, *5 (N.D.Cal. July 18, 1997), *aff'd,* 151 F.3d 1234, 1234 (9th Cir.1998).

"In addition, the settlement may not be the product of collusion among the negotiating parties." *In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 458 (9th Cir.2000).

III. DISCUSSION

D. *Final Approval of Class Action Settlement and Plan of Allocation*

The proposed Settlement is the outcome of an arms-length negotiation conducted with the help of Judge Layn R. Phillips (Ret.) acting as mediator. (Motion at 6). The parties participated in a full-day mediation on June 12, 2015. (*Id.*). The parties did not reach agreement at the conclusion of that session, but Judge Phillips conducted further negotiations over the course of the next 1.5 months. (*Id.*). The parties eventually agreed to settle the action following Judge Phillips' double-blind Mediator's Recommendation of $15 million, which the parties accepted. (*Id.* at 6–7). "The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp*., No. C 03 2878 SI, 2007 WL 1114010, at *4 (N.D.Cal. Apr. 13, 2007). The Court is satisfied that the proposed Settlement is not the product of collusion between the parties. The arms-length nature of the negotiation resulting in the proposed Settlement supports final approval.

***4** Furthermore, the *Hanlon* factors listed above also favor final approval of the proposed Settlement.

1. Strength of Plaintiff's case and risk, expense, complexity, and likely duration of further litigation

Lead Plaintiff argues that its case is strong but entails risks. Specifically, Lead Plaintiff points to several defenses mounted by Defendants that include, among others (1) the allegedly false statements were nonactionable puffery or statements of corporate optimism, (2) the allegedly false statements were technically true, and (3) Lead Plaintiff would be unable to disaggregate the losses caused by Defendants' allegedly wrongful conduct from losses caused by other non-actionable factors. (Motion at 9–10). Furthermore, Lead Plaintiff's case is complicated, if not hindered, by the complex contractual arrangement between OSI and the TSA as well as the TSA's assertion that certain requested discovery cannot be produced because they are Sensitive Security Information. (*Id.*). Defendant has strongly defended this case, including filing a motion to dismiss. Judge Phillips has also observed that "[c]ounsel for both parties presented significant arguments regarding their clients' positions, and it was apparent to me that both sides possessed strong, non-frivolous arguments, and that neither side was assured of victory." (Declaration of Layn R. Phillips ("Phillips Decl."), Docket No. 86–5, ¶ 7).

To ultimately prevail, Lead Plaintiff would need to prevail at several stages–class certification, summary judgment, trial, and perhaps even on appeal. Absent a settlement, the parties could incur additional costs in conducting further discovery, completing briefing on the pending motion for class certification, briefing on cross-motions for summary judgments, preparing for trial, and conducting trial.

In light of these considerations, the uncertainties, risks, and additional costs inherent to further litigation weigh in favor of granting final approval of the proposed Settlement.

2. Risk of maintaining class action status throughout the trial

As discussed above, Lead Plaintiff's Motion to Certify Class is pending before the Court. Because the Settlement avoids the uncertainty with respect to class certification, this factor weighs in favor of final approval.

3. Amount offered in settlement

The Court concludes that the $15 million offered in the Settlement is reasonable. Lead Counsel's consultant estimated that the potential maximum recoverable damages in this case, assuming that Lead Plaintiff prevails on all claims, would be at most $170 million. (Motion at 13–14). However, if "Defendants proved that their alleged misstatements about the baggage scanners were not false, damages could be reduced to $76 million." (Motion at 14). Furthermore, if Defendants succeeded on their defense that certain announcements did not constitute corrective disclosures, damages could be eliminated entirely. (*Id.*). Therefore, the Settlement amount is reasonable in light of the anticipated risks in further litigation. *Cf. Officers for Justice,* 688 F.2d at 628 ("It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair."). The adequacy of this amount is reinforced by the fact that the amount was originally recommended by Judge Phillips, an objective and informed third-party during the mediation process.

***5** The Plan of Allocation is likewise reasonable. Here, Lead Plaintiff hired a consultant to develop the plan to allocate the Settlement proceeds. (Motion at 21). The proposed Plan of Allocation distributes the settlement proceeds on a *pro rata* basis, calculating a claimant's relative loss proximately caused by Defendants' allegedly wrongful conduct, based on factors such as when and at what prices the claimant purchased and sold OSI common stock. (*Id.*). *See In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1045 (N.D.Cal.2008) ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.").

In developing the Plan of Allocation, the consultant calculated the artificial inflation caused by Defendants' allegedly wrongful conduct, considering the declines on OSI's common stock price following the four alleged corrective disclosures that revealed the alleged truth to investors. (*Id.*). The consultant also performed an event study to control for other noise and to determine whether the price decline is statistically significant. (*Id.*). The Plan of Allocation was described in detail in the notice sent to potential Settlement Class members. As discussed above, no objections to the Plan of Allocation or the proposed Settlement have been received by the Claims Administrator or submitted to the Court.

Accordingly, this factor weighs in favor of granting final approval.

4. Extent of discovery completed and stage of the proceedings

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney,* 151 F.3d at 1239. Lead Counsel has sufficiently developed the record by, *inter alia*, (1) performing in-depth review and analysis of OSI's public filings, press releases, news articles, transcripts from earning's calls and investor conferences, and other pricing and trading data concerning OSI common stock; (2) investigating and interviewing potential percipient witnesses such as former OSI employees; (3) consulting with economic and accounting experts; (4) serving and responding to discovery requests; (5) serving Freedom of Information Act ("FOIA") requests on TSA and DHS; (6) reviewing discovery and FOIA responses and production; and (7) preparing the motion for class certification, including an expert report. (Motion at 15–17). Based on the above, the Court concludes that the parties have engaged in sufficient investigation to make an informed decision about settlement. Accordingly, this factor weighs in favor of granting final approval.

5. Experience and views of Lead Counsel

Both Lead Counsel and Defendants' counsel are skilled and well-respected in their field of litigation. (Motion at 18–19). Judge Phillips has also praised counsel for their "effort, creativity, and zeal." (Phillips Decl. ¶ 14). Lead Counsel, Lead Plaintiff (as a sophisticated institutional investor), and Defendants' counsel endorse the Settlement as fair, reasonable, and adequate. (Motion at 19–20). Accordingly, this factor weighs in favor of granting final approval.

6. Reaction of the class members to the proposed settlement

As discussed above, approximately 35,407 notices were sent. Only one person (who suffered no financial injury) has opted out of the settlement, and no one has objected to the settlement. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *Nat'l Rural Telecomm'cns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D.Cal.2004). After receiving notice of the proposed Settlement, the Settlement Class has been entirely silent. By any standard, the lack of objection favors final approval. *See, e.g., Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.2004) (affirming settlement with 45 objections out of 90,000 notices sent).

***6** Based on the *Hanlon* factors, the Court concludes that the Settlement and Plan of Allocation are reasonable, fair, and adequate.

E. *Attorney's Fees and Reimbursement of Litigation Expenses*

In the Ninth Circuit, there are two primary methods to calculate attorney's fees: the lodestar method and the percentage-of-recovery method. *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir.2015) (citation omitted). "The lodestar method requires 'multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.' " *Id.* (citation omitted).

"Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%." *Id.* (citation omitted). However, the "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir.1990). An assessment of the reasonableness of the fee request is to be determined by consideration of multiple factors. "The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases." *Martin v. Ameripride Services, Inc.*, No. 08cv440–MMA (JMA), 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, at 1048–50 (9th Cir.2002)). The choice of "the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino,* 290 F.3d at 1048.

Here, the factors listed above all favor of approving Lead Counsel's request for attorney's fees:

As to the first and second factors, as discussed, the risks of continued litigation are substantial. Defendants' vigorous opposition to this case, including filing a motion to dismiss, raised numerous significant defenses to the claims presented.

As to the third factor, the skill required from Lead Counsel in this case was high, given the nature of the claims at issue and the quality of work performed by opposing counsel.

As to the fourth factor, Lead Counsel took this case on a contingent fee basis and therefore has not received any payment to date for their efforts in prosecuting these actions. Lead Counsel has also fronted $130,205.34 in costs.

As to the fifth factor, Lead Counsel invested nearly 2,500 of attorney and staff hours on this case during the course of two years.

As to the sixth factor, the percentage of the Settlement that Lead Counsel seeks is 20%, which is slightly below the benchmark of 25% established by the Ninth Circuit. This is reasonable given that, in most common fund cases, the award exceeds that benchmark. *In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377 (N.D.Cal.1989) (surveying securities cases nationwide and noting "[t]his court's review of recent reported cases discloses that nearly all common fund awards range around 30% ..."); *see also In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D.Pa.2000) ("The median in class actions is approximately twenty-five percent, but awards of thirty percent are not uncommon in securities class actions."). The *Activision* court concluded that, where a court adopts the percentage method, "absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%." 723 F.Supp. at 1378. The awards in other similar cases involving

securities class action therefore support an award of 20% of the Settlement, and there is no evidence of extraordinary circumstances that suggest reasons to lower or increase the percentage.

***7** The reasonableness of this amount is confirmed by a cross-check with a lodestar comparison. *Vizcaino,* 290 F.3d at 1050–51. Lead Counsel provide documentation as to the hours each of them billed in this litigation, and they have devoted 2,492.25 hours to this action. (Motion for Attorney's Fees at 16). The Court agrees this amount is reasonable given the length of the case and the issues involved. Moreover, Lead Counsel's attorney rates–between $525 to $975–are reasonable given that each has at least 15 years of litigation experience (upwards of over 40 years of litigation experience), with the exception of Matthew Jubenville, the day-to-day litigation associate. (Docket No. 86–1, Ex. 4). These rates are also the same or comparable with rates submitted by Lead Counsel for lodestar crosschecks in other securities class action litigation for fee applications that have been granted, including in this Circuit. (Motion for Attorney's Fees at 16). Multiplying the hours by the rates documented results in a lodestar of $1.36 million. (*Id.*). The Court's $3 million fee award represents a multiplier of less than 2.2 of Lead Counsel's total lodestar, which is well within the range of acceptable multipliers in a common fund case. *See Vizcaino,* 290 F.3d at 1051 n.6 (noting that the majority of fee awards are 1.5 to 3 times higher than lodestar).

The Motion for Attorney's Fees also seeks to recover $130,205.34 spent by Lead Counsel in prosecuting this action to date. Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters. *See Harris v. Marhoefer,* 24 F.3d 16, 19 (9th Cir.1994). Lead Counsel's expenses are documented in great detail in the accompanying declaration. (Docket No. 86–1, Ex. 4). The expenses relate to service of process, online legal and factual research, travel, experts and consultants, and mediation. (Motion for Attorney's Fees at 17). The bulk of the costs are driven by legal research ($21,203.81), experts/consultants ($86,758.00), and mediation fees ($13,416.67). (*Id.* at 88). Attorneys routinely bill clients for all of these expenses, and it is therefore appropriate for Lead Counsel here to recover these costs from the Settlement. Lead Counsel has also represented that Lead Counsel's firm does not include charges for expense items in the firm's billing rates. (*Id.* at 84).

IV. CONCLUSION

The Court **GRANTS** the Motion for Final Approval. For the reasons set forth in the Court's Order preliminarily approving the Settlement (Docket No. 82), the Court also **GRANTS** final certification of the Settlement Class. Distribution of the Settlement funds to claimants shall be made in accordance with the method outlined in the Plan of Allocation.

The Court also **GRANTS** the Motion for Attorney's Fees. The Court awards class counsel $130,205.34 in costs and $3 million in fees, based on an award of 20% of the $15 million Settlement.

Consistent with the Court's rulings in this Order, a separate Judgment granting final approval and awarding attorney's fees will issue.

Based on the above, Lead Counsel's pending Motion to Certify Class (Docket No. 74) is hereby **DENIED *as moot***.

IT IS SO ORDERED.

All Citations

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EXHIBIT J

2016 WL 772785
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

IN RE: SEARS, ROEBUCK AND CO. FRONT-LOADING WASHER PRODUCTS LIABILITY LITIGATION.
This Document Relates to CCU Claims.

Case Nos. 06 C 7023, 07 C 0412, 08 C 1832
|
Signed 02/29/2016

MEMORANDUM OPINION AND ORDER

MARY M. ROWLAND, United States Magistrate Judge

***1** In 2001, Whirlpool began manufacturing front-load washing machines and selling them under its own brand. In 2005, Sears began to sell the same Whirlpool-manufactured machines under the Sears brand. Unfortunately, some buyers of these machines began to experience problems. The buyers began to file lawsuits against both Whirlpool and Sears, asserting the washing machines suffered two types of defects: (1) the "Biofilm defect," which caused mold and mildew to grow inside the machines; and (2) the "CCU defect," which caused the machines' Central Control Unit to malfunction. The cases against Sears are all pending in this Court. The cases against Whirlpool were joined through multidistrict litigation and are all pending in the Northern District of Ohio. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, case no. 08-WP-65000, MDL No. 2001 (N.D. Ohio).

Recently, the parties in both the *Sears* and *Whirlpool* cases announced they had settled all claims. Rather than agree to a "Sears Settlement" and a "Whirlpool Settlement," however, it proved easier to agree to a "CCU Settlement" and a "Biofilm Settlement." The parties have chosen to file their CCU Settlement papers (resolving CCU claims against both Sears and Whirlpool) in this Court, and to file their Biofilm Settlement papers (resolving Biofilm claims against both Sears and Whirlpool) in the MDL Court.

On August 21, 2015, this Court entered an Order granting preliminary approval to the CCU Class Action Settlement Agreement. *See* docket no. 514 ("*Preliminary Approval Order*"). The plaintiffs, Sears, and Whirlpool now join to ask the Court for final approval. *See* docket no. 569. For the reasons stated below, the joint motion for final approval of the CCU class action settlement is **GRANTED**.

In addition, class counsel has moved for an award of attorney fees, reimbursement of expenses, and incentive awards for representative plaintiffs (docket no. 530). Defendants take issue with the requested amounts of fees and expenses, but do not object to the requested amount of incentive awards. Accordingly, the Court **GRANTS** this motion **in part** as unopposed and hereby awards to each of the nine representative plaintiffs an incentive award of $4,000, for a total of $36,000.[1] The Court will address class counsel's request for fees and expenses in a separate Order.

[1] The nine named representative plaintiffs in the consolidated complaint are Kevin Barnes, Alfred Blair, Martin Champion, Lauren Crane, Alan Jarashow, Joseph Leonard, Lawrence L'Hommedieu, Victor Matos, and Victoria Poulsen.

I. PROCEDURAL HISTORY

On December 19, 2006, a group of five plaintiffs filed this action against Sears, complaining that the Kenmore-brand front-load washers they had purchased from Sears suffered serious performance problems. After two other groups of plaintiffs filed similar lawsuits against Sears, the three cases were consolidated in this Court for pretrial purposes. *See* docket nos. 36, 96.

About two years later, on March 24, 2009, plaintiff Victoria Poulsen filed a similar action against Whirlpool (which manufactured the washers at issue under both the Kenmore and Whirlpool brand names) in the U.S. District Court for the Eastern District of California. The MDL Panel transferred the *Poulsen* action to the *Whirlpool* multidistrict litigation in the Northern District of Ohio.

***2** In 2011, this Court certified a class of all Illinois, Indiana, Kentucky, Minnesota, Texas, and California purchasers of the Kenmore-brand Washers who suffered the alleged CCU defect. *See* docket no. 285. The Seventh Circuit upheld that ruling on appeal, but clarified that the class was properly certified only for class liability proceedings, not for a determination of classwide damages. *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *rehearing and rehearing en banc denied* (7th Cir. 2012), *cert.*

granted, judgment vacated, 133 S. Ct. 2268 (2013), *judgment reinstated, affirmed in relevant part*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). The parties and the Court later agreed to conduct the first trial on behalf of the Illinois class only, which the Court scheduled for July 2015.

Two months before the scheduled trial, the parties informed the Court they had settled plaintiffs' CCU claims. *See* docket no. 483. The Court then granted the parties' joint motion for preliminary approval of the CCU Settlement Agreement. *See* docket no. 514. For purposes of accomplishing the *nationwide* proposed class settlement in this Court, plaintiffs amended the complaint in this case to add Poulsen's claims. *See* docket no. 508. The parties state that, if the Court approves their CCU Settlement Agreement, they will move the MDL Court to dismiss the *Poulsen* case with prejudice. Thus, this Court's approval of the CCU settlement agreement will serve to resolve the class-action CCU claims against both Sears and Whirlpool.

II. THE CLAIMS AT ISSUE

In their consolidated class action complaint, the nine representative plaintiffs assert that Sears and Whirlpool sold them certain models of front-load washing machines that "had as component parts Matador 1 Central Control Unit ("CCU") boards manufactured by Bitron...on a CEM-1 printed circuit board." Complaint at ¶2 (docket no. 508). Plaintiffs allege these CCU circuit boards were defective, causing problems during the wash cycle, including "but not limited to, (a) premature and repeated mechanical failure; (b) stopping or not starting; (c) door remaining locked; and (d) displaying a variety of error codes such as F11 and FDL." *Id.* Plaintiffs' expert later opined that the CCUs were defective because they were printed on a material known as CEM-1, which is brittle, rather than a more flexible material such as CEM-3; when consumers operated the washers, normal vibrations stressed the brittle CEM-1 material, causing micro-fractures to the CCU's solder connections and breaking the electronic circuits. *See* docket no. 564-1 (report of plaintiffs' expert Michael Pecht).

In their consolidated complaint, plaintiffs state claims for various species of breach of express and implied warranty under State and federal law. *See* complaint at ¶4 (docket no. 508). Plaintiffs assert these claims on behalf of two classes: (1) a nationwide class of owners of certain Sears Kenmore washers that contain the "Matador 1" CCU; and (2) a California class of owners of certain Whirlpool washers that contain the "Matador 1" CCU. *Id.* at ¶55. [2] The parties explain that these two classes include about 450,000 Kenmore washers and 86,500 Whirlpool washers.

[2] Originally, in the *Sears* litigation, plaintiffs brought a claim for injunctive relief on behalf of a nationwide class of owners of Sears-branded washers with faulty CCUs. *See* Complaint at 7 (docket no. 1). In contrast, plaintiffs in the *Whirlpool* MDL brought claims only on behalf of a class of California owners of Whirlpool-branded washers with faulty CCUs. *See Poulsen v. Whirlpool Corp.*, case no. 09-WP-65003 (N.D. Ohio) (docket no. 1, complaint at ¶52). The current Settlement Agreement reflects the original scope of each class—the Sears settlement class includes a nationwide group of Sears washer owners, while the Whirlpool settlement class remains limited to California Whirlpool washer owners. The parties recently filed a consolidated complaint in this case to mirror these settlement class definitions, *see* docket no. 508 at ¶55.

III. SETTLEMENT AGREEMENT

***3** The principal feature of the parties' CCU Settlement Agreement is that defendants will pay full monetary compensation to class members who suffered out-of-pocket expenses for repairs related to the CCU problem. The Settlement Agreement also provides defendants will: (1) pay attorneys fees to class counsel, (2) reimburse class counsel's litigation expenses, (3) pay incentive awards to the nine named plaintiffs, and (4) pay the costs of settlement administration and class notice. In exchange, class members who do not opt out will release all of their CCU-based claims. (In the CCU settlement, class members will *not* be releasing any of their biofilm-based claims.)

The terms of the CCU Settlement Agreement are described in more detail, below.

• The Settlement Classes

The Kenmore Settlement Class is defined to include all persons who, while living in the United States, purchased or received as a gift a new Kenmore Washer. The term "Kenmore Washer" is defined to include a Kenmore-brand front-loading

washing machine manufactured by Whirlpool between June 8, 2004, and February 28, 2006, with a Bitron-manufactured Matador 1 CCU. These Kenmore washers are identifiable by specific combinations of model and serial numbers. S.A. at 6.

Similarly, the Whirlpool Settlement Class is defined to include all persons who, while in the State of California, purchased or received as a gift a new Whirlpool Washer. The term "Whirlpool Washer" is defined to include a Whirlpool-brand front-loading washing machine manufactured by Whirlpool between May 25, 2004, and February 28, 2006, with a Bitron-manufactured Matador 1 CCU. These Whirlpool Washers are also identifiable by specific combinations of model and serial numbers. S.A. at 11-12.

• Compensable Performance Problems

The Settlement Agreement provides monetary compensation for class members whose washers suffered certain "Performance Problems," and who suffered out-of-pocket losses to pay for "Qualifying Repairs."

Notably, the definition of a CCU-related Performance Problem is fairly broad—it includes, *but is not limited to*, "(a) failure of the Washer to complete a cycle or interruption of the cycle; (b) failure of the door to lock at the start of the wash cycle or display of an Fdl error code on the control console, or both; (c) failure of the door to unlock at the end of the wash cycle or display of an Fdu error code on the control console, or both; (d) display of an F11 error code; and (e) service calls to repair or replace the CCU, the door lock assembly, the wire harness between the CCU and the MCU [Motor Control Unit], the wire harness between the CCU and the door lock, or the MCU." S.A. at 7.

Compensation is available for "Qualifying Repairs," which essentially tracks the definition of Performance Problems. Thus, a "Qualifying Repair" means that "***within three years after the Purchase Date***: (1) a Service Technician repaired or replaced the Washer's CCU, or (2) a Settlement Class Member otherwise incurred documented out of pocket costs to repair the Washer due to the Washer's Performance Problem..., or (3) a Settlement Class Member replaced the Washer or otherwise took it out of service after contacting Whirlpool, Sears, an authorized Whirlpool or Sears retailer, or a Service Technician about a Performance Problem...." S.A. at 8 (emphasis added).

The three-year period is especially notable, because the original manufacturer's warranty for the Washers was limited to one year for labor and two years for parts. Thus, the Settlement Agreement provides benefits in excess of the defendants' written warranties.

• Amount of Compensation

The amount of compensation to which class members are entitled depends on the amount of repair costs they incurred and the proofs they submit. As a general matter, however, class members will receive a minimum of $150.00 for a valid claim. This is not a "limited fund" settlement, meaning there is no cap on the total amount that defendants may ultimately be required to pay for valid claims; nor is there a cap on how much an individual class member may receive. Plaintiffs accurately summarize the compensation scheme as follows (quoted from docket no. 503-1 at 10-11, emphasis in original):

> ***4** ***Reimbursement for Paid Qualifying Repairs***: Eligible Settlement Class Members will receive the **full amount**—with no cap—of any documented costs for their First Paid Repair for any Performance Problems within 3 years of purchase. Moreover, to the extent Settlement Class Members can provide sufficient documentary proof for their First Paid Repair but the proof does not show the amount paid for that repair, such Settlement Class Members will nonetheless receive $150. S.A. § IV.C.1. Class members can also get additional compensation (on the same terms) for a Second Paid Repair (as long as the repair occurs less than 54 months after purchase). S.A. § IV.C.2.a.
>
> ***Reimbursement for Replacement***: If the Settlement Class Member chose to replace, rather than repair, the Washer or otherwise took it out of service after contacting Whirlpool, Sears, or an Authorized Service Technician about a Performance Problem, the Settlement Class Member will be reimbursed for the amount that sufficient documentary proof shows the Settlement Class Member actually paid for the replacement clothes washer up to a **maximum of $300.** S.A. § IV.C.2.
>
> ***Compensation for Qualifying Service Contracts***: Class Members who effected repairs of performance promise by purchasing a warranty service contract will be reimbursed **$100** to partially offset the cost of the service contract. The slightly-reduced amount reflects that the service contract provided value in addition to the cost of repairing the CCU Performance Problem. S.A. § IV.C.4.

> ***Compensation for Excessive Repairs***: Settlement Class Members [who] had the CCU replaced by a Service Technician on three occasions within four years of purchase will receive the **greater of** (i) the purchase price of the Washer or (ii) the aggregate cost for the three repairs. S.A. § IV.C.5.
>
> ***Offsets***: The above compensation is subject to an offset if Whirlpool or Sears previously provided compensation for CCU Performance Problems (e.g., a policy-adjust cash payment, a partial refund, a discount off the regular price of a new clothes washer, a coupon applicable to the purchase of a new clothes washer that was redeemed, etc.). S.A. § IV.D.

With regard to how the "compensable amounts" payable to class members is actually panning out under the Settlement Agreement, the Claims Administrator reports that, so far, the average amount for valid claims is about $277.

• Notice and The Claims Process

When a consumer purchases a Sears washer, Sears usually collects point-of-purchase data, including the contact information for the consumer and also serial and model numbers of the purchased washer. To a lesser extent, Whirlpool collects similar information (mostly through warranty registration card returns, rather than point-of-purchase data). As a result, the defendants know the specific identify of the vast majority of purchasers of the Kenmore Washers at issue, and many of the Whirlpool Washers at issue. Further, in many cases, Sears and Whirlpool know whether those purchasers already complained about CCU-related problems—for example, Sears' database would also reveal that a purchaser of a Kenmore Washer made a service call to Sears shortly after buying the machine, asking why the console keeps displaying the F11 error code.

These circumstances allowed Notice to be more precise, and also allowed the claim submission process to be more streamlined. Regarding Notice, the Claims Administrator explains he used defendants' databases to identify names and addresses for 486,387 individuals known to have purchased the Washers at issue, and also to send 41,072 emails directly to individuals known to have purchased the Washers at issue. *See* docket no. 523-1 at ¶¶15-16. In addition, the Claims Administrator undertook publication notice via newspaper, magazine, and the internet, with special focus on California. *Id.* at ¶17. By using defendants' databases, this Notice plan made it highly likely that class members would learn of their rights.

***5** Moreover, defendants' databases allowed the Claims Administrator to streamline the claims submission process. Whenever possible, class members were sent postcard notices that contained a specific, individualized code; when the class member entered this code in the online claim form, many fields "auto-populated," making claim submission easier. And if a class member could also "be identified in Whirlpool's or Sears's databases as having paid for a Qualifying Repair or as having paid for a Qualifying Service Contract," then he or she was deemed a "Prequalified Class Member." S.A. at 7. Prequalified Class Members are not required to submit *any* documentation to support their claims; to receive reimbursement for the amounts that Sears already knows the Prequalified Class Members paid, these Class Members need only confirm their current name and address, check the eligibility boxes on the online Claim Form, and submit their electronic signature. *Id.* at 20.

Finally, defendants also agreed that, if a non-prequalified class member did not provide necessary documentation of an out-of-pocket expense for a Qualifying Repair, the Claims Administrator would search defendants' databases for proof of a claimed Qualifying Repair, so that the claim might be cured. *Id.* at 21.

In sum, because defendants can identify the vast majority of purchasers of the Washers at issue, and even whether those purchasers have already paid for a Qualifying Repair, the Claims Administrator was better able to ensure all class members (a) got notice and (b) could easily submit a claim.

• Attorney Fees, Expenses, and Class Representative Awards

By separate motion, class counsel ask the Court to approve: (1) an attorney fee award of $6 million; (2) reimbursement of about $187,000 in litigation costs and expenses; and (3) incentive awards of $4,000 to each of the nine representative plaintiffs. *See* docket no. 530. The Court will address that motion more fully in a separate opinion. It is worth noting now, however, how the Settlement Agreement addresses these subjects.

Attorney Fees and Expenses: The Settlement Agreement provides that defendants "have agreed to pay Class Counsel reasonable attorneys' fees and costs, without reducing the amount of money available to pay Valid Claims submitted by

Settlement Class Members or the amount of money to be paid for work performed by the Settlement Administrator." S.A. at 34-35. Thus, unlike cases where there is a limited settlement fund, payment to class counsel of fees and expenses will not in any way reduce the amount received by the settlement class.

Service Awards: The Settlement Agreement provides that defendants "shall" pay incentive awards of $4,000 each to the nine named plaintiffs, subject to Court approval. Like class counsel's fees and expenses, this $36,000 amount is in addition to any amounts the defendants will pay as settlement benefits to class members. S.A. at 29. Payment of these incentive awards will not in any way reduce the amount received by the settlement class.

In other words, eligible class members will be paid in full, regardless of defendants' separate obligations for attorney fees, administration costs, or anything else. And the approval and enforceability of the Settlement Agreement is not contingent on the Court's separate approval of a specific award of attorney fees, expenses, or class representative awards. S.A. at 36-37.

• Claims Administration

The Court previously approved Kurtzman, Carson Consultants, LLC ("KCC") as the settlement administrator. KCC's duties include: (1) preparing and issuing Class Notice; (2) identifying Prequalified Class Members; (3) creating the online claims process and written claim forms; (3) setting up and maintaining the settlement website and toll-free number; (4) responding to class member inquiries; (5) assessing and approving or rejecting claims; and (5) issuing settlement payments. S.A. at §§ IV.A.4 & V.

All costs of notice and claims administration are paid by defendants and do not reduce the amounts available to class members. *Id.* at § VI.

III. LEGAL STANDARDS

***6** This Court must determine whether the CCU class-action Settlement Agreement should be ratified. Federal Rule of Civil Procedure 23(e) mandates that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." To certify a class for settlement, a court must first consider whether the proposed class meets the requirements of Rule 23(a) & (b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The Court is also required to direct adequate notice to members of the settlement class. Fed. R. Civ. P. 23(c)(2)(B). If these requirements are met, then the court must ensure the proposed class action settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

Under Seventh Circuit law, a district court must, in evaluating the fairness of a settlement, consider "[a] the strength of plaintiffs' case compared to the amount of defendants' settlement offer, [b] an assessment of the likely complexity, length and expense of the litigation, [c] an evaluation of the amount of opposition to settlement among affected parties, [d] the opinion of competent counsel, and [e] the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996)). In reviewing these factors, courts view the facts "in the light most favorable to the settlement." *Isby*, 75 F.3d at 1199 (quoting *Armstrong v. Board of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 315 (7th Cir.1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)).

"The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.' " *Synfuel*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)). Furthermore, "[i]n conducting this analysis, the district court should begin by 'quantifying the net expected value of continued litigation to the class.' To do so, the court should 'estimate the range of possible outcomes and ascribe a probability to each point on the range.' " *Id.* (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002)).

"Federal courts naturally favor the settlement of class action litigation." *Isby*, 75 F.3d at 1196; *see Armstrong*, 616 F.2d at 313 ("In the class action context in particular, there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.") (citations and internal quotation marks omitted). Nevertheless, the Seventh Circuit has warned that "the structure of class actions under Rule 23...gives class action lawyers an incentive to negotiate settlements that enrich themselves but give scant reward to class members,

while at the same time the burden of responding to class plaintiffs' discovery demands gives defendants an incentive to agree to early settlement that may treat the class action lawyers better than the class." *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 293 (7th Cir. 2010) (emphasis omitted). District courts must therefore "exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions." *Synfuel*, 463 F.3d at 652; *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015).

***7** When considering whether a proposed settlement meets the requirements of Rule 23, the Court does not decide whether the agreement reached between the parties is the "best possible deal" for plaintiffs, nor whether the class has received the same benefit from the settlement as they would have recovered from a trial. *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1004 (N.D. Ill. 2000). Courts "should not substitute their own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. "Because the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citations and internal quotation marks omitted).

V. ANALYSIS

A. Notice was Sufficient.

Rule 23(c)(2)(B) requires that, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also* Fed. R. Civ. P. 23(e)(1). This Court earlier approved the plan of notice and the claim forms, concluding they "satisf[y] the notice requirements of Federal Rule of Civil Procedure 23(e) and all applicable federal law." *See* docket no. 514 at 8. The Settlement Administrator mailed a copy of the notice to all Settlement Class members whose ad-dress reasonably could be identified in Whirlpool's or Sears' records, and also emailed a copy of the notice to all Settlement Class members for whom Sears or Whirlpool had email addresses. This effort provided direct notice to about 89% of class members.

Because direct notice could not be sent to a substantial percentage of the California Whirlpool class membership – since many of those individuals could not be identified in Whirlpool's or Sears' records – the Settlement Administrator also issued publication notice, focused on California. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 233-34 (S.D. Ill. 2001) ("It is well settled that in the usual situation first-class mail and publication in the press fully satisfy the notice requirements of both F.R.C.P. 23 and the due process clause.") (quoting *Zimmer Paper Prods. Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3rd Cir. 1985)). This publication notice included: (1) a full-page notice in the November 16, 2015, issue of the California edition of *People* magazine; (2) banner advertisements on Facebook from October 5, 2015, to November 1, 2015, with 11,000,000 unique impressions; and (3) a ⅛-page notice that appeared once a week for four consecutive weeks during October, 2015 in the Los Angeles Daily News. The Settlement Administrator also posted Notice online at a dedicated website, www.CCUsettlement.com.

Furthermore, plaintiffs' counsel explains that, after Notice was sent, counsel "vetted the Settlement Website and claims process functionality and identified certain inadequacies and brought them to the attention of defendants and the Settlement Administrator. Those inadequacies were fixed within a few days. While those inadequacies were short-lived, Class Counsel insisted out of an abundance of caution that, in addition to the Court-approved plan, an additional corrective postcard notice be sent to ***all*** Prequalified Class Members." Docket no. 570 at 2 (emphasis added) (the "inadequacies" involved failure of the online claim form to correctly auto-populate certain fields; the corrective notice apparently yielded a substantial increase in claim submissions). For similar reasons, class counsel later convinced defendants and the Settlement Administrator to send a corrective notice to about 30,000 non-Prequalified Class Members. These additional notices served only to improve the Notice Plan earlier approved by the Court.

***8** Class counsel states that "[t]he claims rate for both [Prequalified and non-Prequalified Class members] is at the high end of what Class Counsel expected given the nature of the case and settlement based on their decades of experience prosecuting consumer class cases. Class Counsel have also been advised that Counsel for Defendants and the Settlement Administrator concur that claims rate for both groups is excellent and at the high end of what they each expected at the outset of the notice and claims process." Docket no. 570-1 at ¶6.

The Court concludes that, under the circumstances of this case, the Settlement Administrator's notice program was the "best notice that is practicable," Fed. R. Civ. P. 23(c)(2)(B), and was "reasonably calculated to reach interested parties," *Mul-lane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 318 (1950). Further, notice was sent to the appropriate federal and state officials, as required under the Class Action Fairness Act, 28 U.S.C. § 1715.

B. The Requirements for Class Certification are Met.

A settlement class must meet the requirements of Rules 23(a) & (b). The Seventh Circuit Court of Appeals has already affirmed this Court's conclusion that certification of a liability-only, multi-state class for trial is appropriate under Rules 23(a) and (b)(3). Given that the requirements for a settlement class are generally less onerous than those for a trial class, there is little question that the proposed nationwide settlement class also meets the requirements of Rules 23(a) and (b)(3). As the Supreme Court has explained, when "[c]onfronted with a request for settlement-only class certification, a [trial] court need [no longer] inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial," *Amchem*, 521 U.S. at 620.

Plaintiffs and defendants have each stipulated that the two Settlement Classes, as defined in the Settlement Agreement, meet all the requirements of Rule 23. A quick examination of Rule 23's prerequisites confirm the propriety of class certification for settlement purposes:

Numerosity—Rule 23(a)(1) requires that joinder of all class members be impracticable. Here, the total Settlement Class consists of approximately 550,000 purchasers and owners, which easily satisfies the numerosity requirement. *See Hyderi v. Wash. Mutual Bank, F.A.*, 235 F.R.D. 390, 396 (N.D. Ill. 2006) (finding that over 1,000 class members satisfied the numerosity requirement).

Commonality—Rule 23(a)(2) requires that Settlement Class Members share common questions of law and fact. This rule is easily satisfied; two of the most important common questions shared by Class Members are: (1) whether the Class Washers contain a defect that caused CCU malfunctions; and (2) whether Class Members can recover damages based on those alleged defects.

Typicality—Rule 23(a)(3) requires that the named plaintiffs' claims be typical of the claims of the class. As Class Washer owners, the named plaintiffs are members of the Settlement Class and they claim they have been damaged by the same conduct that has allegedly damaged all the other Settlement Class members. Moreover, the claims of the named plaintiffs and other members of the Settlement Class are based upon similar theories, such as breach of express and implied warranty. Finally, the named plaintiffs' claims are not in conflict or antagonistic to the claims of the Settlement Class. The typicality requirement is satisfied.

9** ***Adequacy—Rule 23(a)(4) requires that the named plaintiffs and their attorneys be able to fairly and adequately represent the interests of the class. There is no question but that class counsel is highly experienced, and class counsel has clearly demonstrated (for over nine years) that it can and will continue to fully protect the interests of the Settlement Class. Moreover, neither plaintiffs nor class counsel have any interests that conflict with, or are adverse to, those of the Settlement Class.

Predominance—Rule 23(b)(3) requires that questions of law or fact common to the class predominate over individual questions, and that a class settlement is superior to other available methods for the fair and efficient adjudication of the controversy. The Seventh Circuit has confirmed that common questions predominate in this case. *See Butler*, 727 F.3d at 801 (holding the predominance requirement is satisfied because "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective."). Further, it is axiomatic that a class settlement is superior to continued litigation. Moreover, even though warranty laws vary from State to State, the settlement class remains "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

In sum, certification of the Settlement Classes, as defined in the Settlement Agreement at § I.R and § I.PP, is appropriate.

C. The CCU Settlement Agreement is Fair, Reasonable, and Adequate.

Examination of the five factors identified in *Synfuel* leads the Court to easily conclude the CCU Settlement Agreement is "fair, reasonable, and adequate," and therefore meets the requirements of Rule 23(e)(2).

1. Strength of Plaintiffs' Case Compared to the Amount of Settlement.

Plaintiffs assert they "believe that their claims against Defendants have merit and that they could make a compelling case if their claims were tried." Docket no. 570 at 9. But it is clear that plaintiffs would face numerous difficult challenges if this litigation were to continue, each with an unpredictable outcome. And when "considering the strength of the plaintiffs' case, legal uncertainties at the time of settlement favor approval." *In re Southwest Airlines Voucher Litig.*, 2013 WL 4510197 at *7 (N.D. Ill. Aug. 26, 2013), *affirmed*, 799 F.3d 701 (7th Cir. 2015).

In this case, the following circumstances suggest that final victory for plaintiffs at the Illinois class trial, in the form of a money judgment, was hardly assured: (1) defendants' expert insists the class members' Washers did not suffer a common CCU defect; rather, a short-term manufacturing problem affected a *small percentage* of the Washers' CCUs, and that problem was quickly remedied; (2) numerous class members (probably the great majority) never experienced a CCU-related problem; (3) defendants were likely to challenge again the propriety of class certification, which was never addressed on the merits by the Supreme Court; (4) defendants would probably appeal any adverse judgment on the merits, even if class certification was upheld; and (5) because certification was for a liability-only class, additional proceedings (probably individualized for each plaintiff) would have to take place to establish damages. Moreover, even if plaintiffs succeeded in the Illinois class action, the result could be different for other State classes, if only because their warranty laws are different. And, of course, it would take huge amounts of time and money for plaintiffs to pursue these uncertain outcomes.

***10** Assessed in light of these circumstances, the settlement terms for the class are excellent. Eligible class members will receive a complete, full-value, dollar-for-dollar recovery of all costs they incurred to fix a CCU-related problem. Further, class members will enjoy a streamlined claims process to obtain cash reimbursements for the full amount of their damages. Class counsel trumpets, and defendants concede, that the settlement "provides as good, if not a better, recovery for Class Members than could have been achieved" at trial, even if plaintiffs cleared all of the above-mentioned hurdles. Docket no. 570 at 4; *see also* docket no. 571 at 16 (defendants state that "[t]he result likely is better than what Plaintiffs and the class would have achieved at trial").

In *Southwest Airlines*, 2013 WL 4510197 at *7, the court granted final approval to a class action settlement, observing: "The key factor in this particular case is that the proposed settlement calls for a full-value, one-to-one reimbursement...for class members. * * * [E]ven if plaintiffs faced few uncertainties in proving their claims, the fact that they get back almost exactly what they lost weighs heavily in favor of approval of the proposed settlement." The same is true in this case.

It is also notable that some other class action settlements involving washing machines have *not* provided full reimbursement to class members. *See* docket no. 531-2 at 16-17 (describing a limited fund settlement involving Maytag washers, where the defendant "fund[ed] the settlement with a combination of cash and coupons," and further explaining that the defendant's "cash obligation was limited to $2 million, and claims exceeded that cap, resulting in reduced cash payment and instead coupons to purchase Maytag appliances"). The relief afforded to class members under the CCU Settlement Agreement is superior.

In sum, a comparison of the strength of the plaintiffs' case with the amount of the settlement obtained makes it clear that the CCU Settlement Agreement is, at the very least, fair, adequate, and reasonable. Furthermore, the Court has no concern that class counsel negotiated the settlement with the goal of "enrich[ing] themselves but giv[ing] scant reward to class members," especially in light of the fact that determination of the fee award has been left to the Court. *Thorogood*, 627 F.3d at 293. Injured class members are obtaining full relief regardless of how their counsel is eventually compensated. There is no sign that class counsel traded potentially greater class benefits for an increase in their own fees. The first *Synfuel* factor weighs decisively in favor of final approval.

2. Complexity, Length, and Expense of Further Litigation.

After nine years of litigation, this settlement will resolve the claims of all Kenmore-brand Class Washer owners nationwide, and all Whirlpool-brand Class Washer owners in California. Although the trial of claims made by Illinois class members was scheduled for July 2015, that trial would not have resolved the claims of class members in the remaining 49 states. Resolution of the claims for all class members would have taken many years. Further, there was a significant amount of work left to do even for the Illinois trial, including expert depositions, *Daubert* motions, trial preparation, and the multi-week trial itself. The history of this case suggests strongly that any jury verdict would be appealed by the losing

side. The lodestar and expenses associated with trial of the Illinois class, itself, would have cost millions of dollars, not counting any appeal.

By contrast, the settlement provides immediate and certain relief to eligible members of the Settlement Class. Indeed, the settlement is likely the only viable avenue for Class Members to see *any* relief, given the economic realities of litigating claims of this nature. Moreover, the Settlement Agreement provides essentially *full* relief to eligible class members. Continuing to litigate the claims would needlessly entail significant risk and delay for the class without any realistic hope of a more favorable outcome.

***11** This factor certainly weighs in favor of approval of the Settlement Agreement. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

3. Amount of Opposition to the Settlement.

Out of approximately 542,000 class members, only three objected to the settlement (*see* docket nos. 522, 561, & 562), and only 59 chose to opt out (*see* docket no. 571-5). The small number of class members who objected or opted out further supports the fairness and reasonableness of the settlement. *See Mangone*, 206 F.R.D. at 227 (statistics like these provide "strong circumstantial evidence supporting the fairness of the Settlement"); *Southwest Airlines*, 2013 WL 4510197 at **7* (finding that a similarly "low level of opposition supports the reasonableness of the settlement"). In addition, none of the State Attorneys General to whom notice was sent (pursuant to the Class Action Fairness Act) filed any objection to the Settlement Agreement. In other words, the amount of opposition to the Settlement has been minuscule.

Moreover, the three objections to the Settlement Agreement do not provide a valid basis for disapproval. All three objections raise the same, single issue—that is, that the three-year period within which a Class Member must have suffered a CCU Performance Problem, in order to be eligible for settlement benefits, is too short. As already noted, however, the three-year period is one year *longer* than the written warranties. It is highly likely this relief is far better than what any Class Member could have recovered at trial. Moreover, class counsel explains that the three-year eligibility period was "one of the most hotly contested aspects of the Settlement during its negotiation." Docket no. 570 at 12. Both defendants and plaintiffs ultimately settled on the provision that a "Qualifying Repair" had to occur within three years of the Purchase Date because, to use class counsel's own words, "extensive investi-gation and factual development, including extensive expert analysis, [showed] that, as a matter of fact, the initial manifestation of the defect at issue in the case (*as opposed to ordinary failures unrelated to the defect*) would generally occur, if at all, within three years of purchase." Docket no. 570-1 at 3 (emphasis added); *see also* docket no. 571 at 17 (defendants' service data show that, "if a class member's Washer malfunctioned more than three years after purchase, *that problem likely was unrelated to the alleged defect at issue*") (emphasis added).

The three objectors are correct, or course, that a longer eligibility period would be better for plaintiffs, and that it is frustrating for a class member to "just miss" being eligible. [3] The relevant inquiry, however, "is not whether a better benefit could theoretically be provided, but whether the settlement is 'fair, adequate and free from collusion.' " *Browning v. Yahoo, Inc.*, 2007 WL 7105971 at **5* (N.D. Cal. Nov. 16, 2007) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)); *see Schulte*, 805 F. Supp. 2d at 595 (an objection "complaining that the settlement should be 'better,'...is not a valid objection"). "It is true that something could always be added to every class action settlement to make it more favorable to class members, but that is not the standard by which class action settlements should be measured." *Mangone*, 206 F.R.D. at 227.

[3] Although it appears that objector Meyers missed being eligible by about three months, because he incurred repair costs about 39 months after purchasing his Washer, objector Weyhaupt incurred repair costs five years after he purchased his Washer (*see* docket no. 522), and objector Gebhart asserts he began suffering CCU-related issues eight years after he purchased his washer (*see* docket no. 561). Of course, at some point, insisting on a lengthy eligibility period becomes entirely unreasonable – the life expectancy of a front-load washer is only about 10-12 years. The three-year period agreed to by the parties is ultimately rational and reasonable and fair, based on the law and facts of this case.

***12** Except for the three-year eligibility period, no class member filed any opposition or objection to any *other* aspect of the Settlement Agreement – including its provisions regarding notice, the claims process, the amount of settlement

benefits, the incentive awards, the potential amount of an attorney fee award, or the contested process for fee award determination. The objection regarding the three-year eligibility period does not undermine the conclusion that the Settlement Agreement, as a whole, is fair, reasonable, and adequate. Because there is essentially no valid opposition to the settlement, this factor also weighs in favor of final approval.

4. Opinions of Counsel.

"The opinion of competent counsel is relevant to determining whether a class action settlement is fair, reasonable, and adequate under Rule 23." *In re Capital One*, 80 F. Supp. 3d at 792 (citing *Synfuel*, 463 F.3d at 653); *see Meyenberg v. Exxon Mobil Corp.*, 2006 WL 5062697 at *5 (S.D. Ill. June 5, 2006) (placing "significant weight" on the strong endorsement of settlement by class counsel). The Court accepts that both plaintiffs' class counsel and defense counsel are highly experienced and competent attorneys; they all have excellent, national reputations, especially in the context of consumer class-action litigation. After spending nine years litigating this action, exhaustively evaluating the claims at issue, preparing for trial, and then vigorously negotiating terms, counsel for both sides strongly support the settlement. Accordingly, this factor weighs in favor of approval.

5. Stage of the Proceedings; Amount of Discovery Completed.

The last factor the Court must consider is the stage of the proceedings and the amount of discovery completed. This factor is relevant because it determines "how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325.

Here, the parties engaged in dispositive motion practice, appellate practice, fact and expert discovery, and trial preparation. Defendants produced hundreds of thousands of pages of documents and multiple electronic databases, produced multiple witnesses for depositions, responded to written interrogatories, and provided several employees for deposition. Plaintiffs also produced documents and answers to interrogatories, and defendants took the named plaintiffs' depositions.

In the months leading up to settlement, the parties each disclosed comprehensive expert engineering reports. Counsel then exchanged a series of counter-proposals on key aspects of the settlement. After the essential terms of the Settlement Agreement had been reached, the parties continued to negotiate, but could not come to agreement on the amount of attorneys' fees and costs to be paid to class counsel; therefore, the parties agreed to leave that question for the Court.

It is clear that, at all times, both the litigation activity and the settlement negotiations were highly adversarial, non-collusive, and at arm's length. As a result, the parties and this Court are well positioned to assess the strength of this case and the merits of plaintiffs' claims. Like the other four factors, this fifth factor favors final approval.

V. CONCLUSION

The Court's analysis makes clear that final approval of the parties' settlement is appropriate. Accordingly, this Court grants the parties' joint motion for final approval of the CCU Settlement Agreement (docket no. 569). Specifically, the Court:

1. grants final approval of (a) the certification of the Settlement Classes, (b) designation of Plaintiffs Joseph Leonard, Kevin Barnes, Victor Matos, Alfred Blair, Martin Champion, Alan Jarashow, Lauren Crane, Lawrence L'Hommedieu, and Victoria Poulsen as the representatives of the Settlement Classes, and (c) designation of Class Counsel as counsel for the Settlement Classes, all as conditionally approved in the *Preliminary Approval Order*;

***13** 2. overrules the objections presented against approval of the Settlement Agreement;

3. grants final approval of the Settlement Agreement as fair, reasonable, and adequate to the Settlement Classes;

4. provides for the release of all Released Claims (as that term is defined in the Settlement Agreement Section I.BB and consistent with Section XI of the Settlement Agreement) and enjoins Settlement Class Members from asserting, filing, maintaining, or prosecuting any of the Released Claims in the future;

5. orders the dismissal with prejudice of all CCU Claims alleged in the Sears Action and Whirlpool Action, and incorporates the releases and covenant not to sue stated in the Settlement Agreement, with each of the Parties to bear its, his, or her own costs and attorneys' fees, except as provided in Section X of the Settlement Agreement;

6. authorizes the payment by Defendants of Valid Claims approved by the Settlement Administrator as Valid Claims, or otherwise reviewed by Class Counsel and counsel for Defendants and determined to be Valid Claims, in accordance with the terms of the Settlement Agreement; and

7. without affecting the finality of this Order, retains exclusive jurisdiction over the Class Action and the Settlement Agreement, including the administration, interpretation, consummation, and enforcement of the Settlement Agreement. With the parties' joint consent, the Court specifically incorporates into this Order in full the parties' Settlement Agreement at docket no. 505-1, so that this Order may serve as an enforceable injunction. *See Lynch, Inc. v. SamataMason Inc.*, 279 F.3d 487, 489 (7th Cir. 2002); *Natkin v. Winfrey*, 2015 WL 8484511 at *2 (N.D. Ill. Dec. 8, 2015).

8. orders that, as soon as practicable, the Parties shall file in the Whirlpool Action any filings necessary to terminate the *Poulsen* case.

9. orders that the persons identified in "Exhibit 5" to defendants' memorandum in support of motion for settlement (docket no. 571-5) have timely and validly requested exclusion from the Settlement Classes and therefore are excluded from the Settlement Classes and not bound by this Order, and may not make any claim or receive any benefit from the Settlement Agreement, whether monetary or otherwise. These excluded persons and entities may not pursue any Released Claims on behalf of those who are bound by this Order. Each Class member who has not requested to be excluded from the Settlement Classes, and is not listed in Exhibit A, is bound by this Order, and will remain forever bound.

10. orders that, as to the Released Claims, as defined in the Settlement Agreement, the Class Action and any and all currently pending class action lawsuits directly related to the subject matter of this litigation are dismissed with prejudice and in their entirety, on the merits, and, except as provided for in the Settlement Agreement, without costs. This dismissal shall not affect, in any way, any Class Member's right to pursue claims, if any, outside the scope of the Released Claims set forth in the Settlement Agreement.

11. orders that the Releasing Parties release, forever discharge, and covenant not to sue the Released Parties from and for Claims as set forth in the Settlement Agreement. The Releasing Parties are permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Released Claims released in the Settlement Agreement against any of the Released Parties, either indirectly, individually, representatively, derivatively, or in any other capacity, by whatever means, in any local, state, or federal court, or in any agency or other authority or arbitral or other forum wherever located.

***14** 12. orders that this Order does not settle or compromise any other claims by Class Representatives or the Settlement Classes against the Defendants or other persons or entities other than Released Parties, and all rights against any other Defendant or other person or entity are specifically reserved.

13. pursuant to Fed. R. Civ. P. 54(b), directs entry of final judgment on all claims, counts, and causes of action related to the alleged CCU defect asserted by Plaintiffs, on behalf of themselves, the Settlement Class, or both. (Final judgment is not entered on any claims, counts, or causes of action related to the Biofilm defect asserted by Plaintiffs.) This Court specifically refers to and invokes the Full Faith and Credit Clause of the United States Constitution and the doctrine of comity, and requests that any court in any other jurisdiction reviewing, construing, or applying this Order implement and enforce its terms in their entirety.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 772785

EXHIBIT K

2020 WL 5627171
Only the Westlaw citation is currently available.
United States District Court, N.D. Indiana, South Bend Division.

Rajesh M. SHAH, et al., Plaintiffs,
v.
ZIMMER BIOMET HOLDINGS, INC., et al., Defendants.

Case No. 3:16-cv-815-PPS-MGG
|
Signed 09/18/2020

Attorneys and Law Firms

Andrew M. McNeela, PHV, Pro Hac Vice, Ira M. Press, PHV, Pro Hac Vice, Thomas W. Elrod, PHV, Pro Hac Vice, Emily C. Finestone, PHV, Pro Hac Vice, Kirby McInerney LLP, New York, NY, Howard G. Smith, PHV, Pro Hac Vice, Law Offices of Howard G. Smith, Bensalem, PA, Jason L. Krajcer, PHV, Pro Hac Vice, Joseph D. Cohen, PHV, Pro Hac Vice, Kara M. Wolke, PHV, Pro Hac Vice, Kevin F. Ruf, PHV, Pro Hac Vice, Leanne H. Solish, PHV, Pro Hac Vice, Natalie S. Pang, PHV, Pro Hac Vice, Robert V. Prongay, PHV, Pro Hac Vice, Lesley F. Portnoy, PHV, Pro Hac Vice, Vahe Mesropyan, PHV, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, Offer Korin, Katz Korin Cunningham PC, Indianapolis, IN, for Plaintiff Rajesh M. Shah.

Andrew M. McNeela, PHV, Pro Hac Vice, Ira M. Press, PHV, Pro Hac Vice, Thomas W. Elrod, PHV, Pro Hac Vice, Emily C. Finestone, PHV, Pro Hac Vice, Kirby McInerney LLP, New York, NY, Howard G. Smith, PHV, Pro Hac Vice, Law Offices of Howard G. Smith, Bensalem, PA, Jason L. Krajcer, PHV, Pro Hac Vice, Joseph D. Cohen, PHV, Pro Hac Vice, Kara M. Wolke, PHV, Pro Hac Vice, Leanne H. Solish, PHV, Pro Hac Vice, Robert V. Prongay, PHV, Pro Hac Vice, Lesley F. Portnoy, PHV, Pro Hac Vice, Vahe Mesropyan, PHV, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, for Plaintiff Matt Brierley.

Andrew M. McNeela, PHV, Pro Hac Vice, Emily C. Finestone, PHV, Pro Hac Vice, Kirby McInerney LLP, New York, NY, Howard G. Smith, PHV, Pro Hac Vice, Law Offices of Howard G. Smith, Bensalem, PA, Joseph D. Cohen, PHV, Pro Hac Vice, Kara M. Wolke, PHV, Leanne H. Solish, PHV, Pro Hac Vice, Robert V. Prongay, PHV, Pro Hac Vice, Vahe Mesropyan, PHV, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, for Plaintiff Local 1500 UFCW.

Andrew M. McNeela, PHV, Pro Hac Vice, Emily C. Finestone, PHV, Pro Hac Vice, Kirby McInerney LLP, New York, NY, Joseph D. Cohen, PHV, Pro Hac Vice, Kara M. Wolke, PHV, Robert V. Prongay, PHV, Pro Hac Vice, Glancy Prongay & Murray LLP, Los Angeles, CA, for Plaintiff Steven Castillo.

Amanda F. Lashner, PHV, Pro Hac Vice, Karen A. Pieslak Pohlmann, PHV, Pro Hac Vice, Laura H. McNally, PHV, Pro Hac Vice, Marc J. Sonnenfeld, PHV, Pro Hac Vice, Nicholas E. Hakun, PHV, Pro Hac Vice, Troy S. Brown, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, Philadelphia, PA, Elizabeth M. Gary, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, New York, NY, Paul A. Wolfla, Matthew R. Kinsman, Faegre Drinker Biddle & Reath LLP, Indianapolis, IN, for Defendants Zimmer Biomet Holdings, Inc., David C. Dvorak, Daniel P. Florin, Robert J. Marshall, Jr.

Amanda F. Lashner, PHV, Pro Hac Vice, Karen A. Pieslak Pohlmann, PHV, Pro Hac Vice, Laura H. McNally, PHV, Pro Hac Vice, Nicholas E. Hakun, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, Philadelphia, PA, Elizabeth M. Gary, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, New York, NY, Paul A. Wolfla, Matthew R. Kinsman, Faegre Drinker Biddle & Reath LLP, Indianapolis, IN, for Defendants Christopher B. Begley, Betsy J. Bernard, Paul M. Bisaro, Gail K. Boudreaux, Tony W. Collins, Larry Glasscock, Robert A. Hagemann, Arthur J. Higgins, Cecil B. Pickett, Michael J. Farrell.

Amanda F. Lashner, PHV, Pro Hac Vice, Karen A. Pieslak Pohlmann, PHV, Pro Hac Vice, Laura H. McNally, PHV, Pro Hac Vice, Nicholas E. Hakun, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, Philadelphia, PA, Daniel J. Stujenske, PHV, Pro Hac Vice, Peter E. Kazanoff, PHV, Pro Hac Vice, Simpson Thacher & Bartlett LLP, Elizabeth M. Gary, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, New York, NY, Paul A. Wolfla, Matthew R. Kinsman, Faegre Drinker Biddle & Reath LLP, Indianapolis, IN, for Defendant Michael W. Michelson.

Amanda F. Lashner, PHV, Pro Hac Vice, Karen A. Pieslak Pohlmann, PHV, Pro Hac Vice, Laura H. McNally, PHV, Pro Hac Vice, Nicholas E. Hakun, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, Philadelphia, PA, Daniel V. McCaughey, PHV, Pro Hac Vice, Ropes & Gray LLP, Boston, MA, Elizabeth M. Gary, PHV, Pro Hac Vice, Morgan Lewis & Bockius LLP, New York, NY, Paul A. Wolfla, Matthew R.

Kinsman, Faegre Drinker Biddle & Reath LLP, Indianapolis, IN, for Defendant Jeffrey K. Rhodes.

Daniel J. Stujenske, PHV, Pro Hac Vice, Peter E. Kazanoff, PHV, Pro Hac Vice, Simpson Thacher & Bartlett LLP, New York, NY, for Defendant KKR Biomet LLC.

Amanda N. Raad, Ropes & Gray LLP, New York, NY, Daniel V. McCaughey, PHV, Pro Hac Vice, Ropes & Gray LLP, Boston, MA, for Defendants TPG Partners IV, L.P., TPG Partners V, L.P., TPG FOF V-A, L.P., TPG FOF V-B, L.P., TPG LVB Co-Invest LLC, TPG LVB Co-Invest II LLC.

Brian E. Casey, Barnes & Thornburg LLP, South Bend, IN, John F. Lynch, PHV, Pro Hac Vice, Paul Vizcarrondo, PHV, Jr., Pro Hac Vice, Wachtell Lipton Rosen & Katz, New York, NY, for Defendants GS Capital Partners VI Fund, L.P., GS Capital Partners VI Parallel, L.P., GS Capital Partners VI Offshore Fund, L.P., GS Capital Partners VI GMBH & CO. KG, Goldman Sachs BMET InvesTORS, L.P., Goldman Sachs BMET Investors Offshore Holdings, L.P., PEP Bass Holdings, LLC, Private Equity Partners 2004 Direct Investment Fund L.P., Private Equity Partners 2005 Direct L.P., Private Equity Partners IX Direct L.P., GS LVB Co-Invest, L.P.

OPINION AND ORDER

PHILIP P. SIMON, JUDGE

***1** After nearly four years of complex and contested litigation, this securities class action has settled. Before me are Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation [DE 254] and Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses [DE 256.] I previously granted preliminary approval of the settlement and certified a class for settlement purposes. [DE 251; *Shah v. Zimmer Biomet Holdings, Inc.*, 2020 WL 2570050 (N.D. Ind. May 21, 2020).] The parties then sent notice of the settlement to the class and allowed class members to make claims, opt-out, or object to the proposal.

On September 3, 2020, I held a telephonic final fairness hearing in which any objectors or other members of the public could attend. I also heard from both plaintiffs' class counsel and defendants' counsel. It is clear that the settlement has been well-received by the class, and I stated on the record the reasons why I found the proposed settlement to be plainly fair, adequate and reasonable. This opinion elaborates on those findings and reduces them to writing. It further grants the requested reimbursements of costs and expenses to class counsel and lead plaintiffs. Lastly, while I reserved judgment on class counsel's motion for attorneys' fees at the hearing, I will now grant that motion as well, albeit in part. While I think counsel has done a tremendous job litigating this case on behalf of the class, the requested 33.3% is simply beyond the "market rate" for this case and a reduced percentage fee will be awarded.

Background

Plaintiffs filed this lawsuit against a multitude of defendants, both corporate and individual, affiliated with Zimmer Biomet Holdings, Inc. (ZBH for short). ZBH is a multi-billion-dollar medical device manufacturer headquartered in Warsaw, Indiana. It came into existence in June 2015 after two cross-town rivals (Zimmer Holdings, Inc. and Biomet, Inc.) merged with one another. At its core, the complaint alleged that, from June 7, 2016 to November 7, 2016, ZBH and its senior leadership misled investors and concealed material information from the market in violation of various federal securities laws. Plaintiffs sought to represent a class of all persons who traded in shares of ZBH during the relevant time period and harmed as a result.

Although the substance of the complaint is not all that integral to the motions presently before me, it's worth summarizing what this lawsuit was about, as alleged by plaintiffs (but of course not admitted to by ZBH). At issue was a major ZBH manufacturing facility known as "North Campus." By spring 2016, ZBH knew that North Campus was badly out of compliance with federal regulations and has serious issues with its quality systems. ZBH learned this after conducting a series of internal audits. Those audits were conducted in response to systemic regulatory problems with the FDA over non-compliance and quality control issues at a different facility, known as West Campus, the year before. North Campus was in such a state that it would likely need to be completely overhauled to bring it up to snuff and would likely be shut down in the process. This, of course, would have a dramatic effect on production and thus ZBH's sales.

***2** Plaintiffs allege that given ZBH's experience with West Campus and other then-recent remediations (specifically one known as "Project Trident"), the company knew how costly and extensive the remediation of North Campus was going to

be and that the FDA had the company under a microscope. Plaintiffs say ZBH was under a duty to disclose the problems at North Campus pursuant to the requirements of Item 303 of SEC Regulation S-K which requires companies to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii).

But even knowing what it knew about North Campus, ZBH was issuing investor guidance which contained ambitious revenue and sales targets. Those statements were made during investor calls and conferences, two prospectuses relating to stock offerings in June and August 2016, and regular SEC filings. Plaintiffs contend that in order to meet the targets the company was announcing and committing itself to, ZBH needed North Campus to be running at full capacity. But full capacity was mutually exclusive with doing the necessary remediation at North Campus. So instead ZBH took a chance, telling the market it was on track to hit its revenue and sales targets and engaging in a few quick-fixes at North Campus in the hopes that everything would work out with anticipated FDA inspections of North Campus later in 2016.

Things didn't work out as planned. The FDA's inspection of North Campus began on September 16, 2016 and the issues at North Campus were immediately evident. This led to a complete and almost immediate hold on all products being manufactured out of North Campus. This devasted ZBH's product supply and therefore its revenue. When ZBH announced its third quarter financial results during an October 31, 2016 investor call, they weren't great. The company announced a drop in growth, and it reduced its projected revenue guidance for both the fourth quarter and the year. During the call, ZBH's CEO stated that the revenue misses were the result of unanticipated supply constraints related to the company's ongoing efforts to merge its two predecessor entities' operations. But there was no mention of North Campus's problems or the FDA's ongoing inspection of the facility. Investors and analysts were apparently blindsided by the news, and the company's stock fell 14%.

Plaintiffs allege that the reasons given on the October 31 call were knowingly false and an effort by ZBH to concoct a coverup for the issues at North Campus. Former senior employees at ZBH have stated as much, saying there were directives from the top to create a different story to explain the company's performance. Regardless, it didn't work. In the days following the October 31 investor call, analysts learned of and began reporting on the ongoing FDA inspection at North Campus and the problems being encountered. Plaintiffs say it was this which forced ZBH to finally come clean about its problems.

On November 8, 2016, ZBH disclosed what plaintiffs say were the true cause of the company's problems in its quarterly SEC filings and a press release. This caused another drop in the company's stock price. Later that month, much of the scope of the issues were confirmed when the FDA concluded its audit and issued a letter to ZBH which plaintiffs say mirror what ZBH already knew from its own audits. As mentioned, plaintiffs say the concealment of the problems at North Campus were fraudulent because ZBH had a duty to disclose this information pursuant to Item 303 of SEC Regulation S-K. Plaintiffs further allege that the problems needed to be disclosed because ZBH knew North Campus was going to be audited by the FDA after what had happened at West Campus. They further state that the statements made during the October 31 call were flat out falsehoods.

***3** After several amendments to the complaint, four motions to dismiss were filed and I granted them in part. I dismissed some defendants and claims but left the primary case against ZBH and its senior management in place. [DE 119; *Shah v. Zimmer Biomet Holdings, Inc.*, 348 F. Supp. 821 (N.D. Ind. 2019).] Simply put, there was enough factual matter alleged in the complaint to overcome the substantial pleading hurdles in securities fraud cases. ZBH sought an interlocutory appeal of that decision because the Seventh Circuit had not ruled before on the issue of whether claims premised on a duty to disclose under Item 303 of SEC Regulation S-K were actionable under Section 10(b) of the Securities Exchange Act of 1934. While I agreed that the Seventh Circuit had not specifically addressed this issue, that was not reason enough to grant an interlocutory appeal. [DE 183; *Shah v. Zimmer Biomet Holdings, Inc.*, 2019 WL 762510 (N.D. Ind. Feb. 20, 2019).] The case then proceeded to discovery.

While plaintiffs' motion for class certification was pending, the parties alerted the Court that they had reached a proposed settlement of the case. The settlement was the result of a mediation conducted by the Hon. Daniel Weinstein (Ret.) and Jed Melnick, two highly respected and experienced mediators who have mediated several other large securities class actions. [DE 258-1.]

On May 13, 2020, I held a hearing on plaintiffs' motion for preliminary approval of the proposed settlement. [DE 250.]

At bottom, the proposed settlement set aside $50,000,000 to be divided up amongst class members who make valid claims. Plaintiffs' counsel also indicated that they would seek an award of attorneys' fees equal to 33.3% of the settlement fund and reimbursement of up to $1.9 million in costs and expenses. On May 21, 2020, I granted preliminary approval of the proposed settlement, finding that it was well within the range of what is fair, adequate and reasonable and that the proposed plan to give notice to potential class members was sufficient. [DE 251; *Shah*, 2020 WL 2570050.]

After preliminary approval was granted, notice packets containing information about the proposed settlement and how to make a claim were sent out. A summary notice was further published in *Investor's Business Daily* and transmitted over the *PR Newswire*. Class members were then allowed to make claims by submitting a claim to an administrator. As of August 25, 2020, 1,655 claims have been made. [DE 260-1.] In addition, the claims administrator received eight opt-outs from class members who requested to be excluded from the proposed settlement. [*Id.*] But there was only one objection to the proposed settlement. [DE 259.] On July 30, 2020, the plaintiffs filed their Motion for Final Approval and Application for Fees and Expenses. No opposition to those motions or additional objections were received by the August 13, 2020 deadline. On September 3, 2020, I held a final fairness hearing in which I heard from counsel for the plaintiffs and defendants. [DE 264.] Due to the ongoing COVID-19 pandemic, an in-person hearing on the motion was not safe or feasible and the hearing in this matter was held telephonically using a conference line listed on the docket and which members of the class and the public at large were able to call into. No objectors appeared for the hearing.

Discussion

A. The Proposed Settlement Class Satisfies Rule 23(a) and Rule 23(b)(3).

Federal Rule of Civil Procedure 23 is the starting place for almost anything class action related. Rule 23(a) has four specific requirements that must be met before a class may be certified. Those are commonly referred to as (1) numerosity ("the class is so numerous that joinder of all members is impracticable"); (2) commonality ("there are questions of law or fact common to the class"); (3) typicality ("the claims or defenses of the representative parties are typical of the claims or defenses of the class"); and (4) adequacy of representation ("the representative parties will fairly and adequately protect the interests of the class"). Fed. R. Civ. P. 23(a). In addition, the class must also satisfy one of the subsections in Rule 23(b). Here that's subsection 23(b)(3).

4** As stated in my preliminary approval order, Rule 23(a)'s requirements are clearly satisfied in this case. ***First, numerosity is practically a foregone conclusion in a large securities class action like this. "The issue ordinarily receives only summary treatment ... and often is uncontested." Rubenstein, William B., Ed., Newberg on Class Actions § 3:12 (5th ed. 2019); *id.* ("[I]n class actions involving nationally traded securities, courts generally presume that the numerosity requirement is met."); *see also Teachers' Ret. Sys. of La. V. ACLN Ltd.*, 2004 2997957, at *3 (S.D.N.Y. Dec. 27, 2004).

Second, there are numerous common questions of law and fact common to the class. The primary substantive issues in this case were what legal duties ZBH had to disclose, what it disclosed, and whether those disclosures were misleading. Those are all common to the class and thus commonality is satisfied. *Schleicher v. Wendt*, 618 F.3d 679, 681 (7th Cir. 2010) ("Whether statements are false is one common question. Whether the falsehoods are intentional (*i.e.*, whether each defendant acted with the required state of mind) is another. Whether the falsehoods affect the stock's price is a third.").

Third, typicality is satisfied, as each of the named plaintiffs traded in ZBH shares during the class period. And trading in ZBH shares during the class period is the *sine quo non* of the class.

Fourth, I must be sure the named plaintiffs have "fairly and adequately protect the interests of the class" in their representative capacity. Fed. R. Civ. P. 23(a)(4). This requirement is satisfied so long as the class representatives do not have clear conflicts of interest with the absent class members and have shown a willingness to vigorously pursue the litigation on behalf of the class. There was no evidence or argument of a conflict mentioned in the opposition to the motion for class certification. Nothing else has come to light since either. Likewise, the named plaintiffs pursued the case diligently, although obviously class counsel were the ones doing the lion's share of the work.

With all four of Rule 23(a)'s requirements satisfied, it is time to move on to Rule 23(b)(3) and it's predominance and superiority requirements. Fed. R. Civ. P. 23(b)(3)

(requiring "questions of law or fact common to class members predominate over any questions affecting only individual members" and a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy"). I'll start with superiority because it's easy to satisfy in a case like this. Securities fraud cases are something of a prototypical class action. You generally have a group of thousands of people, all of whom were allegedly harmed by the same activity and for the same reasons. But most of them were only harmed in small dollar amounts. As Judge Posner once quipped, "only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004). And no lawyer is going to take a case worth so little on a contingency fee basis either. But multiply that times several thousand and you've got yourself something, both for the plaintiffs and the lawyers. *Id.* ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individuals suits[.]") (italics in original). Furthermore, while in some instances concerns over trial management might weigh against a class action being truly superior, I need not concern myself with that here. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried would present intractable management problems for the proposal is that there be no trial.").

***5** The common questions of law and fact further predominate over individual ones. "The predominance inquiry focuses on whether a proposed class is sufficiently cohesive to warrant adjudication by representation. It is akin to, but ultimately a more demanding criterion than, the commonality inquiry under Rule 23(a)." *In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016) (citations and quotation marks omitted). The main issue in the case is whether statements made by ZBH to the investing public were fraudulent. It is common to all members of the class. Furthermore, plaintiffs may use the fraud-on-the-market theory to show reliance on class-wide basis and thus overcome individual reliance issues. *See generally Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Finally, while individualized damages are inevitable in a securities class action, plaintiffs' allocation model prevents them from "predominating" over the common questions of law and fact. The allocation model accounts for the price, date of a trade, and other factors relevant to determining the harmed suffered by each plaintiff and thus each class member's recovery. As such, the twin requirements of Rule 23(b)(3) are satisfied.

B. The Proposed Settlement is Fair, Adequate and Reasonable.

Having found that the requirements to certify a settlement class are met here, it's time to get to the heart of the matter: whether the substance of the settlement is fair, reasonable and adequate. This standard is candidly a bit mushy, but there are some factors that help to guide the decision-making process. "(1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed." *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863 (7th Cir. 2014) (citations omitted); Fed. R. Civ. P. 23(e)(2) (enumerating factors for courts to consider in determining whether a settlement is fair, reasonable and adequate).

To be blunt, I think the $50 million settlement fund represents a superb result for the class. Plaintiffs' retained expert calculated the class's maximum potential recovery at $625 million. But, of course, that's a pie in the sky, best case scenario. It's the *potential* result only if plaintiffs survived summary judgment on all of their claims and theories of liability, took the case to trial, won on liability, had the jury agree to award them their full claimed damages, and finally had the verdict upheld on appeal. That was going to be perilous journey, to say the least. *See Great Neck Capital Appreciation Inv. Partnership, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 409 (E.D. Wis. 2002) ("Shareholder class actions are difficult and unpredictable, and skepticism about optimist forecasts of recovery is warranted."). I'm not casting doubt on the substance of plaintiffs' claims, just remarking on the reality of litigation.

The settlement amount thus represents roughly 8% of plaintiffs' maximum possible damages. But again, that's only if the case crossed the finish line fully intact and the plaintiffs hit the proverbial grand slam at trial. In addition to the possibility of plaintiffs losing outright at summary judgment or at trial, there were clear ways in which their recovery could have been cabined. For example, there were potential problems with plaintiffs' case relating to loss causation stemming from ZBH's October 31, 2016 disclosures about the cause of the company's revenue misses—although obviously plaintiffs don't concede the issue. If plaintiffs failed to prove loss causation as to those statements, according to their

own experts, potential damages would plummet by 85% to $95 million. In that scenario, the proposed settlement would represent more than 50% of the potential maximum recovery.

If an 8% recovery was a good result for the class, settling for 50 cents on the dollar at this still relatively early stage in the litigation would be a phenomenal deal. That much is true when the result is compared against the median percentage recovery in securities fraud class action lawsuits. According to a report from a firm called Cornerstone Research, in 2019 the median percentage recovery in securities class action settlements was 4.8%: with cases alleging $500-$999 million settling at a median of 3.3% and cases alleging $75-$149 million settling at a median of 9.4%. [DE 246-2.] With that in mind, the 8% recovery scenario is at the high end of the spectrum and it's more than double the median amount of recent cases which share a price bracket with this case. If I valued this case at $95 million, then the settlement here would be nearly nine times the median amount. In either case, it's beyond doubt that $50 million is a terrific result for the class.

***6** The raw numbers only tell part of the story, but the remainder is a tale of a hard-fought result on behalf of the class. Both plaintiffs' and defendants' counsel are experienced securities class action litigators. That experience and expertise was brought to bear in all three of the major contested motions in this case. That they reached this settlement at arms' length supports the notion that it is fair and reasonable. *See, e.g.*, *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001). Lastly, the settlement was the product of two lengthy mediation sessions which were conducted by two of the leading mediators in this field, Jed Melnick and the Hon. Daniel Weinstein (Ret.). They both believe the settlement "represents a fair and reasonable resolution of this complex and uncertain litigation." [DE 258-1 at ¶ 5.] "A strong presumption of fairness attaches to a settlement agreement when it is the result of this type of negotiation." *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002) (citing *Anderson v. Torrington Co.*, 755 F. Supp. 834, 838 (N.D. Ind. 1991)); *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *3 (S.D. Ill. Dec. 16, 2018) (same).

The plan of allocation in this case is also fair and reasonable. *See Great Neck Capital*, 212 F.R.D. at 410 ("A plan of allocation of settlement proceeds in a class action must also be fair and reasonable."). "When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds 'need have only a reasonable, rational basis" in order to be fair and reasonable. *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012) (citation and quotation marks omitted). Here, the settlement proceeds are not disbursed purely on a pro rata basis, as that would make little sense given the securities at issue were traded at different times and at different prices over the course of many months. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 590 (N.D. Ill. 2011) ("The way in which the settlement allocates benefits is fair because it recognizes these important differences among Class Members. What would be arbitrary, unreasonable and unfair would be to distribute 72% of the settlement fund to the 7% of Class Members who have the weakest claims.") (cleaned up). Instead, what each individual class member receives is determined by an allocation model devised by plaintiffs' counsel and their retained experts. [DE 246-1 at 75-82.] The allocation model is admittedly complex but was explained in detail in the notice that went out to class members. [*Id.*] Each settlement class member will have a "recognized loss" calculated which takes into account factors such as when they purchased or sold ZBH shares, the type of ZBH shares purchased or sold, the price of ZBH shares purchased or sold, as well as the "artificial inflation or deflation" of the price at the time of the trade. [*Id.*; *see also* DE 255 at 20-21.] Finally, there have been no objections to the allocation model in particular, which supports it being reasonable on top of the generally deferential nature courts have towards the nitty gritty of settlement allocation. *See In re IMAX Sec. Litig.* 283 F.R.D. at 192.

C. Notice to the Class Was Sufficient and the Class's Reaction to the Settlement Has Been Overwhelmingly Positive.

Because this is a class certified pursuant to Rule 23(b)(3), class members must receive "the best notice that is practicable under the circumstances" including notice to all individual class members that can reasonably be identified. This is to give class members the ability to opt out if they would rather pursue their claims individually and not settle with the lot. *See* Fed. R. Civ. P. 23(c)(2)(B). Plaintiffs provided notice primarily through a physical mailing to class members (both individuals and institutions) who traded in ZBH stock during the relevant period. Class members were identified based on records from ZBH, brokerage firms and other nominees for beneficial purchasers of securities. As a backstop, the notice appeared on a settlement website and the shorter summary notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire.* Additional information was available on the website and the claims

administrator has operated a toll-free telephone number to help address any inquiries. This type of notice meets the all the applicable requirements.

***7** Thus far, more than 1650 claims have been submitted. While this is a relatively small number compared to the more than 156,000 notice packets mailed, in the world of class actions it isn't an unreasonable "take-rate." What's more, the time for individual class members to make claims has not yet expired. Both the settlement administrator and class counsel both have stated that in their experience, large institutional investors, who are quite likely to be some of the major shareholders here, tend to not make their claims until closer to the end of the deadline. [DE 260-1 at ¶ 10 ("a significant number of claims are submitted on, or near, the claim filing deadline, which is October 19, 2020.").] Since there's nothing to indicate that isn't true, I can only assume the number of claims will continue to climb.

The number of claims looks even better though compared to the number of class members who have opted out. Only seven class members timely submitted forms requesting to be excluded from the settlement. [DE 260-1 at ¶ 7.] Another request for exclusion was received after the cut-off date. Of those eight opt-outs, three of them did not contain the necessary information allowing the claims administrator to confirm the individuals were actually members of the class. In other words, they did not provide the necessary proof to show they purchased or sold ZBH securities. Thus, there were only five timely filed and sufficiently completed opt-outs to the class action filed compared to 1655 claims and a total of more than 156,000 notice packets sent. [*See id.* at ¶¶ 2, 10-11.]

The number of objections to the settlement is even smaller. The Court received only a single objection from Joseph R. Sahid. [DE 259.] Mr. Sahid's objection is perfunctory at best. In the objection, he states that the reason for his objection is that "[t]he instructions sent me [*sic*] were useless." This appears to relate to instructions in the notice packet not to contact the Court with questions concerning the substance of the settlement (the notice packet stated those should be directed to counsel) and to other instructions which stated that any objections must be filed with the Court (so that they may be considered). I'm not sure I fully understand Mr. Sahid's supposed confusion, it's straightforward and unambiguous. In any event, reading two unrelated passages in a document, separated by 25 pages as being in conflict to create an alleged ambiguity is a very lawyerly thing for Mr. Sahid to do, but that doesn't mean it has any merit. These are standard instructions for large, complex class actions such as this.

He next states that the time for him to object was insufficient and then questions whether this "rush" was "so that objectors do not have the time to understand the proposal?" It was of course ample time for him to file his objection and there is no indication it was insufficient time for any other would be-objector. The deadline to mail the notice was June 19, 2020, and objections were due on August 13, 2020. [DE 251 at 16.] That was a period of 55 days and nearly two months. Even if it took a few weeks for Mr. Sahid or others to receive their notice that was more than enough time to review the notice and file objections. Additionally, there were two weeks between the date of the filing of class counsel's motion for attorneys' fees (July 30, 2020) and the deadline to object (August 13, 2020). *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (holding that Fed. R. Civ. P. 23(h) and due process mandates that deadline to object come after the date for the filing of the motion for attorneys' fees); *see also In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 969 (N.D. Ill. 2011) (applying *In re Mercury* and finding one week sufficient time to objection). This provided enough time and opportunity to file an objection if a class member wanted to.

***8** Mr. Sahid then appeals to his own authority as a former partner at "a large Wall Street law firm and at a plaintiff's class action firm" to say that the requested fees in this case are "absurd" when compared to the per share recovery. [DE 259.] Evidently, Mr. Sahid wants me to simply accept that fact based on who he is. But I like to decide things based on reason. And Mr. Sahid has provided me no *reasons* as to why the settlement here is unfair or inadequate. He just wants me to accept his conclusion that it is "absurd." Thanks, but no thanks.

Finally, Mr. Sahid says that the settlement "will contribute to the widespread believe [*sic*] that the Judges and the plaintiff's lawyers are in cahoots." [DE 259.] I'm not sure what widespread belief he is referring to—presumably it is just his own. As an experienced lawyer, Mr. Sahid should know better than to make these kinds of baseless accusations. In any event, that is not a valid objection either. I was uninvolved in the settlement discussions in this case. Those were handled by the parties at arms-length and with the assistance of experienced mediators whose resumes could choke a horse. At bottom, this objection reads as nothing more than axe grinding and not

grounded in any specific substance related to this particular case.

Beyond the lack of substance, the objection can be set aside for a more fundamental reason. Mr. Sahid fails to show that he is a member of the class with standing to object. "Any class member has standing to object to a class settlement. Filing a proof of claim to the settlement fund is one way, but not the only way, for an objector to demonstrate that he is a member of the class." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 638–39 (5th Cir. 2012) (citing *Devlin v. Scardelletti,* 536 U.S. 1, 6–7 (2002)). Mr. Sahid not only fails to offer any proof that he is a member of the class, he doesn't even claim to be one. He states he received a notice packet, but the subset of people receiving notice packets is aimed to be over-inclusive. Without any indication that he actually bought or sold any share of ZBH, I cannot simply assume he is a member of the class. As such, the objection of Joseph Sahid to the settlement is overruled for both a lack of standing and a lack of merit.

D. Lead Plaintiff Incentive Awards are Reasonable.

"[A] named plaintiff is an essential ingredient of any class action." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Thus, courts in this circuit try to incentivize quality lead plaintiffs to participate in class actions. And we do that in the best way any of us know how, with cash. This is done with an incentive award on top of whatever the lead plaintiffs receive as members of the class. "To determine if an incentive award is warranted, a district court evaluates 'the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.' " *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 834 (7th Cir. 2018) (quoting *Cook*, 142 F.3d at 1016).

Each of the lead plaintiffs (Rajesh M. Shah, Matt Brierley, Steven Castillo, and Anthony G. Speelman on behalf of institutional plaintiff UFCW Local 1500) provided a declaration in support of their requests. [DE 258-4, 285-5, 258-6, and 258-7.] Frankly, the affidavits are a bit perfunctory. All four are nearly identical documents and affirm that each of these individuals generally participated in the case by speaking with counsel, reviewing pleadings, reviewing written discovery responses and collecting documents. [*Id.*] They then request and state they believe it is reasonable that they each receive $15,000 to compensate for time they would have otherwise spent on their jobs, or in Mr. Brierley's case his "investment activities." [*Id.*] But none of them tell me or even estimate how much time they spent on the lawsuit. That missing data and the obvious uniformity of each declaration make it difficult to evaluate these requests on any individual level.

***9** But each of them did at least have to sit for a deposition in connection with discovery and class certification. That obviously involved several hours of unpleasantness and preparation in service of their fellow class members. And the case has been going for over three and a half years. While it is certainly my preference that lead plaintiffs provide *some* estimate of the actual time they spent on the case before asking for $15,000, I think the excellent result for the class can justify the incentive awards here. Furthermore, courts have approved of similarly sized and even larger incentive awards in cases where both the individual and class recovery were much smaller than in this case. *E.g., In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 716 (7th Cir. 2015) (approving $15,000 incentive award for lead plaintiffs without conflicts of interest in coupon settlement class action); *Masters v. Wilhelmina Model Agency, Inc.*, 472 F.3d 423, 430 (2d Cir. 2007) (approving $25,000 incentive awards for lead plaintiffs who sat for depositions in case where settlement included a $22 million common fund). Thus, each of the four lead plaintiffs will receive their requested [1] $15,000 incentive awards.

[1] Mr. Brierley will be especially pleased with the result today. Because his affidavit (and the others) were so conclusory, I thought it would be prudent to read the depositions to get a flavor for what the lead plaintiffs had to do in working on the case. There I learned that when told that he would have to spend two or three weeks in Northwest Indiana for the trial, he declared it "the armpit of the world" and that he dreaded the possibility of having to travel here for trial. [DE 226-4.] It's enough to say that we are all pleased he was spared that "burden."

E. Class Counsel's Motion for Attorneys' Fees and Cost Reimbursement.

With approval of the settlement complete, the final issue to address is class counsel's motion for attorneys' fees and reimbursement of costs. [DE 256.] In the motion for preliminary approval, class counsel stated that they would be seeking a fee of a third of the settlement fund and estimated their expenses at no greater than $1,900,000. [DE 244-45.] In the final motion for fees they now seek the full 33.3%

and reimbursement of costs and expenses in the amount of $1,535,402.94.

At first blush, I thought that seemed like an exceedingly high contingency fee. Excluding interest, that comes out to $16,650,000 for work in a case that settled before any decision on class certification, before discovery was completed, and obviously before summary judgment was briefed or decided. My gut instinct was that something in the range of 20-25% would represent a reasonable attorneys' fee in a case like this. As discussed below, after a review of a lot of data and caselaw, as well as the particular risks taken by counsel in this case, a fee roughly in the middle of what counsel requested and my initial instincts is appropriate and reasonable.

The Seventh Circuit has stated "[i]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price" in divining what the appropriate fee award should be. *In re Continental l Ill. Sec. Litig.,* 962 F.2d 566, 568 (7th Cir. 1992). Instead, "[i]t is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." *Id.* This is a difficult inquiry when I only have briefing from the party who wants their request approved. And candidly, calling it a market rate and then having district court judges, who are almost always untrained in economics and often even untrained in the private practice of law, come up with a number is only a step removed from St. Thomas Aquinas's just price endeavor. To put it plainly, all I have is myself and some brilliant law clerks to assist me. But the mandate is to do my best to ascertain a market rate. So that's what I'll attempt to do.

The factors or "benchmarks" to consider when setting the market rate ex post include: "(1) actual fee agreements; (2) data from large common fund cases where the parties negotiated the fees privately, and (3) bids and results from class counsel auction cases for insight into the fee levels attorneys in competition were willing to accept." *Sutton v. Bernard*, 504 F.3d 688, 692, n.2 (7th Cir. 2007) (citing *In re Synthroid Mkgt. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)).

***10** On the first benchmark, actual fee agreements, I'm at something of a loss. There is no fee agreement in the case before me and class counsel in this case have not included any fee agreements from other securities class actions in their motion.[2] But I think it's fair to say that if there were fee agreements in similar cases with a flat 33.3% fee, counsel would have included them with their briefing. Thus, their absence somewhat undercuts the requested amount. But at the same time, if the requested award of 33.3% was way out of line, I would also expect some legitimate opposition or objections to the proposed settlement, either from large institutional investors or a group like the Center for Class Action Fairness who pay attention to such things. *See* https://hlli.org/class-action-fairness. As discussed above, there was none of that in this case. I could order additional briefing on this point or conduct my own independent research to try and find such agreements, but I have my doubts that either of those would result in anything definitive. Thus, I really view this benchmark as not particularly relevant here.

2 Defendants have taken the approach common in class action settlements in which they express no view on the requested award, even if it is their money being distributed.

That brings me to empirical data on the subject. Thankfully, there's something of an embarrassment of riches. I won't go into a detailed analysis of the methodology of the studies in this subset of law and economics. I'm hardly qualified to do that. But I can report on and utilize the top-line findings from each study. While their conclusions are not uniform, they offer important touchstones that any judge taking their duty to ascertain a market rate for legal services seriously should consider.

The first frequently cited study in this field is one by Professors Theodore Eisenberg and Geoffrey Miller. They originally published their study in 2004 and then updated it in 2010. The updated study analyzed class action fee awards in cases from 1993 to 2008. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees in Class Action Settlements: 1993-2008,* 7 J. Empirical Legal Studies 248 (2010). While it analyzed all class actions, it broke out fee awards by case type. In securities class actions, fee awards had, as a percentage of the total settlement amount, a mean of 23% and a median of 25%. Those percentages translated into a mean fee of $14.78 million and median fee of $2.52 million across 268 cases. *Id.* at 262. Another study from 2010 concluded that there were similar ranges of fees awarded, with a mean and median hovering around 25% in securities class actions. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Studies 811, 835 (2010). For cases in which the settlement amount was $30 - $72.5 million, the mean award as a percentage was 22.3% and the median 24.9%. *Id.* at 839. It seems that studies consistently have found the mean and median fee awards in securities class actions to fall "between 20 percent and

30 percent of the settlement amount." *Id.* at 815 (discussing and summarizing prior research studies in the field). Thus, it seems that 25% is fairly standard in large securities class actions, and 30% is at the high end.

Another key aspect of these studies is their agreement on a "scaling effect" in which as the amount of the settlement increased, the percentage of the attorneys' fee award decreased. *See* Eisenberg & Miller, at 263-64 ("a substantial scaling effect existed in the 2003-2008 period, as well as in the earlier 1993-2002 period"); Fitzpatrick at 837 ("[F]ee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases."). For example, in cases where the class recovery was $1.1 million or less, the mean attorney fee percentage was 37.9% and the median was 32.3%. Eisenberg & Miller at 265. For cases in the $38.3 – $69.6 million range (*i.e.*, this case), the mean was 22.1% and median 24.9%. *Id.* In the highest bracket, cases with recovery greater than $175.5 million, the mean was 12% and the median 10.2%. *Id.*; *see also In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp.3d 781, 797-799 (reviewing the same empirical data on fee awards in class actions). Thus, while a 33.3% fee may be common in personal injury cases or class actions where the recovery is "only" seven figures, that is simply not the case when dealing with much larger dollar amounts.

***11** Likely anticipating this data, plaintiffs included with their motion a joint declaration from Professors Charles Silver and Brian Fitzpatrick—the same professor whose article is discussed above. [DE 258-2.] There are two broad points made in that declaration. First, while Professor Fitzpatrick states that his 2010 article on the subject is still "the most comprehensive examination of class action settlements and attorneys' fees that has ever been published" (*id.* at ¶ 10), they direct me to studies on contingency fee patent litigation and a narrower data set of "related pharmaceutical antitrust cases, in which approximately 20 drug wholesalers sued drug manufacturers on a contingency fee basis." [DE 257 at 17-18.] In the patent cases, the mean rate of attorneys' fees was 38.6% of the recovery. In the large pharmaceutical direct purchaser antitrust cases, there were fee agreements of 33.3% supported by sophisticated class members. [*Id.*] But neither of those data sets relate to securities class actions, or even class actions. As discussed, there's an abundance of data on fee arrangements in securities class actions. Since I'm dealing with a securities class action, that's the more relevant data compared to patent or large pharmaceutical antitrust cases.

Second, Professors Fitzpatrick and Silver make another point in their declaration which I think has greater salience in the context of this case. Contrary to the conventional wisdom which embraces a sliding scale where the fee award percentage goes down as the total amount of recovery goes up, they posit that the better way to incentivize class counsel to get the best deal for the class is to have a scaling effect in the *opposite* direction. [DE 258-2 at ¶¶ 58-64.] That is, as the amount of the settlement increases, so should the percentage of the attorneys' fee. This provides a direct incentive for class counsel to push for a higher settlement figure, rather than accept the first good offer. The idea is that the last dollar is much harder to get than the first dollar is. Other courts have noted a similar concept. *Allahpattah Servs. Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1213 (S.D. Fla. 2006) ("By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, [this] approach creates the perverse incentive for Class Counsel to settle too early for too little."); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y. 2000) ("By adjusting downward the percentage of the recovery awarded to counsel as plaintiffs' recovery increases, [downward sliding scale] arrangement arguably limits windfall attorney's fee awards. However, this method may give rise to an attorney incentive problem by creating declining marginal returns to effort for counsel.").

An analogy is perhaps in order. Imagine you're working with a real estate agent who gets 3% of the home's sale price as a commission. For them, the difference between selling a home for $250,000 today compared to waiting and working several more weeks to sell it for $300,000 is only $1,500 ($7,500 vs. $9,000). But for you the seller, the higher sale amount translates to $48,500 more. In such a situation, the seller's and their real estate agent's incentives begin to diverge because of decreasing marginal returns for the real estate agent's efforts, assuming you're not in a huge rush to sell.

So too in the class action settlement context, assuming everyone is behaving in their own self-interest. *See In re Sw. Airlines Voucher Litig.*, 799 F.3d at 711 ("Judicial scrutiny of class action fee awards and class settlements more generally is based on the assumption that class counsel behave as economically rational actors who seek to serve their own interests first and foremost, particularly in classes certified under Rule 23(b)(3) that seek primarily monetary relief."). Hypothetically, class counsel could settle at early stages of the case for $30,000,000 and get a 25% award (equally $7,500,000). Or they could spend two additional years slogging through discovery and motion practice (a cost

counsel is "eating" in the meantime) and settle the case for $50,000,000. Then they might receive a 20% award (equaling $12,500,000). $5,000,000 isn't anything to scoff at, but when a case like this incurs several million dollars in legal fees and expenses every year, rational class counsel is likely going to take the quick but still substantial settlement. In that situation, the class members (most of whom probably have no idea the case exists) lose because they missed out on an extra $15,000,00, after fees.

***12** The third benchmark is insight from class counsel auctions. Some judges have had success in creating a market price in securities class actions ex ante by holding a competitive auction near the outset and awarding the case out to the lowest reasonable bid by a plaintiffs' firm. *See, e.g.*, *In re Auction Houses Antitrust Litig.*, 197 F.R.D. at 82 ("[T]his case is singularly appropriate for the use of an auction for several reasons."); *In re Comdisco Sec. Litig.*, 141 F. Supp.2d 951 (N.D. Ill. 2001) (ordering sealed bids to be filed by potential class counsel). Like many economic exercises, it works tremendously in theory but runs into a host of complications in the real world. Professors Fitzpatrick and Silver agree as much and state in their joint declaration that "[t]he obstacles are so severe that experimentation with auctions has ceased." [DE 258-2 at ¶ 40.] The case law seems to bear that out, as reported cases with auctions drop off dramatically after 2001. *See In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp.3d 781, 800-801 (N.D. Ill. 2015) ("As far as the court can tell, there are at least fourteen class action cases—twelve securities actions and two antitrust actions—where district court judges have selected lead counsel and negotiated a fee structure using a competitive process.") (collecting cases all predating 2002).

This case is a good example of how an auction likely wouldn't have done much good. There was no competition between plaintiffs' law firms to bring this case. As far as I can tell, this was the only lawsuit filed in relation to ZBH's 2016 stock price drops. There was no publicly disclosed SEC investigation before or after the complaint was filed, and no copycat complaints filed either. No other firm (or group of firms) moved to try to represent the class at any point. It was thus a market of one, and monopolies and monopsonies aren't exactly famous for efficiency. Perhaps I could have announced an auction, and additional class counsel would have come knocking, but that's pure speculation. In all likelihood, an auction at the outset of the case wouldn't have helped much with figuring out a market rate for attorneys' fees in this case.

While the lack of competition amongst plaintiffs' lawyers may have made holding an auction impracticable or unhelpful, that fact can still help inform the market rate for a case like this. Precipitous stock price drops are blood in the water for securities class action firms. Lawsuits almost always follow, and there are frequently multiple competing lawsuits that must be consolidated, whether piecemeal or through the Judicial Panel on Multidistrict Litigation. But here, that didn't happen. This case was filed on December 2, 2016, four weeks after the relevant disclosures by ZBH and attendant drops in the company's stock price. Given ZBH's massive market capitalization, it was clear there would be hundreds of millions of dollars on the line. As such, I can only assume that if more entrepreneurial lawyers thought there was a viable case, they would have done their own investigations and filed their own lawsuits. But no one else did. That's probably because this was going to be a difficult case and one in which the chances of success were low. No litigation is a sure-fire win, but this one was riskier than the average lawsuit and certainly riskier than the average securities litigation class action. Any market-based fee award should take that into account.

After considering these benchmarks, I think some enhancement over the "standard" 25% fee award for large securities class actions makes sense in this case. By so doing, I've admittedly brought myself back into the realm of counting the number of angels that fit on the head of a pin or divining a just price for lawyers' fees, but there's no way out of it. Five specific facts or elements about this case justify an increase in the fee award: (1) substantial independent investigation on counsel's part was required (there were no regulatory actions to piggyback off of and numerous confidential witnesses were located, interviewed and relied upon to adequately plead the case); (2) the somewhat novel legal theory used in connection with the duty to disclose and the Section 10b claims (discussed at length in my prior opinion on the motion for interlocutory appeal, *see Shah*, 2019 WL 762510); (3) an incentive for being the first/only mover in the field where no other counsel sought to represent the class (a monopoly award something akin to a patent); (4) the fact settlement was achieved only after counsel did the work of creating a damages model, fully brief class certification, and multiple rounds with experienced mediators; and (5) that class counsel held out until there was a settlement offer well in excess of what similar cases settle for in terms of a percentage of total possible recovery. [3]

[3] I think of this consideration as distinct from a result-oriented view of basing the fee percentage on the success or total size of the settlement award, an approach the Seventh Circuit has frowned upon multiple times. *See, e.g. Sullivan*, 504 F.3d at 693 ("The trouble we have with the district court's methodology is that the fee determination began and ended with the amount actually recovered for the class" which only accounted for the district court's "subjective judgment regarding [Counsel's] work[.]"). The point here is to properly incentivize class counsel to not have a diminishing marginal rate of return on the "last dollar" and instead work to maximize the amount recovered for the class.

***13** Given these things, I think a fee award of 30% represents a reasonable market rate. That number could be thought of as a percentage point increase for each of the five elements listed above. And it likewise splits the baby between the requested 33.3% and large securities class action standard rate of 25%. Most importantly, it accurately takes into account the market forces that would be at play if sophisticated parties were negotiating a fee for this case at the outset. In particular, the risk of nonpayment to counsel and investment of millions of dollars' worth of attorney time taken on in advancing a novel legal theory in a case where there are some strong indications that no one else was willing to. It's less than counsel's requested award of 33.3% but is still indisputably at the high end of the spectrum of percentage of fund awards. In dollar amount, it comes out to $15,000,000 (excluding any additional amount for interest earned on the settlement fund). And for whatever value the lodestar crosscheck still has, *see In re Synthroid,* 325 F.3d at 979-80, the award is in line with the lodestar amount provided by counsel, which came out to $14,675,216.00. [DE 258 at ¶ 140.]

As for the requested amount of costs and expenses in this case, counsel's requested amount of $1,535,402.94 is reasonable. "It is well established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses, which includes such things as expert witness costs; computerized research; court reports; travel expense; copy, phone and facsimile expenses and mediation." *Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014). To be sure, it's a lot of costs, but that's the nature of high-stakes complex litigation like this. More than 80% of those costs ($1,237,009.78) related to expert witness costs. [DE 258 at ¶ 160.] This case required consultation with many experts in fields of medical device regulation and accounting given the subject matter of the case and experts on economic damages, market efficiency, and loss causation given its nature as a securities class action. [*Id.*] As detailed in counsel's declaration, all of the costs and expenses sought are of the type and nature that a paying client and consumer of high-end legal services would be expected to pay in a case billed at an hourly rate. They are thus fully recoverable.

Conclusion

For the reasons stated on the record during the final fairness hearing and in this opinion, Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation [DE 254] is GRANTED; and Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses [DE 256], is GRANTED, in part.

It is ORDERED that once final disbursement of the settlement fund is authorized, plaintiffs' counsel shall be paid attorneys' fees in the amount of 30% of the settlement fund as of that date; it is further ORDERED that plaintiffs' counsel be reimbursed costs and expenses from the settlement fund in the amount of $1,595,402.94; and it is further ORDERED that each of the lead plaintiffs, Rajesh M Shah, Matt Brierley, UFCW Local 1500, and Steven Castillo each be paid $15,000 from the settlement fund as incentive awards and reimbursement for serving as lead plaintiffs.

SO ORDERED on September 18, 2020.

All Citations

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EXHIBIT L

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United States District Court, N.D. Illinois, Eastern Division.

Keith SNYDER and Susan Mansanarez, individually and on behalf of all others similarly situated, Plaintiffs,
v.
OCWEN LOAN SERVICING, LLC, Defendant.
Tracee A. Beecroft, Plaintiff,
v.
Ocwen Loan Servicing, LLC, Defendant.

Case No. 14 C 8461
|
consolidated with Case No. 16 C 8677
|
Signed 05/14/2019

Attorneys and Law Firms

Mark Daniel Ankcorn, Ankcorn Law Firm, PLLC, Orlando, FL, Adrienne D. McEntee, Beth Ellen Terrell, Pro Hac Vice, Terrell Marshall Law Group PLLC, Seattle, WA, Alexander Holmes Burke, Daniel J. Marovitch, Burke Law Offices, LLC, Chicago, IL, Ann Marie Hansen, East Amherst, NY, Guillermo Cabrera, Jared Matthew Quient, Pro Hac Vice, The Cabrera Firm, APC, San Diego, CA, Mark Luther Heaney, Heaney Law Firm, LLC, Minnetonka, MN, for Plaintiff Keith Snyder.

Mark Daniel Ankcorn, Ankcorn Law Firm, PLLC, Orlando, FL, Adrienne D. McEntee, Beth Ellen Terrell, Pro Hac Vice, Terrell Marshall Law Group PLLC, Seattle, WA, Alexander Holmes Burke, Daniel J. Marovitch, Burke Law Offices, LLC, Chicago, IL, for Plaintiff Susan Mansanarez.

Tracee A. Beecroft, pro se.

Simon A. Fleischmann, Chethan G. Shetty, David F. Standa, Thomas Justin Cunningham, Locke Lord LLP, Chicago, IL, Brian Vincent Otero, Pro Hac Vice, Ryan Andrew Becker, Pro Hac Vice, Stephen Roy Blacklocks, Pro Hac Vice, Hunton & Williams LLP, New York, NY, for Defendant.

ORDER ON MOTION FOR FINAL APPROVAL OF FIRST AMENDMENT TO CLASS ACTION SETTLEMENT

MATTHEW F. KENNELLY, United States District Judge

***1** The plaintiffs in these consolidated cases filed suit against Ocwen Loan Servicing, LLC on behalf of a putative class, alleging, among other things, violations of the Telephone Consumer Protection Act (TCPA) and the Fair Debt Collection Practices Act (FDCPA). The parties reached a classwide settlement and moved for the Court to approve it. After thoroughly reviewing the settlement, the Court declined to approve it. The parties returned to negotiations and modified the proposed settlement to address the Court's concerns. The plaintiffs now move for final approval of the first amendment to the settlement and for attorneys' fees. The Court grants the motion for final approval of the settlement, with modifications described in this decision. The Court also grants the plaintiffs' motion for attorneys' fees in part.

Background

A. Procedural history

In October 2014, the plaintiffs in these consolidated cases filed suit against Ocwen. They challenged Ocwen's alleged practice of making debt-collection calls using an automated telephone dialing system without the call recipients' prior consent. In late December 2016, the plaintiffs separately sued a number of banks that served as the trustees for loans to the putative class members, alleging that the debt-collection calls were made on the banks' behalf, making them also liable for the resulting violations. *Snyder v. US Bank, N.A.*, No. 16 C 11675 (N.D. Ill). The class was potentially enormous. As of December 2016, Ocwen was servicing 1.4 million mortgage loans. Plaintiffs represented that Ocwen's records showed that it had made, during the period covered by the limited class proposed for preliminary injunctive relief, over 146 million calls to 1.45 million unique telephone numbers. And, indeed, Ocwen ultimately produced a list of nearly 1.7 million unique telephone numbers that its records indicated had been dialed.

In late June 2017, the Court provisionally granted, in the Ocwen suit, the plaintiffs' motion for certification of a limited class under Federal Rule of Civil Procedure 23(b)(2) and for a preliminary injunction to prevent Ocwen from continuing certain practices that allegedly violated the TCPA. *See Snyder v. Ocwen Loan Servicing, LLC*, 258 F. Supp. 3d 893 (N.D. Ill. 2017). Before the Court's ruling on the motion for a preliminary injunction, the parties conducted extensive discovery, including exchanging information regarding calls made by Ocwen and information regarding the basis for

Ocwen's defense that it had acted with the consent of the call recipients. Plaintiffs encountered significant hurdles in obtaining information supporting Ocwen's consent defense, largely because of the way in which Ocwen kept its records of debt collection calls. This same problem, however, complicated Ocwen's ability to prove the defense.

Meanwhile, several rounds of settlement negotiations occurred. A mediation in May 2016 with retired Judge James Holderman was unsuccessful. At a second mediation, this one facilitated by mediator Rodney Max in October 2016, Ocwen disclosed that its insurer had denied coverage for the claims asserted by the plaintiffs and suggested that it had a limited ability to finance the settlement on its own. These revelations led to the second mediation's unsuccessful termination. The same considerations also led the plaintiffs to move to amend their complaint in the *Snyder* case to add as defendants the banks that were trustees of the loans on which Ocwen had attempted to collect. The Court denied the motion as untimely. The plaintiffs then filed a separate suit against the banks, which the Court found to be related to *Snyder* under Local Rule 40.4, resulting in the transfer of the newly filed case to the undersigned judge's docket.

***2** In July 2017, shortly after the Court granted the motion for a preliminary injunction, a third mediation was held with retired U.S. Magistrate Judge Morton Denlow. This mediation resulted in an agreement to settle the claims of the putative class. It is reasonable to conclude that the settlement was produced, at least in part, by the plaintiffs' successful prosecution of the motion for preliminary injunction and certification of a limited class, and by their filing of the lawsuit against the bank defendants—who, the Court later learned, had tendered the defense of the case to Ocwen based upon apparent contractual indemnification provisions.

B. Original settlement

The original settlement agreement provided for the establishment of a fund of $ 17,500,000. This would have been used to pay, first, costs of notice and administration—requested at $ 1,600,000; second, attorneys' fees—requested at one-third of the total settlement less administration costs, or $ 5,289,250; third, incentive awards for the three named plaintiffs, requested at a total of $ 75,000; and, finally, payment of the claims of class members who submitted claim forms. Given the number of class members who submitted claim forms (see below), had the Court approved the costs, fees, and incentive awards in the amounts requested, each class member who submitted a form would have received about $ 39. The first proposed settlement also included injunctive relief requiring Ocwen to change its practices for obtaining consent to call borrowers, including a requirement to pay enhanced damages to those who inappropriately receive automated calls in the future. *See* Final Settlement Agr., dkt. no. 252-1, ¶ 4.2. Finally, the settlement provided for dismissal of not only the *Snyder* and *Beecroft* suits against Ocwen, but also the putative class's suit against the banks. *See id.* ¶ 3.5. The banks offered no contribution to the settlement fund or any other consideration for the dismissal of the case against them.

The Court preliminarily approved the proposed settlement, including conditional certification of a settlement class, in October 2017. Notice of the proposed settlement was then sent to the members of the class, giving them the opportunity to make claims, object, or request exclusion (also called "opting out"). The settlement class consisted of persons who had been called on nearly 1,700,000 cellular telephone numbers.

In March 2017, the plaintiffs moved for final approval of the proposed settlement, for incentive awards for the named plaintiffs, and for payment of administrative fees and an award of attorneys' fees from the settlement proceeds. The motion was fully briefed by the end of April. In September 2018, the Court denied the motion for final approval because it was concerned that the agreement (1) potentially overcompensated class counsel; (2) failed to address Ocwen's ability (or inability) to pay, which was relevant to the Court's assessment of the reasonableness of the settlement amount; and (3) would release the claims against the bank defendants for nothing. *See Snyder v. Ocwen Loan Servicing, LLC*, No. 14 C 8461, 2018 WL 4659274, at *5-6 (N.D. Ill. Sept. 28, 2018). The Court deferred decision on whether late claims and opt-outs would be accepted. *Id.* at *6.

C. Subsequent negotiations and the amended settlement

Following the Court's denial of the motion to approve the final settlement agreement, the parties returned to mediation. A fourth mediation session—the second with retired Judge Denlow—occurred on July 20, 2017 and resulted in an improved settlement. A number of the settlement's terms were unchanged from the original proposal. For instance, the settlement still provides for $ 1,600,000 in administration and notice costs and requests $ 75,000 (to be split three ways) in incentive payments for the named plaintiffs. Likewise, class counsel still requests a total of $ 96,380 in costs—$ 29,600 to be paid to Mark Ankcorn (reduced from his original request

for $ 35,000) and the remaining $ 66,780 to be divided among the other firms that shared in representing the plaintiffs.

***3** But the proposed amended settlement also makes several significant changes. Most significantly, the settlement fund provided for in the agreement has increased by $ 4,000,000 from $ 17,500,000 to $ 21,500,000. Moreover, class counsel seeks $ 500,000 less in attorneys' fees, bringing that figure down from $ 5,289,250 in the original settlement to $ 4,789,250 in the amended settlement. Next, the amended settlement also provides for dismissal of only the *Snyder* and *Beecroft* suits against Ocwen and does not seek to release the claims against the bank defendants. Finally, the proposed amendment adds to the injunctive relief described in the original settlement. [1]

[1] The parties report that Ocwen has already implemented the changes required by the original proposed injunction. *See* Pls.' Br. in Supp. of Mot. for Approval of First Am. to Settlement Agreement & Release, dkt. no. 350, at 4. The amended settlement goes further and sets out specific requirements for how the injunction is to be maintained by Ocwen during and after its adoption of new loan servicing technology. *See* First Am. to Settlement Agreement & Release, Ex. 1 to Terrell Decl., dkt. no. 353, ¶¶ 4-5.

The upshot, then, is that the proposed amendment provides at least $ 4,500,000 more for payment of the claims of class members who submitted claim forms and leaves the class free to pursue claims against the bank defendants if it chooses. Given the number of class members who submitted claim forms, if the Court approves the costs, fees, and incentive awards in the amounts requested, each claim will be worth between $ 53 and $ 74, depending on the Court's handling of disputed claim submissions and opt-outs. Even the lower end of this range compares quite favorably to the approximately $ 39 recovery each claimant would have received under the original settlement.

The plaintiffs have moved for final approval of the amended settlement agreement.

D. Imperfect claims and opt-outs

The deadline to file claims and opt-outs was March 5, 2018. The administrator reports that it received 212,165 complete and valid claim forms as well as 5,401 forms that were missing signatures, which the claimants were provided an opportunity to cure. [2] The settlement allows individuals to submit separate claims for up to three phone numbers, but 5,318 claimants erroneously submitted two phone numbers on a single claim form and another 59 claimants submitted three numbers on a single form. The administrator also received 52,709 claims that included numbers that did not match phone numbers from the list provided by Ocwen, 23,212 duplicate claims, and 124 requests to withdraw claims. Additionally, there were a total of 3,801 late claims submitted, discussed further below, including 358 filed by an individual named Reuben Metcalfe.

[2] Numbers are drawn from the supplemental declaration of Michael R. O'Connor, the vice president of class administrator Epiq Class Actions & Claim Solutions, Inc. *See* dkt. no. 354.

Description	Count
Complete claims	212,165
Incomplete claims (missing signature)	5,401
Multiple number claims	5,436
Late claims	3,801
Claims for numbers not on list	52,709
Total	**279,512**

As for opt-outs, the administrator reports having received 379 timely and complete requests, 178 late requests, and eighteen incomplete requests. Almost all of the late claims were either (1) postmarked and received by the administrator within the two weeks following the March 5 deadline or (2) submitted in April 2018 by Reuben Metcalfe. As the Court discovered at

the April 5, 2018 hearing, Metcalfe is the proprietor of a then-nascent business specializing in assisting class members in consumer class actions exercise their rights to submit claims or opt-out of such litigation. At that hearing he admitted that the late-submitted claims and opt-outs were a product of his own mistake rather than the neglect of any member of the plaintiff class.

E. Mark Ankcorn's role

***4** Finally, the conduct of one of the attorneys who represented the plaintiff class bears on the resolution of these motions. Mark Ankcorn agreed to prosecute this case jointly with counsel from four other firms on behalf of the class. Ankcorn's service was, by all accounts, satisfactory for much of the case's history; indeed, his firm served as lead counsel for the class for much of the litigation. But in November 2017 Ocwen filed a motion informing the Court that Ankcorn had potentially (1) committed an ethical violation by encouraging high-value members of the class to opt out and pursue their claims individually and (2) violated this Court's protective order regarding confidential information produced by the defendant. *See* dkt. no. 268. These allegations and the ensuing related proceedings bear, to some extent, on the final resolution of this matter. But because it is difficult to understand why the details matter without context, the Court reserves their discussion until later in this opinion.

Discussion

A. Amended settlement approval

A district court may approve a proposed settlement of a class action only after it directs notice in a reasonable manner to all class members who would be bound and finds, after a hearing, that the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). In making the latter determination, courts in this circuit consider the following factors:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) the stage of the proceedings and the amount of discovery completed.... The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863–64 (7th Cir. 2014) (internal quotation marks and citations omitted). Rule 23(e)(2) also sets forth a list of points a court must consider in determining whether a proposed class action settlement is fair, reasonable, and adequate. The Court will address these points as well. They include whether:

- the class representatives and class counsel have adequately represented the class;
- the proposal was negotiated at arm's length;
- it treats class members equitably relative to each other; and
- the relief provided by the settlement is adequate, taking into consideration the costs, risks, and delay of trial and appeal; the effectiveness of the proposed method of distributing relief; the terms of any proposed award of attorneys' fees; any agreements made in connection with the proposed settlement.

Fed. R. Civ. P. 23(e)(2).

1. Fairness, reasonableness, and adequacy of the proposed settlement

Significant portions of the Court's analysis remain materially unchanged from the previous order. Nevertheless, the Court will once again carefully review each of the factors set forth in *Wong* and Rule 23(e)(2).

a. Adequacy of representation of the class

The named plaintiffs participated in the case diligently, including being subjected to discovery. And class counsel fought hard throughout the litigation and pursued mediation when it appeared to be an advisable and feasible alternative. The Court has concerns regarding certain aspects of the

conduct of Mark Ankcorn, which are discussed below. But there is no basis to believe that Ankcorn's conduct influenced the representation of the class by counsel unaffiliated with his law firm. Nor does the Court believe that misconduct attributed to Ankcorn—who was only one of several attorneys who represented the class—is on its own problematic enough to seriously undermine the proposed settlement's viability under this factor.

b. Arm's length negotiation

The record reflects that the settlement was negotiated at arm's length. The parties conducted their negotiations via three separate and independent mediators—retired Judge James Holderman, mediator Rodney Max, and retired Magistrate Judge Morton Denlow. There is no indication of any side deals material to this analysis.[3] And there is no provision for reversion of unclaimed amounts, no clear sailing clause regarding attorneys' fees, and none of the other types of settlement terms that sometimes suggest something other than an arm's length negotiation.

[3] The Court includes this limitation in light of the later discussion of Mark Ankcorn.

c. Treatment of class members vis-à-vis each other

***5** The proposed settlement treats all class members the same; each is entitled to a single payment for each claim submitted. There is an argument to be made that this is inequitable, as some class members received more unwanted calls than others—including some who received hundreds or even thousands of unwanted calls. No class member has objected on this basis, however, and the ability to opt out (plus an explanation in the class notice of what a class member who opts out might expect) has provided a safety valve that permitted class members on the higher end of the call spectrum to, in effect, vote with their feet and pursue the possibility of a greater award. The Court is especially comfortable with the effectiveness of the opt-out mechanism to cure any potential inequity among class members in light of the Court's treatment of modestly late opt-out requests, discussed below. The Court finds that the proposal for equal treatment is reasonably equitable.

d. Adequacy of relief

The six factors identified by the Seventh Circuit in *Wong*, 773 F.3d at 863-64, and numerous other cases subsume most of the factors listed in Rule 23(e)(2). The Court addresses each in turn.

Complexity, length, and expense of further litigation. Little has changed regarding this factor since the Court's previous order. Almost all of the work that has occurred since then has been aimed at reaching a settlement that addressed the Court's concerns. As the Court previously observed, absent a settlement, a good deal of work would remain to bring the case to a conclusion. Fact discovery on the suit against Ocwen was largely completed before the parties reached the original settlement. But expert disclosure and discovery remained to be done. Plaintiffs had moved to certify a class under Rule 23(b)(3), and the remaining briefing on that motion had yet to be finished. The losing party on that motion could then request an interlocutory appeal. Before this Court, both sides likely would have moved for summary judgment following determination of the class certification motion. It is fair to say that settlement obviated a significant amount of work in the suit against Ocwen.

One piece of the analysis has changed since the original settlement proposal, however. The Court previously noted that very little discovery had been done regarding the claims against the bank defendants at the time of the first settlement. But because the amended settlement no longer concerns the bank defendants, the complexity, length, and expense of litigating the claims against them is no longer a relevant consideration in this analysis. Nonetheless, the fact that the proposed settlement does not implicate the bank defendants does not meaningfully undermine the conclusion that approving the settlement would avoid substantial future litigation.

In sum, this factor favors approval of the settlement.

Amount of opposition to the settlement. There remain only three objections out of more than 270,000 responses submitted. This factor favors approval.

***6** Opinion of competent counsel. Class counsel are experienced members of the plaintiff's consumer class action bar. They favor the settlement, and this is a factor supporting approval of the amended settlement. *See Isby v. Bayh*, 75 F.3d

1191, 1200 (7th Cir. 1996). As the Court previously noted, however, they are hardly disinterested parties; they stand to gain handsomely—though materially less than in the original proposed settlement—if the Court approves the proposed fee award.

Stage of proceedings and amount of discovery completed. The analysis of this factor remains largely unchanged from the previous order. Though a lot of work remains to be done if the case is not settled, much has been done already. Work previously completed includes a significant amount of fact discovery as well as litigation of the motion for preliminary injunction. And plaintiffs had, in the Court's view, sufficient information via discovery and otherwise to enable them to evaluate the merits of the case against Ocwen. *See Isby*, 75 F.3d at 1200.

One factor has changed considerably from the Court's previous analysis. In the last order, the Court noted that it had insufficient information from which to evaluate Ocwen's contention that its ability to pay was limited. Certainly the plaintiffs had enough information to determine that Ocwen could not write a check in the billion-dollar range—which may have theoretically been the judgment if Ocwen were ordered to pay full statutory damages for each alleged violation—and Ocwen's counsel repeatedly represented that the company was in a relatively tenuous financial position at least in light of the potential exposure. But, as the Court noted in its previous order, there was little information in the record regarding Ocwen's financial status when class counsel agreed to the proposed settlement at the third mediation.

Based on the parties' representations, the Court is now satisfied that Ocwen's financial status was not a significant factor in this settlement agreement and thus should not be a significant factor in deciding whether to approve it. Specifically, in their briefing on this motion for final approval, the parties assured the Court that Ocwen's ability to pay the judgment was not so limited that it influenced the settlement amount. They explained that any previous indication to the contrary was mistaken or uninformed and that such representations should be disregarded. The Court is persuaded that the parties are sufficiently apprised of the underlying facts to support those assertions.

The Court also previously noted that the parties failed to meaningfully discuss the claims against the banks in their papers on the previous motion for final approval. Because the claims against the banks have been removed from the proposed amended settlement agreement, that concern is no longer operative.

On balance, this factor favors approval of the amended settlement.

Strength of the case compared with the settlement offer. The primary consideration in deciding whether to approve a proposed settlement under *Wong* and Seventh Circuit precedent is "the strength of the plaintiff's case on the merits balanced against the amount offered in settlement." *Wong*, 773 F.3d at 864. In addressing the original proposed settlement, the Court considered (1) the relative strength of the plaintiffs' claims and counsel's assessment of the merits, together with the risk to the claims of a potential adverse decision by the D.C. Circuit on a key legal issue; (2) the overall weakness of Ocwen's consent defense in light of its poor recordkeeping, but the potential for the defense to adversely affect class certification; (3) the lack of documentation supporting Ocwen's purportedly weak financial health, which had been offered as a basis to approve the settlement; (4) the entirely gratuitous dismissal of the claims against the bank defendants; and (5) what the Court considered a potentially unreasonably large request for attorneys' fees. Balancing these considerations, the Court denied the motion to approve the original settlement.

***7** The first two considerations remain unchanged. For instance, although the parties present arguments about the relative strengths and weaknesses of the plaintiffs' claims in light of recent changes to the relevant regulatory regime, *see, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), they largely reproduce points already made and acknowledged in relation to the original settlement. The Court's assessment of the merits has not changed much since the order on the first motion for final approval.

But the amended settlement agreement includes several substantial changes that address the concerns outlined in the Court's previous order. First, as discussed above, the parties have provided assurances that Ocwen's finances are not relevant to the settlement. Specifically, they have represented to the Court that their own previous statements about Ocwen's financial infirmity were mistaken, overblown, or misinterpreted. Rather, they intended only to suggest that Ocwen would be unable to afford the multi-billion dollar judgment that would have resulted from class certification combined with a victory on the merits. In its papers on the

motion for final approval of the amended settlement, for instance, Ocwen states that:

> It is not disputed that Ocwen cannot pay the many billions of dollars in damages that Plaintiffs are seeking. But the question of whether Ocwen might pay such a judgment is distinct from the question of whether Ocwen might be able to pay more than the agreed-on amount of the settlement. The proposed amended settlement is not predicated on Ocwen's ability or inability to pay more by way of settlement, and, as a result, Ocwen's financial capacity is not pertinent to whether the settlement is fair, reasonable and adequate.

Def.'s Br. in Supp. of Mot. to Approve First Am. to Settlement Agreement, dkt. no. 355, at 12-13. The Court is satisfied with the parties' assurances and concludes that their failure to provide details regarding Ocwen's finances is immaterial to the settlement analysis.

The parties have also addressed the Court's reservations regarding the bank defendants. Recall that the bank defendants were the trustees of the loans upon which Ocwen was seeking to collect when it allegedly violated the TCPA. After an attempt to add them to this suit was denied, the plaintiffs sued the banks separately and the Court found that case related to this one. The original settlement agreement sought to release the claims against the banks for nothing and with no explanation. The amended settlement addresses this issue. Specifically, the plaintiffs, Ocwen, and the banks agreed during the fourth mediation that the amended settlement would not release the claims against the banks. In short, the banks have been carved out of the settlement, and the lawsuit against them is proceeding ahead. This change resolves the Court's concerns about the settlement's treatment of the bank defendants.

The other consideration that led the Court to deny the original settlement was the fee requested by class counsel. Specifically, the attorneys representing the plaintiff class sought nearly $ 5.3 million in attorneys' fees out of the $ 17,500,000 settlement fund. In tandem with other considerations discussed here, the Court concluded that such a fee was probably excessive. Class counsel wisely changed course. In the amended settlement, they seek $ 500,000 less in fees, or $ 4,789,250 in total.

Finally, one other key factor supports approval: the settlement got considerably larger. Between the original settlement and the amended settlement, the total amount of the settlement fund increased from $ 17,500,000 to $ 21,500,000. In combination with the reduced fee request from class counsel, that means that there is effectively $ 4.5 million more available to compensate individual claimants. As a result, claimants will be able to collect between $ 53 and $ 74 per claim—pending the discussion of late claims, opt-outs, and other loose ends below—up from the approximately $ 39 per claim to which they would have been entitled under the original settlement. This is a considerable improvement in the value of the settlement in both absolute and relative terms.

***8** Taking these considerations together, the Court concludes that the single most important consideration under *Wong*, the strength of the case compared with the settlement offer, now favors approval of the amended settlement.

e. Approval decision

The Court concludes that the amended settlement is "fair, reasonable and adequate," Fed. R. Civ. P. 23(e)(2), subject to the following modifications.

First, the attorneys' fee request is acceptable as to all attorneys other than Mark Ankcorn. Ankcorn's fees are to be modified as discussed below. "[D]istrict courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 832 (7th Cir. 2018). Applying this standard, the proposed attorneys' fees are acceptable under either the percentage or lodestar methods of analysis. *See Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 246-47 (7th Cir. 2014). The amended settlement requests around 22% of the total, less administration costs, as attorneys' fees, well within the parameters of the declining marginal fee scale often employed in this district. *See, e.g.*, *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 805-07 (N.D. Ill. 2015). Likewise, applying a lodestar cross-check reveals that the risk multiplier sought by plaintiffs' counsel is well

within reason, *see, e.g.*, *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *17-21 (N.D. Ill. Dec. 9, 2009), with the key exception of Mark Ankcorn, whose fees are discussed below.

Second, the Court concludes that the amended settlement's proposal to give each of the three named plaintiffs $ 25,000 incentive rewards is excessive. Although "[i]ncentive awards are justified when necessary to induce individuals to become named representatives," *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001), the proposed awards are disproportionate and unwarranted. In deciding the appropriate incentive award, "relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Most often, "[c]ourts in this District have granted $ 5,000 incentive awards to named plaintiffs in TCPA cases." *Douglas v. W. Union Co.*, 328 F.R.D. 204, 219 (N.D. Ill. 2018) (collecting cases).

In acknowledgment that the named plaintiffs here have endured several years of discovery, scrutiny, and inconvenience in the pursuit of the case, the Court approves incentives awards of $ 10,000 to each of the named plaintiffs, for a cumulative total of $ 30,000.

2. Adequacy of notice

As noted previously, the Court may approve a settlement only if it is satisfied that notice of the settlement has been effected in a reasonable manner. In this case, notice was sent by mail and/or e-mail to over 1.4 million class members, using addresses in Ocwen's records. No better sources for physical or e-mail addresses were reasonably available. The settlement administrator determined that 95 percent of the proposed settlement class received mail or e-mail notice, and this determination appears to be reasonably supported. There was an initial coding error, made by the administrator, in the Internet-based claim submission process, but this was fixed, and the deadline to file a claim was extended accordingly. The administrator also set up a toll-free number and a website for class members to obtain additional information, and these were used extensively. The claim rate in this case was about 16 percent, which is far higher than the usual TCPA settlement —a further indication of the success of the notice program. As such, the Court reaffirms its finding that notice was sent in a reasonable manner to all class members and that, indeed, class members received the best notice practicable.

***9** But the analysis does not end there. Because the amended settlement changes somewhat the terms upon which the plaintiff class's claims will be discharged, the Court must assess whether those changes are "material" and thus require a new round of notice to the class and a new Rule 23(e) hearing. *See Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018). The Seventh Circuit recently explained that any change that results in a disadvantage to the class without an offsetting benefit demands that a new round of notice be disseminated to the class. *Id.* But courts routinely hold that no new notice is required where changes to a proposed settlement are objectively favorable for class members and do not prejudice any benefit previously promised. *See, e.g.*, *In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 330 (N.D. Cal. 2018) (collecting cases).

The proposed amended settlement at issue here leaves class members objectively better off than the original settlement would have. Most directly, it substantially increases the payout per claim to which members are entitled. Moreover, it excludes the claims against the banks from settlement, meaning that litigation against them may yet be viable. These changes unequivocally enhance the value of the settlement to class members and they come at no apparent cost in terms of benefits provided by the original settlement. Because the changes embodied by the amended settlement are entirely beneficial to the plaintiff class and have no apparent costs to it, the Court concludes that no further notice is required under Rule 23.

3. Objections

As noted above, the Court received three objections. They were from class members Brenda Stuart, Paul Squicciarini, and Daniel Seltzer. Each stated that his or her opposition stemmed from a combination of the relatively low per-claim award amount to which class members would have been entitled irrespective how many calls they received—then around $ 39—and the relatively high attorneys' fees sought in the original settlement—then $ 5,289,250, which was a third of the total settlement fund.

The Court overrules these objections. First, the per-claim award has improved considerably since the original notice. Furthermore, after reviewing the parties' submissions, the Court is satisfied that the per-claim settlement amount provided by the amended settlement falls comfortably within the range of rates that have been approved in the Seventh Circuit and elsewhere in similar TCPA litigation. And, in

any event, objectors' reservations about the amount of the settlement could have been resolved by simply opting out of the class and filing separate suits.

Second, as noted previously, the attorneys' fees requested in the amended settlement are significantly lower than those sought in the original settlement, both in absolute terms and as a proportion of the total settlement fund. Two of the three objectors pointed out that the fee request in the original settlement sought one third of the total settlement fund. Because the fund has increased by $ 4,000,000 and the fee request has decreased by $ 500,000, the fee request now totals only a little more than 22% of the settlement fund. And, indeed, the total fee award will be less once the adjustment discussed below is made by plaintiffs' counsel.

4. Late, incomplete, imperfect, and unlisted claims and opt-outs

The Court must also determine how to handle claims and opt-outs that were submitted late, were incomplete, included multiple phone numbers, or were submitted with phone numbers that did not appear on the list the defined the class. The Court has discretion to permit claims and opt-outs submitted after the March 5, 2018 deadline upon a determination that their tardiness was a product of excusable neglect. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209-10 (D.C. Cir. 2003).

a. Claims

***10** The administrator received a total of 279,512 claim submissions (not including duplicates). Some 52,709 of these claims sought recovery for calls to phone numbers that did not appear on the list provided by Ocwen. Because the class notice clearly instructed claimants on how to submit claims and because settlement class was defined to include only "persons who were called by Ocwen on the 1,685,757 unique phone numbers" on the list it provided, *see* Order Conditionally Certifying Settlement Class, dkt. no. 266, at 3, the Court finds that these claimants fall outside of the plaintiff class and are entitled to no further opportunity to correct their submissions.

Another 5,401 claim forms bore phone numbers that matched the list but were missing the claimants' signatures. The class administrator provided these claimants opportunity to cure their submissions. The deadline to cure was February 14, 2019. Claimants who cured their submissions by that date are entitled to recovery; those who failed to cure their submissions are not.

The administrator reported that an additional 5,436 claims incorrectly listed multiple phone numbers from Ocwen's list on a single form. The settlement agreement permits a single claimant to submit up to three claims for calls to three separate phone numbers but required submitting such claims on separate forms. Nevertheless, the Court finds that any neglect on the claimants' part was excusable and concludes that claim forms bearing two or three phone numbers on Ocwen's list should be treated as separate claim forms for the purposes of recovery.

Finally, 3,801 claims were submitted late, including 358 that were submitted by Reuben Metcalfe. These claims make up a tiny portion of the overall total—less than two percent of the nearly 280,000 total claims submitted to the administrator. As such, allowing them to go forward would have a negligible impact on class as a whole and no impact on Ocwen, which is on the hook for the same amount irrespective how many claims are filed. In light of these considerations, the Court finds the 3,801 late claimants' neglect to be excusable. And, as discussed further below, any neglect on the part of the claimants on whose behalf Metcalfe submitted claims is also entirely excusable because it was apparently his error, not the claimants', that led to the late submission. The late claims discussed here may therefore proceed forward as though submitted timely.

b. Opt-outs

Although the Court retains considerable discretion to allow late and otherwise imperfect opt-outs to go forward, the calculus is a bit different because opt-outs present a potential cost to the defendant. Specifically, any member of the class who exercised her right to opt out will not be bound by the terms of the settlement and may pursue individual litigation against Ocwen. Ocwen made clear at a hearing that it opposes recognizing any of the late or incomplete opt-outs. In this case, there were a total of 379 timely and complete requests to opt out of the plaintiff class. Additionally, there were eighteen incomplete requests and 178 late requests.

At the threshold, the Court finds that the incomplete requests to opt-out are forfeited. The class notice stated clearly how to opt out of the plaintiff class and a failure to do so correctly or

to cure an incorrect opt-out by now—more than a year after the deadline—constitutes inexcusable neglect in light of the prejudice it would cause the defendant.

The late requests present a closer question. The Court notes that nearly all of the late opt-outs were submitted either within two weeks of the March 5 deadline or in April 2018 by Reuben Metcalfe. After considering the balance of the equities, the Court concludes that both groups will be allowed to opt out. Most of the opt-outs in the first group were postmarked either the same week as the March 5 deadline or the following week. Although these submissions fell outside the March 5 timeline, they were submitted near enough to it to make any neglect in their submission excusable.

***11** The second group, the eighty-eight opt-outs submitted by Metcalfe, were postmarked on April 16. Although longer after the deadline, the Court is still persuaded that these requests should be honored. It was Metcalfe's error, not the fault of any of the class members requesting to opt-out, that led to their untimely submission. That alone satisfies the Court that any neglect on the part of those seeking to opt out was entirely excusable. That said, the Court recommends that Metcalfe take greater care in the future to observe the deadlines set by courts.

But not quite all of the opt-outs fall into the categories described above. After cross-referencing the class administrator's records with those provided by Metcalfe, it appears that three opt-out requests were submitted significantly beyond the deadline without any explanation. These three requests were from James Sweeny (postmarked March 26), Charles Calia (postmarked April 18), and Brian Lametto (postmarked June 14). The Court concludes that Sweeny's March 26 opt-out—precisely three weeks after the deadline—represents the outer limit of excusable neglect. That is, it will be honored, but none beyond it will be. For that reason, Calia's and Lametto's opt-outs—submitted forty-seven and 101 days after the deadline respectively—are deemed untimely and will not be authorized.

5. Summary

The Court concludes that the proposed settlement is "fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). The Court overrules the three objections made by members of the plaintiff class and further concludes that no additional notice is necessary for approval of the amended settlement. Finally, the Court finds that certain late and otherwise imperfect claims and opt-outs are authorized to proceed as described above.

B. Ankcorn's actions and their consequences

In the background of this discussion looms Mark Ankcorn's ill-advised conduct in the months preceding the first proposed settlement. Ankcorn agreed to prosecute this case jointly with counsel from four other firms on behalf of the plaintiff class. Ankcorn's firm served as lead class counsel for most of the history of the case. But in November 2017 Ocwen filed a motion alleging that Ankcorn had potentially committed an ethical violation by encouraging high-value members of the class he represented to opt out and pursue their claims individually and had violated the Court's protective order regarding information produced by Ocwen. *See* dkt. no. 268.

The Seventh Circuit has long recognized that class actions offer fertile soil for conflicts of interest. *See, e.g.*, *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008) (describing the paradigmatic conflict). For that reason, the court has repeatedly described a district judge reviewing a proposed settlement as a "fiduciary of the class," responsible for ferreting out inappropriate conduct by class counsel. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014). Furthermore, the Court has "an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008); *see also In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 228-35 (D.D.C. 2005); Manual for Complex Litigation § 14.211 (4th ed. 2004).

In light of the allegations against Ankcorn and the Court's own duty to the class, the Court finds it necessary to review the alleged misconduct and, as discussed below, exercise its "broad authority" to address that conduct in the distribution of attorneys' fees. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

1. Ankcorn's conduct

***12** The Court first caught wind of the allegations against Ankcorn in November 2017 when Ocwen filed a motion for leave to depose Ankcorn and for other relief. In its motion, Ocwen contended that Ankcorn had sent letters to members of the plaintiff class who had particularly valuable claims reminding them that they had the right to opt out of the class to pursue individual litigation. That is, knowing that

individuals would likely be compensated at a flat rate if they remained members of the class irrespective how many illegal calls they had received, Ankcorn allegedly persuaded class members who had received large numbers of calls to opt out and to instead pursue their valuable claims individually—presumably to obtain higher recovery. Ocwen also alleged that Ankcorn used the call data produced by Ocwen under protective order during discovery to file a new lawsuit in Florida—the *Graham* suit—on behalf of a number of former members of the *Snyder* plaintiff class. In its motion, Ocwen sought leave to depose Ankcorn and requested a hearing on his conduct.

To understand why Ankcorn's letter-writing campaign and individual representation of class members was potentially fraught, one need only look to paragraph 11.4 of the original settlement agreement. "If 4,000 or more potential members of the Settlement Class properly and timely opt out of the Settlement," that paragraph states, "then the Settlement may be deemed null and void upon notice by Ocwen without penalty or sanction." *See* Final Settlement Agr., dkt. no. 252-1, ¶ 4.2. This sort provision, known as a "blow up" or "tip over" clause, is common in class action settlements and provides a device by which the defendant can terminate the settlement if a certain number (or cumulative value) of claims opt out. *See generally Terms of Art in Class Action Settlements—"Blow Up" Provision*, Newberg on Class Actions § 13:6 (5th ed. 2018). Any effort by class counsel to encourage opt outs could thus endanger the settlement for the class as a whole while (at least potentially) enriching certain individual plaintiffs and their counsel, amounting to a conflict of interest.

In response to Ocwen's motion, Ankcorn denied any wrongdoing. He admitted that he had sent letters to about 2,000 class members, in which he said he asked them to call or e-mail him in order to help build the record for the motion for a preliminary injunction. He contended, however, that he had not directly solicited or encouraged opt-outs. Ankcorn also contended that, although the letters included a reminder of the right to opt out and some recipients indeed asked him about pursuing individual suits, he did not represent such class members himself. Instead, Ankcorn said, he referred those interested in individual litigation to outside counsel—mostly, the Court later learned, to the law firm of Hyde & Swigert. He argued that such actions did not constitute an ethical violation. Likewise, Ankcorn admitted to having filed the *Graham* suits in Florida but attested that the information that he had used to file those suits had been public at the time. He further contended that he had never earned a fee for that representation and had merely filed the suits as a favor to his colleagues at Hyde & Swigert.

After ordering briefing on Ocwen's motion and holding a hearing on January 4, 2018, the Court denied the motion for leave to depose Ankcorn but ordered him to (1) destroy certain confidential data; (2) inform all parties of the extent of his previous disclosures; and (3) show cause why he should not be removed as class counsel. After further briefing, the Court removed Ankcorn as lead counsel and appointed Burke Law Offices, LLC and Terrell Marshall Law Group PLLC as interim lead class counsel. The Court also scheduled an evidentiary hearing on Ankcorn's alleged misconduct for April 5, 2018.

The content and timing of Ankcorn's alleged misconduct came into better focus during his testimony at the April 5 hearing. According to Ankcorn, he sent about 2,400 letters to members of the *Snyder* class. These letters apparently included details about the value of individual claims under the TCPA; lauded Ankcorn's firm's skill at prosecuting TCPA claims; and advised class members that they would "need to file an opt out request" in order to keep their individual claims alive. *See* Hearing Tr., dkt. no. 302, at 28:5-7. The letters also included a clause disclaiming that the letters were not intended to be solicitations for representation.

***13** The letters were sent in two rounds. The first round, Ankcorn testified, involved about 2,000 letters sent between September and November 2016 to members of the *Snyder* class who had received between approximately 500 and 1,200 calls from Ocwen. The second round of letters, sent during the spring of 2017, was directed to a subset of 300-400 of those who received letters in the first round. According in Ankcorn, the final such letter was sent in June 2017. The timing of Ankcorn's correspondence with class members is important. The first round of letters was sent between September and November 2016, after the first unsuccessful mediation with Judge Holderman on May 25, 2016 and roughly contemporaneously with the second mediation with Rodney Max on October 14, 2016. The second round of letters was sent to class members in the months preceding the July 20, 2017 mediation with Judge Denlow, which resulted in the original settlement deal. In other words, the record reveals that Ankcorn's letters were sent to members of the class throughout the period during which negotiations to settle the case were ongoing.

During his April 5 testimony, Ankcorn again characterized the letters as entirely innocent. He claimed that when he sent the letters he did not have any reason to expect a successful resolution of the *Snyder* litigation given the failure of the first two mediation sessions. Furthermore, Ankcorn contended that paragraph 11.4's provision for terminating the settlement if 4,000 or more members of the class opted out was not discussed until the July 2017 mediation with retired Judge Denlow. He again represented that the letters were not intended to solicit individual class members to opt out and pursue profitable litigation. Instead, he contended, the letters were meant to reach credible, knowledgeable class members who could provide evidentiary support for the class's motion for a preliminary injunction. Nevertheless, Ankcorn admitted that virtually all of the class members who responded to his mailings were primarily interested in opting out and pursuing individual claims against Ocwen. But Ankcorn testified that he did not represent any of the class members who reached out to him because he simply did not have the time in the midst of litigating the class action. Rather than offering to personally represent any of the potential opt-outs himself, he said he instead referred them to outside counsel. Specifically, he testified that he referred most of the potential individual claims to the firm of Hyde & Swigert, with which he reported having an "understanding" but from which he says he received no referral fees.

But the April 5 hearing also revealed several pieces of evidence that tend to contradict Ankcorn's characterizations of his conduct. First, Ankcorn's co-counsel pointed out that, by the time the first round of letters was sent in the fall of 2016, there was no investigation remaining to be done on the motion for a preliminary injunction—contrary to his testimony regarding the rationale for the letters. The record supports that position; the motion for a preliminary injunction was filed in October 2016, approximately concurrently with the first round of letters and several months before the second round. Indeed, the motion was fully briefed by February 2017, before the second round of mailings even began. Co-counsel also pointed out that none of the four other firms representing the class were aware that Ankcorn was sending the letters, casting further doubt on his claim that the letters were intended to facilitate fact-finding in the lawsuit.

Second, contrary to Ankcorn's own representations to this Court that he had never represented class members in individual litigation against Ocwen, Ankcorn admitted that he had filed at least one lawsuit in Florida on behalf of a small group of class members with high-value claims. These were the *Graham* cases, discussed above. Ankcorn contends that he acted only as the "filing attorney" as a favor to Hyde & Swigert while that firm sought local counsel. Ankcorn says he did not get paid a fee for his service and only hoped to recover the costs of filing. But the Court notes that Ankcorn nevertheless did appear on behalf of individual class members in that litigation, even if, as he contends, he played only a limited role.

***14** Third, and perhaps most importantly, the Court learned during the April 5 hearing that Ankcorn's firm sent at least one member of the *Snyder* class a retainer agreement for individual representation as an attachment to a second-round letter. Specifically, Ankcorn's co-counsel, Beth Terrell, flagged for the Court that Ankcorn sent class member Earl Simpson a letter dated June 2, 2017, which included a retainer agreement by which Simpson could engage Ankcorn's law firm to represent him in a potential opt-out suit. Unsurprisingly, Simpson—who, the letter stated, had received at least 1,275 calls for which he could receive as much as $ 1,500 per call if he opted out—obliged by signing the retainer agreement. Earl's son, Pat Simpson, also communicated with one of Ankcorn's employees, Benjamin Charles, about opting out of the plaintiff class. According to Ankcorn's co-counsel Beth Terrell, who spoke with Pat Simpson about the exchange, Charles strongly encouraged Pat to persuade his father to opt out of the class action and to pursue individual litigation instead.

Ankcorn testified that this was all a big mistake. He sought to offload culpability for the lapse on his employee, Charles. He said that Charles must have "mistakenly" sent the retainer agreement as an attachment to the second-round letter to Earl Simpson. Ankcorn suggested that Charles must have confused Earl Simpson with another client, and he insisted that he had instructed his employees not to give legal advice about opting out of the class. Ankcorn claimed that as soon as he learned about the Simpson retainer—which apparently did not occur until December 2017, five months after the first settlement was reached and two months after the Court conditionally approved it—he instructed Charles to break off the contractual relationship and refer Earl Simpson to Hyde & Swigert. In the meantime, however, while Ankcorn was apparently still retained to represent him, Earl Simpson was added as a plaintiff in the Florida *Graham* litigation—the very same suit that Ankcorn claimed he had filed as a favor to his colleagues at Hyde & Swigert but which he claimed to have stepped away from almost immediately. The Court does

not find Ankcorn's explanations regarding this episode to be credible.

2. Assessing the damage

At the threshold, the Court finds that Ankcorn had a duty to the putative plaintiff class at all times relevant here. There is no question that class counsel owes a fiduciary duty to a class he or she represents. *See* *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002). Courts in this circuit and elsewhere have also found that where, as here, counsel "file[s] a case as a class action," his fiduciary duty extends to the "putative class even before it is certified." *House v. Akorn*, No. 17 C 5018, 2018 WL 4579781, at *2 (N.D. Ill. Sept. 25, 2018), *appeal docketed*, No. 18-3307 (7th Cir.); *see also* *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (holding that named plaintiffs have fiduciary duties to a putative class before certification); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). Indeed, the Ninth Circuit has noted that the risk of attorneys breaching their fiduciary duty is "even greater" where "a settlement agreement is negotiated prior to formal class certification" and that these potential conflicts must therefore be assiduously policed by reviewing courts. *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d at 946.

In light of his duty, Ankcorn's conduct is troubling. A careful review of the record reveals a shifting narrative and suspicious timing on Ankcorn's part. Time and again, when confronted with allegations of wrongdoing, Ankcorn has attempted to rationalize his actions in completely innocent terms. The Court is not persuaded. For instance, Ankcorn's assertion that the letters he sent to class members were intended only to serve a factfinding function in support of the motion for preliminary injunction is patently implausible. This is even more emphatically the case for the second-round letters, which all appear to have been sent after briefing on the preliminary injunction was complete. Likewise, Ankcorn's legalistic attempts to distance himself from the *Graham* litigation are unconvincing; his categorical claims that he refused to represent any members of the plaintiff class in individual litigation are, by his own admissions, false. And, as indicated, the Court also finds incredible Ankcorn's explanation that his employee, Charles, went rogue by encouraging a class member responding to a second-round letter to opt out.

***15** But, Ankcorn was quick to point out, even if he did encourage opt-outs, he did so only before the parties discussed a blow-up clause. He suggested at the April 5 hearing that he therefore had no way of knowing that making referrals could harm the class. Alternatively, he contended that he did not act improperly because he knew there was little risk of enough class members leaving to jeopardize a settlement agreement. He sent 2,000 letters to *Snyder* class members; even if every single recipient had opted out, that would have only gotten the class halfway to the 4,000-opt-out blow-up provision in paragraph 11.4 of the settlement. And, in fact, he reported that only 10-12% of those who he mailed responded. Virtually all of these respondents opted out, but that amounted to only a little over 200 opt-outs. The net effect, he would argue, was fairly negligible.

The Court concludes that Ankcorn's conduct created an unacceptable risk to the plaintiff class's settlement negotiations, for his own gain and in conflict with the class's interests. *Cf.* *Thorogood*, 547 F.3d at 744 (7th Cir. 2008). Although Ankcorn is correct that the letters he sent to class members preceded specific discussions of the blow-up provision during the July 2017 mediation, the inclusion of such a provision was predictable. Defendants commonly insist on blow-up provisions to insure against costly mass opt-outs. *See Terms of Art in Class Action Settlements—"Blow Up" Provision*, Newberg on Class Actions § 13:6 (5th ed. 2018); Niki Mendoza, *How to Structure Securities Class Action Settlements to Obtain Court Approval and Global Peace*, Am. Bar Ass'n (Aug. 25, 2018) (describing the utility of a blow-up provision). These provisions are no less common in TCPA class actions like this one. *See, e.g.*, *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11 C 4462, 2014 WL 4724387, at *6 (N.D. Ill. Sept. 23, 2014) (assessing a TCPA settlement including a blow-up provision). Given the massive potential exposure Ocwen faced if a large number of class members pursued their claims individually, it was no surprise that it insisted on a clause permitting it to terminate the action if too many class members opted out. Ankcorn has stated that he possesses "extensive experience" in cases like this one, having negotiated multiple class action settlements in the past. *See* Ankcorn Decl. in Supp. of Pls.' Mot. for Att'ys' Fees, Ex. 1 to Pls.' Mot. for Att'ys' Fees, dkt. no. 296-1, ¶¶ 2, 4. It is therefore unlikely that Ankcorn was caught off guard by the inclusion of the blow-up provision.

Likewise, although Ankcorn is correct that his letter-writing campaign alone probably could not have triggered paragraph 11.4 as it was eventually written, his attempts to minimize the

risk he created are unconvincing. How was he to know *ex ante* that a blow-up threshold would not be set at a lower number or that no one else was attempting to drum up a large enough number of opt-outs from the more than 1.6 million member class to imperil the settlement? There was no way to tell. And, in fact, the Court learned during the April 5 hearing that others *were* soliciting opt-outs from class members. When Reuben Metcalfe appeared and explained that his business represented a sizable number of claimants and opt-outs, it became clear that Ankcorn's was not the only game in town. (The key difference, of course, is that Metcalfe did not owe, much less violate, a fiduciary duty to represent the interests of the class.)

Ankcorn's claim that he did not stand to gain anything from the scheme to siphon valuable claimants to Hyde & Swigert is also unconvincing. Although the Court has no reason to doubt the truth of Ankcorn's assertion that he was not paid a fee, it concludes that the understanding Ankcorn said he had with Hyde & Swigert likely included implicit promises of future benefit to his own practice.

***16** Finally, the Court finds that the risk created by Ankcorn's conduct was not harmless. Although there were ultimately fewer than 4,000 requests to opt out of the class, the Court has little trouble determining that his conduct risked significantly impairing the plaintiffs' bargaining position during the fourth and final mediation. The plaintiffs were, of course, ultimately able to come away with an objectively more desirable settlement than they had originally been offered. But the plaintiff class may have been able to leverage an even larger settlement amount if the highly valuable class members from whom Ankcorn had solicited opt-outs—which the parties appear to have learned about between the third and fourth mediations—had remained in the class. Crediting Ankcorn's own testimony, the letters he sent resulted in class members whose claims were cumulatively worth tens or even hundreds of millions of dollars opting out of the class.[4] It is not possible to quantify exactly what effect this loss in individual claim value to be discharged by the settlement had on the agreement eventually reached by the parties. But it is clear that by encouraging high-value class members to opt out of the class to pursue individual lawsuits, Ankcorn harmed the class's interests in violation of his fiduciary duty to it.

4 Ankcorn testified that he sent 2,000 letters to members of the class who had received between approximately 500 and 1,200 calls from Ocwen. He further testified that 10-12% of recipients pursued opt-out requests. Taking the lower end of both ranges and multiplying by the statutory damages range, the opt-out claims were potentially worth $ 150,000,000. If all of the recipients had opted out, which Ankcorn could not have conclusively ruled out at the time he sent the letters, the class would have lost more than $ 1 billion in potential individual claims with which to bargain.

3. Consequences

Based on the record, the April 5 evidentiary hearing and corresponding briefs, and the discussion here, the Court exercises its authority and duty under Rule 23(h) to assess the reasonableness of the fee distribution proposed by the parties. *See Douglas*, 328 F.R.D. at 220-24; *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) ("[T]he district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel."). For the reasons stated below, the Court concludes that the proposed fee distribution must be modified. *See In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209, 228-35 (D.D.C. 2005) (exercising this authority to modify fee distribution)

As noted, the amended settlement seeks $ 4,789,250 in attorneys' fees—$ 500,000 less than the original settlement. The Court already expressed its opinion that this amount appears fair and reasonable. According to their submissions to this Court, the five firms representing the plaintiffs have agreed to the following distribution of the fees: (1) 75% split among the Terrell Marshall Law Group PLLC, Ankcorn Law Firm, PC, and the Cabrera Firm, APC; and (2) the remaining 25% split between Burke Law Offices, LLC and Heaney Law Offices, LLC. It is unclear from the parties' submissions precisely how the distribution to each individual firm will be calculated, but the plaintiffs' statement of lodestar hours may offer some clues. That statement suggests that the value of services provided by each firm are distributed as follows: Terrell Marshall (about 31%); Burke (about 31%); Ankcorn (about 23%); Cabrera (about 10.5%); and Heaney (about 4%). If one applies these same percentages to the reduced settlement amount, Ankcorn may be awarded well over $ 1,000,000 in fees if distribution is left to the parties.

Given Ankcorn's actions, the Court concludes that it is appropriate to reduce his fee. The Seventh Circuit has held that district courts "must set a fee by approximating the terms that would have been agreed to ex ante, had negotiations

occurred." *Americana Art China Co.*, 743 F.3d at 246-47. Any such approximation must account for Ankcorn's conduct. Specifically, by encouraging members of the plaintiff class with valuable claims to abandon the class, Ankcorn put settlement at risk in clear conflict with the interests of the class as a whole. But the Court must also acknowledge the good result that plaintiffs' counsel collectively obtained for the class; the amended settlement includes a $ 21,500,000 fund, the lion's share of which is to be distributed to class members. Balancing these considerations, the Court concludes that the Ankcorn Law Firm is entitled to no more than the value of its services—$ 601,697.50, according to the plaintiffs' lodestar hours statement—and not to any risk multiplier.

***17** Ankcorn has lost any claim to a risk multiplier by creating unnecessary and unacceptable risk. Risk multipliers are intended to compensate attorneys for the risk of nonpayment inherent in contingency fee cases. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 732 (1987) (O'Connor, J., concurring); *In re Synthroid Mktg. Litig.*, 264 F.3d at 718-19. Here, plaintiffs' counsel faced significant risk of nonpayment after the first two unsuccessful mediations. But, rather than working to reduce this risk by facilitating resolution of the class's claims, Ankcorn's conduct actively and materially increased it by siphoning away valuable claims, thereby weakening the plaintiff class's bargaining position in subsequent negotiations. Likewise, Ankcorn's actions drove up the number of opt-outs, increasing the probability of triggering a blow-up provision like the one that was later added—and which, as discussed above, Ankcorn should have anticipated likely would be included in any eventual settlement.

Because Ankcorn's conduct increased the risk of nonpayment for him and for his co-counsel, the Court will limit the Ankcorn Law Firm to the $ 601,697.50 that Ankcorn represented the firm's services to be worth in the April 2018 statement of lodestar hours. This resolution compensates Ankcorn fairly for his contributions to the favorable outcome in the case while simultaneously holding him to account for the unacceptable risk that he created for his clients and colleagues. The value of any additional fee to which Ankcorn may otherwise have been entitled—whether by way of a risk multiplier, by agreement among his group of class counsel, or otherwise—shall return to the fund from which claims are paid and shall be distributed proportionally to claimants. *See NBTY, Inc.*, 772 F.3d at 786 ("The simple and obvious way for the judge to correct an excessive attorney's fee for a class action lawyer is to increase the share of the settlement received by the class, at the expense of class counsel.").

This modification of attorneys' fees is not intended to affect the other attorneys who jointly represented the class. The total fee award is reduced only by the difference between the amount that the Ankcorn Law Firm would have received had the appropriate multiplier been applied to its portion of the award and the firm's lodestar amount of $ 601,697.50. The Court leaves it to class counsel to calculate that figure precisely. Terrell Marshall, Burke, Cabrera, and Heaney remain free to distribute the remaining attorneys' fees according to their own internal agreement or in any other reasonable manner—so long as that distribution does not allocate Ankcorn more than the amount awarded by the Court in this order.

Conclusion

For the foregoing reasons, the motion for final approval of the amended settlement is granted subject to the modifications described here, while the motion for attorneys' fees is granted in part. The Court modifies the settlement such that the distribution of the $ 21,500,000 common fund is as follows: (1) $ 1,600,000 to Epiq for the costs of notice and administration; (2) $ 96,380 to plaintiffs' counsel for costs; (3) $ 4,789,250 to plaintiffs' counsel for fees, less any amount greater than $ 601,697.50 that the Ankcorn Law Firm would have received by way of a risk multiplier, agreement among counsel, or otherwise; (4) $ 30,000 to named plaintiffs Keith Snyder, Susan Mansanarez, and Tracee Beecroft as incentive awards; and (5) the remainder to compensate claimants as set forth herein.

The Court also orders class counsel to submit, by May 21, 2019, a status report detailing (1) the precise amount that the Ankcorn Law Firm would be receiving but for the Court's order (which per this order must be reallocated to the fund from which claimants are compensated) and (2) how class counsel intend to allocate the remaining attorneys' fees award. Counsel are also to submit by that date a draft judgment and order embodying the Court's rulings.

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EXHIBIT M

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United States District Court,
N.D. Indiana,
Hammond Division.

Jamila SWIFT, et al., Plaintiffs,
v.
DIRECT BUY, INC., et al., Defendants.
Janice Harris, et al., Plaintiffs,
v.
DirectBuy, Inc., et al., Defendants.
Brian Vance, et al., Plaintiffs,
v.
DirectBuy, Inc., et al., Defendants.
Phil Ganezer, et al., Plaintiffs,
v.
DirectBuy, Inc., et al., Defendants.

Cause Nos. 2:11–CV–401–TLS, 2:11–CV–415–TLS, 2:11–CV–417–TLS, 2:12–CV–45–TLS.
|
Oct. 24, 2013.

OPINION AND ORDER

PHILIP P. SIMON, District Judge.

***1** This matter is before the Court on the Plaintiffs' Motion for Final Approval of Class Action Settlement Agreement as well as related matters [ECF No. 171]. Forty-two Plaintiffs, individually and on behalf of the class that was stipulated for purposes of settlement, and Defendants DirectBuy, Inc. and related entities, entered the Settlement Agreement to resolve four class action lawsuits that had been transferred here and consolidated. For simplicity sake, I will refer to all of the defendants collectively as simply DirectBuy. One additional lawsuit, *Wilson v. DirectBuy, Inc.,* 2:11–cv–416–TLS–PRC, was not consolidated because the plaintiffs in that case are unwilling to join the Settlement, and are continuing to prosecute their claims separately. [1]

[1] To the extent not otherwise noted, capitalized terms have the definitions assigned in the Settlement Agreement [ECF No. 137–1].

BACKGROUND

DirectBuy is a franchisor of a national network of buying clubs. A consumer may only purchase products from DirectBuy after buying a membership, which can be renewed annually. The club offers products directly from manufacturers and their authorized suppliers, purportedly without a retail markup.

Beginning in 2008, the Plaintiffs initiated several actions alleging that DirectBuy violates various laws through their marketing materials and sales practices. According to the complaints, DirectBuy fails to disclose material information to prospective club members regarding the true prices for its products, including the fact that DirectBuy receives payments from vendors, manufacturers, and suppliers and does not pass these savings along to consumers. The Plaintiffs also complain about the addition of shipping and handling fees to the manufacturers' price. Put simply, the Plaintiffs believe that they did not enjoy savings that were commensurate with their membership fees or DirectBuy's representations.

In December 2010, the Plaintiffs in the *Wilson* case reached a settlement with the Defendants, which they submitted for approval to the United States District Court in the District of Connecticut. The court rejected that settlement. *Wilson v. DirectBuy, Inc.,* No. 3:09–CV–590 (JCH), 2011 WL 2050537 (D.Conn. May 16, 2011). At the Defendants' request, the District of Connecticut then transferred the case to this Court. *See Wilson v. DirectBuy, Inc.,* 821 F.Supp.2d 510 (D.Conn.2011). Four other related cases were also transferred and consolidated.

The parties held in-person mediation sessions on June 11–12, 2012, and August 22, 2012, before a neutral mediator, the Honorable Richard Neville (Ret.) of JAMS, and conducted numerous telephone conferences with Judge Neville and directly with each other in negotiating the resolution of this dispute. On February 8, 2013, the Plaintiffs in four of the cases and DirectBuy presented the Court with a Settlement Agreement, and asked the Court to preliminarily approve the Settlement, certify a proposed Class for settlement purposes, approve the form and manner of giving notice of the Settlement to the proposed Class, and set a hearing date for the final approval of the Settlement and the award to Class Counsel of attorneys' fees, costs, and expenses, and of incentive awards to the Plaintiffs.

***2** On March 22, 2013, Judge Springmann preliminarily certified the Class and approved the Settlement Agreement, and the case was subsequently transferred to me. The Settlement required DirectBuy to pay $1.9 million into a settlement fund. After a reduction of no more than $900,000 for attorneys' fees, the settlement funds would be distributed to the Class Members—made up of Current DirectBuy Members and Former DirectBuy Members who submitted timely and valid claim forms. The Current DirectBuy Members would have the option of choosing a $10 discount off any online order of at least $20 from DirectBuy's website instead of receiving the cash distribution. Additionally, DirectBuy agreed not to collect any charges and unpaid late fees that Defaulted DirectBuy Members had incurred as a result of failing to make payments to Defendant Beta Finance Company. The Defendants agreed to pay the notice and administration expenses associated with the Settlement. Pursuant to Federal Rule of Civil Procedure 23(g), the Court preliminarily appointed the law firms of Cohen & Malad, LLP, and Brager, Eagel & Squire, P.C., as counsel for the Class. The Court approved Epiq Class Action & Claims Solutions, Inc. as the Settlement Administrator.

On April 10, 2013, DirectBuy transferred $1.9 million to an escrow account established by Epiq. Additionally, Epiq provided all the notices that were required under the Preliminary Approval Order to the Class Members, the United States Attorney General, and state officials.

Seventeen class members filed submissions with the Court that could be considered objections. Many of the objectors complain that the settlement amount is too low or that the attorneys' fees are too high. A common alternative suggested by these objectors is that they receive a full refund of their several thousand dollar membership fee. Others complain that they were not allowed to cancel their membership contracts, were pressured into buying the membership, or did not receive benefits that justified the cost of the membership. Nearly 49,000 class members filed claims to participate in the settlement. Another 83,380 will receive benefits without having to file a claim because they are defaulted DirectBuy Members whose late payment penalties are being waived. Epiq received 425 requests for exclusion from the Settlement.

On September 10, 2013, I conducted a fairness hearing. None of the objectors appeared at the hearing. At the hearing, I requested the parties to supplement their submissions with additional information regarding DirectBuy's financial condition, and they have complied with that request.

DISCUSSION

A. Class Certification and Notice

As noted above, Judge Springmann preliminarily certified a Class for purposes of the Settlement consisting of all Current DirectBuy Members, all Former DirectBuy Members, and all Defaulted DirectBuy Members who did not elect to opt out. I find that the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) are satisfied, and certify a Class for purposes of approving the Settlement Agreement.

***3** Rule 23 requires that the Class Members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B). Reasonable notice is required to all class members who would be bound by a proposed settlement. Fed.R.Civ.P. 23(e)(1). The Federal Judicial Center's checklist on class notice instructs that class notice should strive to reach between 70% and 95% of the class. *See* Federal Judicial Center, *Judges Class Action Notice and Claims Process Checklist & Plain Language Guide* 3 (2010) ("It is reasonable to reach between 70–95%. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%.").

According to DirectBuy's records, the class contains 847,860 class members—308,844 Current DirectBuy Members; 455,636 Former DirectBuy Members; and 83,380 Defaulted DirectBuy Members. The Class Period extends from October 11, 2002, through the preliminary approval date. Epiq's implementation of the notice plan, which is detailed in the Declaration of the Settlement Administrator [ECF No. 169–1] and the Updated Declaration of the Settlement Administrator [ECF No. 185–1], has resulted in actual individualized notice to around 99% of the Class. Given these near perfect delivery percentages, it is plain that due process and the notice requirements of Rule 23 have been satisfied.

B. Adequacy of the Settlement Agreement

A district court must scrutinize and evaluate a class action settlement to determine whether it is "fair, reasonable, and adequate." *Williams v. Rohm & Haas Pension Plan,* 658 F.3d 629, 634 (7th Cir.2011) (quoting Fed.R.Civ.P. 23(e)(2)). In making these determinations, the court considers five factors: (1) the strength of plaintiffs' case compared to the defendants'

offered settlement amount; (2) the likely complexity, length, and expense of the litigation; (3) the amount of opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed at the time of settlement. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.,* 463 F.3d 646, 653 (7th Cir.2006).

In most cases, a court cannot make an informed judgment about the fairness, reasonableness, and adequacy of a class without assessing the likelihood and value to the class of the case's possible outcomes, referred to as the net expected value of the litigation. *See Williams,* 658 F.3d at 634 (citing *Synfuel,* 463 F.3d at 653). A court must normally "weigh the value of the proposed settlement against the total amount that the class could recover, discounted by the weaknesses and risks inherent in the class' claims ." *Schulte v. Fifth Third Bank,* 805 F.Supp.2d 560, 578 (N.D.Ill.2011). Although DirectBuy highlights the uncertainty surrounding the viability of obtaining class certification outside of a settlement, as well as other weaknesses in the merits of the Plaintiffs' claims, the parties do not present evidence that would allow the Court to quantify the value to the class of continued litigation. This omission of the total amount the Class could recover was intentional. As the parties see it, any discussion about the strength of the Plaintiffs' claims and, ultimately, about whether the settlement terms are fair, reasonable, or adequate, must be viewed in light of one crucial overriding factor: DirectBuy's severely leveraged financial position. They contend that DirectBuy's compromised financial condition dictates the total amount the class could hope to recover, regardless of other existing strengths or weaknesses. I agree. Having considered the record in its entirety, further litigation may well be pointless given DirectBuy's dire financial situation.

***4** But in looking closely at the factors that I need to consider, it's worth mentioning at the outset that this case does not present "suspicious circumstances." *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 284 (7th Cir.2002). In *Reynolds,* the history of the parties' settlement negotiations suggested that the parties may have colluded and performed a "reverse auction"—where the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant. *Id.* at 282. The *Reynolds* court was particularly concerned because the settlement would have extinguished a similar pending lawsuit that appeared promising without providing the class with consideration for releasing the claims involved in that suit. *Id.* at 283–84. In such a case, the district court must perform a more searching inquiry into the fairness of the settlement. *Id.* at 284.

There is nothing suspicious at play here. In response to the settlement that was presented to the Connecticut court for approval in the *Wilson* litigation, Class Counsel filed a series of objections opposing the settlement on grounds that it was inadequate. After the court rejected the *Wilson* settlement, Class Counsel ensured that settlement discussions going forward involved as many representative Plaintiffs and counsel who were willing to participate. This is not a situation where DirectBuy chose to settle with particular parties and attorneys in the hope of extinguishing cases filed by superior lawyers. Moreover, the Settlement Agreement does not extinguish any other suits without providing the class with consideration. For example, the *Wilson* plaintiffs have now opted out of the Settlement Agreement and will be pursuing their individual claims against DirectBuy.

Negotiations were hard fought, not collusive, in this case. Class Counsel assured the Court at the fairness hearing that settlement was the result of extensive negotiations with adversaries who had established they could vigorously defend the action, and who were adamantly opposed to any cash settlement. An agreement was reached only after extensive arm's length negotiations during three days of in-person formal mediation with Judge Neville and additional negotiations thereafter. Judge Neville participated in and exchanged hundreds of emails and phone calls with the parties to negotiate a settlement over a two-month period. Attorney Eagle's expertise in finance allowed him to confirm the Defendants' critical financial position, and the near certainty that the Plaintiffs would see no cash even if they were awarded damages after successfully litigating the merits. In particular, during the time of the negotiations, DirectBuy was in default on $335 million in senior secured debt. In November 2012, DirectBuy completed restructuring of that indebtedness, whereby the senior bondholder received 100% of the equity of the company, and $100 million in other secured notes. Even after restructuring, DirectBuy has substantial secured indebtedness that exceeds the value of its tangible assets.

***5** Although $20 (the expected pro rata award of the net settlement fund for each class member who filed a claim notice) is not significant in a vacuum, "a dollar today is worth a great deal more than a dollar ten years from now," *Reynolds,*

288 F.3d at 284, and a major benefit of the settlement is that class members will obtain these benefits much more quickly than had the parties not settled. The parties have informed the Court that this case, were it to proceed, would face numerous challenges such that, even if the case reached trial, the class members would not receive benefits for many years, if they received any at all. Faced with the prospect of receiving no recovery—both because DirectBuy might have succeeded in any aspect of what would have been a vigorous defense absent settlement and because DirectBuy had no unencumbered assets—Class Counsel is confident that payment of up to $20.00 per household is an excellent result in this litigation. The parties assert that because the only amount the Plaintiffs could hope to recover after an award of damages is zero, a settlement involving any cash should be considered adequate.

Under these difficult circumstances, I find that it is appropriate to place significant weight on the opinion of counsel in concluding that the Settlement is reasonable in light of the value of further litigation. In addition to the benefits that can be measured in dollars ($1.9 million in a settlement fund to be distributed pro rata, $360,000 in administrative costs associated with providing notice, forgiveness of over $3 million worth of late payment penalty fees), the Defendants have also agreed to include a three-day right of cancellation in all future membership agreements, which will positively impact consumers across multiple states. Several factors show that this is a significant and valuable benefit. First, it is meaningful when considered against the backdrop of DirectBuy's financial position, which limited the ways in which counsel could successfully add value to the Class Members and promote the interests of the public. Second, comments by several of the objectors suggest that it is a term they would have valued, and is thus a benefit that future members will value. The fact that various states have legislation requiring a right of cancellation in consumer contracts and purchases also demonstrates its import on a larger scale. The interests of the public as a whole in a consumers' rights action is a consideration of the broader implication of a class action settlement, *see Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee,* 616 F.2d 305, 313 (7th Cir.1980) *overruled on other grounds by Felzen v. Andreas,* 134 F.3d 873 (7th Cir.1998), and this particular benefit could not have been obtained absent a settlement because the Plaintiffs have not alleged that DirectBuy's current cancellation practices are illegal. Finally, although the benefit to the Class Members is not direct, the provision will generate good will for DirectBuy and enhance their public image. This, in turn, is beneficial to all members of the more than 100 DirectBuy clubs in the United States and Canada who can only continue to receive the benefits of their memberships if the franchises stay in operation.

***6** The terms of the Settlement include real out-of-pocket payments, not just compensation in kind. *Cf. In re Mexico Money Transfer Litig.,* 267 F.3d 743, 748 (7th Cir.2001) (viewing with suspicion the adequacy of a settlement where everyone other than the plaintiffs had been paid in cash). In addition, DirectBuy has offered a significant benefit that impacts the interests of the public as a whole, and has agreed to forego the collection of up to $3 million of late fees and charges despite their precarious financial position. I find that balancing these benefits against the value of further litigation weighs in favor of accepting the Settlement.

A brief analysis of the remaining factors shows that they also support approval of the Settlement as fair, reasonable, and adequate. First, the complexity, length, and expense of continued litigation, *Synfuel,* 463 F.3d at 653, strongly favors settlement. By approving the Settlement Agreement, the present lawsuit will come to an end and class members will realize benefits. By contrast, denying approval will lead to protracted litigation, with no end in sight. Discovery would be needed touching on both the merits of the claims and the propriety of class certification. The nature of the claims would require massive discovery. As the Defendants note, the class period spans over ten years, and the allegations regarding pricing implicate millions of products over that time span, including products offered by third party retailers. In sum, "it would be a monumental undertaking for Plaintiffs to attempt to create any reliable comparison between DirectBuy pricing and that of countless retailers on millions of products going over the past ten-year period." (Br. in Resp. 23, ECF No. 183.) Even after obtaining the data, experts would be needed to review and analyze it. Similar scenarios exist for the Plaintiffs' other claims. Obtaining any result in this litigation —good or bad—would be years away if the litigation were to continue, which weighs in favor of approving the Settlement Agreement.

Second, the limited opposition to the Settlement Agreement among affected parties, *Synfuel,* 463 F.3d at 653, also favors settlement. The participation rate is 100 times higher than the opt out and objection rate. None of the objectors attended the fairness hearing. Additionally, and perhaps more significantly, this case involves no opposition from regulatory agencies or consumer advocacy groups. DirectBuy provided

proper notice of the Settlement Agreement to the appropriate state and federal officials pursuant to the Class Action Fairness Act of 2005 (CAFA), and the only comments they received were to request that the final judgment be amended to facilitate the ability of defaulted class members to defend collection actions that might be brought against them in the future. DirectBuy agreed to this request. In comparison, the rejected settlement in the *Wilson* litigation prompted the attorney generals from the majority of states across the country to join together in opposition to "forcefully argue that the settlement [was] both overstated and undervalued." *Wilson,* 2011 WL 2050537, at *9. "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Garner v. State Farm Mut. Auto. Ins. Co.,* No. CV–08–1365–CW (EMC), 2010 WL 1687832, at *14 (N.D.Cal. Apr. 22, 2010).

***7** Third, as the Court has already noted, the "opinion of competent counsel" supports a determination that the settlement is fair, reasonable, and adequate under Rule 23. *Synfuel,* 463 F.3d at 653. Class Counsel has extensive experience in consumer class actions and complex litigation, and there is no indication that the Settlement Agreement is the result of collusion. Class Counsel reasonably concluded that one of the most significant factors in negotiating a fair and adequate settlement for the Class was the financial condition of DirectBuy. *See, e.g., Torrisi v. Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir.1993) (stating that the Defendant's leveraged financial condition was the "one factor" that "predominate[d] to make clear that the district court acted within its discretion" in the balancing of factors to determine if a settlement was fair, adequate, and reasonable); *In re Montgomery Cnty. Real Estate Antitrust Litig.,* 83 F.R.D. 305, 316 (D.Md.1979) (including the solvency of the defendant and the likelihood of recovery on a litigated judgment as one of the factors to weigh against the amount tendered to the plaintiffs to determine if the proposed settlement was adequate).

The financial condition of the defendant in class action settlement is a legitimate—if not entirely pragmatic—consideration, as the Eighth Circuit has held. *See In re Wireless Tele. Fed. Cost Recovery Fees Litig.,* 396 F.3d 922, 932 (8th Cir.2005) (the financial condition of the defendant is one of the factors that a court must consider in determining whether a settlement is fair, reasonable, and adequate). Other courts have referred to this as the defendant's ability "to withstand a greater judgment." *See City of Detroit v. Grinnel Corp.,* 495 F.2d 448, 463 (2d Cir.1974), *overruled on other grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir.2000). Put simply, faced with the prospect of a bankrupt judgment debtor down the road, I cannot say that Class Counsel did not follow a reasonable course in this litigation and ultimately achieve a fair and adequate settlement.

The final consideration, "the stage of the proceedings and the amount of discovery completed at the time of settlement" *Synfuel,* 463 F.3d at 653, is a relevant factor because it determines "how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims," *Armstrong,* 616 F.2d at 325. The parties concede that pre-settlement discovery was limited to the Defendants' audited financial statements and other matters directly related to DirectBuy's financial position. However, they urge that it was this discovery that permitted them to make an accurate assessment of the likelihood of realizing any recovery, even if the Plaintiffs were to prevail on the merits of their claims. I find that discovery was sufficient for effective representation, and that formal discovery would have only taken more time and resulted in the expenditure of additional funds on both sides without achieving a more attractive settlement or any other appreciable benefit. The recognition by the Eight Circuit that "[t]he parties to a class action are not required to incur immense expense before settling as a means to justify that settlement," *DeBoer v. Mellon Mortg. Co.,* 64 F.3d 1171, 1178 (8th Cir.1995), rings particularly true under these circumstances. Counsel's decision to forgo additional discovery upon learning of DirectBuy's worsened financial condition, in the hopes of minimizing costs and achieving a quick recovery, was fair and reasonable.

***8** None of the objectors who complain about the recovery being too low address the factors that this Court must consider when determining the adequacy of a settlement. It must be remembered that the "essence of a settlement is compromise." *Armstrong,* 616 F.2d at 315. A settlement will not be rejected solely because it does not provide a complete victory to the plaintiffs. *EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir.1985). Additionally, many of the issues the objectors raised go to the merits of the claims and are essentially the same issues raised in the pleadings. Unsurprisingly, in light of their pro se status, the objectors do

not focus—as this Court must—on the principles governing approval of class action settlements.

For the reasons set forth above, the Court finds that the Settlement is fair, reasonable, and adequate. The Court approves the pro rata distribution of the Net Settlement Cash Fund by check, mailed directly to each Class Member who is entitled to payment, with costs of distribution to be paid by DirectBuy.

C. Attorneys' Fees and Incentive Awards

The Plaintiffs submit that an award of $900,000 is fair and reasonable in light of the benefits provided to Class Members under the Settlement; the litigation efforts of Class Counsel to date; compensation levels in the relevant market for such legal services; and the substantial risk of nonpayment at the time Class Counsel undertook the representation of Plaintiffs in this litigation.

In deciding an appropriate fee in common fund cases, the Seventh Circuit has "consistently directed district courts to 'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.' " *Sutton v. Bernard,* 504 F.3d 688, 692 (7th Cir.2007) (quoting *In re Synthroid Mktg. Litig.,* 264 F.3d 712, 718 (7th Cir.2001)); *see also Montgomery v. Aetna Plywood, Inc.,* 231 F.3d 399, 408 (7th Cir.2000) (finding that in common fund cases, "the measure of what is reasonable [as an attorney fee] is what an attorney would receive from a paying client in a similar case").

Relying on *Cullen v. Whitman Med. Corp.,* 197 F.R.D. 136, 147 (E.D.Pa.2000) (finding it reasonable to award fees based on the total value of the settlement, which included the forgiveness of debt for students who were delinquent in paying back their loans) and *In re Lloyd's Am. Trust Fund Litig.,* No. 96 Civ.1262 RWS, 2002 WL 31663577, at * 16 (S.D.N.Y.2002) (awarding fees of 28% of the total settlement consideration, which included credit notes class members could use to reduce debt owed to defendants), Class Counsel submits that the Total Settlement Value in this case should include the $3 million in charged and unpaid late fees that were incurred by defaulted members and which the Defendants agree not to collect. An award of attorneys' fees in the amount of $900,000 represents less than 20% of the Total Settlement Value. Class Counsel also notes that payment of 33% of the common fund is widely accepted by the Seventh Circuit as a reasonable fee in a class action. *See Gaskill v. Gordon,* 160 F.3d 361, 362–63 (7th Cir.1998) (noting that typical contingency fees are between 33% and 40% and that "[s]ome courts have suggested 25 percent as a benchmark figure for a contingent-fee award in a class action"); *In re Mexico Money Transfer Litig.,* 164 F.Supp.2d 1002, 1033 (N.D.Ill.2000) (recognizing "the established 30% benchmark for an award of fees in class actions."); *Spicer v. Chi. Bd. Options Exch., Inc.,* 844 F.Supp. 1226, 1251–52 (N.D.Ill.1993) (awarding 29% of a common fund); *Meyenburg v. Exxon Mobil Corp.,* No. 3:05–cv–15–DGW, 2006 WL 2191422, at *2 (S.D.Ill. July 31, 2006) ("33 1/3% to 40% (plus the cost of litigation) is the standard contingent fee percentages in this legal marketplace for comparable commercial litigation"); *Teamsters Local Union No. 604 v. Inter–Rail Transp., Inc.,* No. 02–CV–1109–DRH, 2004 WL 768658, at *1 (S.D.Ill. Mar. 19, 2004) ("In this Circuit, a fee award of thirty-three and one-third percent (33 1/3%) in a class action i[s] not uncommon").

***9** Class Counsel assumed a substantial risk of non-payment given the complexity of the action and DirectBuy's position that it stood ready at all times to vigorously defend the lawsuit. In light of the significant likelihood that Class Counsel could have ultimately recovered nothing, Class Counsel had every incentive to litigate this matter in the most efficient manner possible. Class Counsel has also submitted an affidavit stating that the recovery is below the fees and expenses they actually incurred, and they have sufficiently outlined the efforts undertaken in this multi-jurisdictional litigation. The Court therefore approves the request for $900,000 for Class Counsel's fees.

Finally, Class Counsel requests that the Court award each class representative an incentive award of $500 from the common fund. Because there are 34 class representatives, the total cost of the requested award is $17,000. "Incentive awards are justified when necessary to induce individuals to become named representatives." *Synthroid,* 264 F.3d at 722; *see also Cook v. Niedart,* 142 F .3d 1004, 1016 (7th Cir.1998).

Incentive payments of $500 for each class representative are appropriate. First, class representatives knew that this litigation would be long and complex and that they might be subject to depositions and cross examination at trial. Even if they were successful after such protracted litigation, the award was not likely to include significant monetary benefit. In addition, $500 is below the average incentive payment awarded to class representatives in other consumer class actions, *see* Theodore Eisenberg & Geoffrey P. Miller,

Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L.Rev. 1303, 1333 (2006), which suggests that $1,000 is the market rate for incentive reimbursements. Finally, the $17,000 total award is only a small percentage of the Class's overall recovery. The incentive payments are therefore approved.

CONCLUSION

For the reasons set forth above, the Plaintiffs' Motion for Final Approval of Class Action Settlement, Approval of Distribution of Net Cash Settlement Fund, Award of Attorneys' Fees, and Award of Class Representatives' Incentive Fee [ECF No. 171] is **GRANTED.** A Final Judgment will be issued consistent with this Opinion and Order and with the Settlement Agreement.

SO ORDERED.

All Citations

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EXHIBIT N

2022 WL 888943
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United States District Court, N.D. Illinois, Eastern Division.

T.K., THROUGH her Mother Sherri LESHORE, and A.S., Through Her Mother, Laura Lopez, individually and on behalf of all others similarly situated, Plaintiffs,
v.
BYTEDANCE TECHNOLOGY CO., LTD., Musical.ly Inc. Musical.ly the Cayman Islands Corporation, Defendants.

Case No. 19-CV-7915
|
Signed 03/25/2022

Attorneys and Law Firms

David K. Lietz, Gary E. Mason, Mason Lietz & Klinger LLP, Washington, DC, Gary M. Klinger, Milberg Coleman Bryson Phillips Grossman, PLLC, Chicago, IL, for Plaintiffs.

Anthony J. Weibell, Wilson Sonsini Goodrich & Rosati, PC, Palo Alto, CA, Steven P. Mandell, Mandell Menkes LLC, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

John Robert Blakey, United States District Judge

***1** Plaintiffs T.K., through her mother Sherri Leshore, and A.S., through her mother Laura Lopez, move for final approval of a proposed class action settlement (the "Proposed Settlement Agreement"), [81], and attorneys' fees, costs, and service awards, [69]. Separately, Mark S., a member of the Proposed Settlement Class, objects to the settlement proposal. [24]; [74]. Mark S. also moves for attorneys' fees and a service award. [71]. For the reasons explained below, this Court grants Plaintiffs' motion for final approval, [81], and, subject to the modifications described herein, grants Plaintiffs' motion for attorneys' fees, costs, and service awards, [69]. This Court denies Mark S.' motion for attorneys' fees and service award, [71], and denies Plaintiffs' motion for sanctions, [75].

I. Background [1]

[1] This Court assumes familiarity with the factual background explained in its Memorandum Opinion and Order denying Plaintiff's first motion for class certification. [62]. This Court incorporates by reference the facts and findings explained therein.

On May 12, 2020, Plaintiffs filed their initial motion [28] for final approval of the Proposed Settlement, a settlement this Court had preliminarily approved in December 2019, [13]. In March 2020, after finding that the Proposed Settlement Class had not received adequate notice of the settlement within the meaning of Federal Rule of Civil Procedure 23, this Court denied Plaintiffs' motion for final approval, along with Plaintiffs' related motion for attorneys' fees, costs, and service awards, [29], without prejudice. [62]. This Court required that Plaintiffs provide additional notice to the class before filing any renewed motion for final approval or renewed motion for fees, costs, and service awards. *Id.* In the same opinion and order, this Court denied Mark S.' motion to intervene. *Id.*

The following month, the parties reached an agreement regarding potentially overlapping claims in this action and in *In re TikTok, Inc., Consumer Privacy Litigation*, No. 20-CV-4699, MDL No. 2948 (N.D. Ill.) (the "TikTok MDL"), whereby Defendants confirmed that they would not seek to enforce their rights under the Proposed Settlement Agreement's release clause against members of the Proposed Settlement Class in the event class members also sought recovery in the TikTok MDL. [68]. Given that agreement, this Court denied Mark S.' motion to enforce this Court's preliminary injunction and for reassignment of the related TikTok MDL [51].

In accordance with this Court's March 2020 order, Plaintiffs launched their Supplemental Notice Program ("SNP") on May 5, 2021. [81-2] at 2. During the SNP, Angeion Group LLC, the settlement administrator, received an additional 89,316 claim forms, bringing the total number of claim forms received to 193,928. *Id.* at 4. The launch of the SNP also triggered additional windows for members of the Proposed Settlement Class to submit objections to the Proposed Settlement or opt-out of the class entirely. *Id.* at 4–5. During the SNP no additional class members submitted objections or requested exclusion. *Id.* [2] The costs of the SNP amounted to $30,035. [81-1] ¶ 10.

[2] Mark S. supplemented his objections to the Proposed Settlement during the SNP. [74].

***2** Plaintiffs now move for final approval of the Proposed Settlement. [81]. Plaintiffs and Mark S. both move for attorneys' fees and service awards, with Plaintiffs also seeking costs. [69]; [71]. In connection with Mark S.' motion for attorneys' fees and service award, Plaintiffs' have filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11. [75].

II. Plaintiffs' Motion for Final Approval

A. Legal Standard

The class action suit constitutes "an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated," *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744 (7th Cir. 2008), one ideal for "situations ... in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate," *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1030 (7th Cir. 2018) (quoting *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006)). But with these economies come a significant risk. Defendants, who have the goal of "minimizing the sum of the damages they pay the class and the fees they pay the class counsel," may find themselves "willing to trade small damages for high attorneys' fees," creating a "community of interest between class counsel, who control the plaintiff's side of the case, and the defendants." *Thorogood*, 547 F.3d at 744–45. And the class members may have stakes in the class action "too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests." *Id.* at 744.

To help mitigate this risk, Rule 23 lays out requirements for settlement. Before approving a proposed settlement, a court must first find that the settlement is "fair, reasonable, and adequate." *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 555–56 (7th Cir. 2017) (quoting Fed. R. Civ. P. 23(e)(2)). This Court's assessment of the Proposed Settlement under Rule 23 follows.

B. Analysis

1. Certification of the Settlement Class

Federal Rule of Civil Procedure 23 states that the "claims, issues, or defenses *of a certified class* may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed R. Civ. P. 23(e) (emphasis added). Accordingly, before approving the Proposed Settlement, this Court must certify the Proposed Settlement Class. This means that the Proposed Settlement Class has to satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy. The class at issue here must also meet Rule 23(b)(3)'s requirements that "questions of law or fact common to class members predominate over any questions affecting individual members" and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Finally, the Seventh Circuit imposes an additional requirement: "the class must be 'identifiable as a class,' " meaning that the class definition "must be 'definite enough that the class can be ascertained.' " *Greene v. Mizuho Bank, Ltd.*, 327 F.R.D. 190, 194 (N.D. Ill. 2018) (alteration in original) (quoting *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006)).

a. Definiteness and Ascertainability

To satisfy the requirement of definiteness and ascertainability, a class must "be defined clearly and based on objective criteria." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015). Under the "weak" version of ascertainability employed by the Seventh Circuit, courts worry most about "the adequacy of the class definition itself," not "whether, given an adequate class definition, it would be difficult to identify particular members of the class." *Id.* A class definition that "identifies a particular group of individuals ... harmed in a particular way ... during a specific period in particular areas" indicates a definite and ascertainable class. *Id.* at 660–61.

***3** Here, the Proposed Settlement defines the class as "all persons residing in the United States who registered for or used the Musical/.ly and/or TikTok software application prior to the Effective Date when under the age of 13 and their parents and/or legal guardians."[3] [5-2] at 22. This definition "is as objective as they come." *Boundas v. Abercrombie & Fitch Stores, Inc.*, 280 F.R.D. 408, 417–18 (N.D. Ill. 2012) (finding that class consisting of "individuals holding an Abercrombie promotional gift card whose value was voided on or around January 30, 2010" met Rule 23's ascertainability requirement).

[3] The "Effective Date" represents the first date after either: (1) the time to appeal an order by this Court approving the settlement has expired, with no appeal having been filed; or (2) an appellate court affirms an order by this Court approving the settlement and, in doing so, forecloses the possibility of further review. [5-1] at 22.

Although Plaintiffs note the impossibility of identifying all members of the Proposed Settlement Class, *e.g.*, [81] at 28, this fact does not destroy definiteness and ascertainability. Rule 23 does not require the identification of "absent class members' actual identities." *Boundas*, 280 F.R.D. at 417. Instead, it suffices "that the class be ascertain*able*." *Id.* (emphasis in original). A class that requires its members to identify themselves through affidavits or claim forms, like the one used here, *see* [28-2] at 4, 28, meets that standard, *see Boundas*, 280 F.R.D. at 417–18 (finding class ascertainable where the only way to identify certain class members was through the submission of affidavits in which they claimed membership). This Court finds that the class definition meets the requirements of definiteness and ascertainability.

b. Rule 23(a) Requirements

i. Numerosity

Rule 23(a)(1) permits class certification only if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The rule contains no magic number that will satisfy this requirement, but the Seventh Circuit has held that a class of forty members constitutes "a sufficiently large group" to satisfy numerosity "where the individual members of the class are widely scattered and their holdings are generally too small to warrant undertaking individual actions." *Barnes v. Air Line Pilots Ass'n, Int'l*, 310 F.R.D. 551, 557 (N.D. Ill. 2015) (quoting *Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 n.9 (7th Cir. 1969)). While Plaintiffs may not "rely on 'mere speculation' or 'conclusory allegations' " to show numerosity, *Arreola v. Godinez*, 546 F.3d 788, 797 (7th Cir. 2008) (quoting *Roe v. Town of Highland*, 909 F.2d 1097, 1100 n.4 (7th Cir. 1990)), they need not "plead or prove the exact number of class members," *Barnes*, 310 F.R.D. at 557. Courts may also rely on "common sense assumptions" when determining numerosity. *Phipps v. Sheriff of Cook Cty.*, 249 F.R.D. 298, 300 (N.D. Ill. 2008).

Here, Plaintiffs estimate that the Proposed Settlement class contains approximately six million members. [81] at 3. Plaintiffs base this estimate upon the "limited information ... provided to Class Counsel" by Defendants. *Id.*; *see also* [5-1] at 5.[4] This reasonable estimate satisfies numerosity. As other courts have noted, TikTok has over 100 million users in the United States alone. *See, e.g.*, *Marland v. Trump*, No. CV 20-4597, 2020 WL 5749928, at *2 (E.D. Pa. Sept. 26, 2020). Plaintiffs note the impossibility of determining the exact class size, [28] at 9, but even a sliver of this user base would constitute a class large enough to satisfy the numerosity requirement.[5]

[4] Mark S. offers up his own estimate as to the size of the class, but this Court declines to adopt his figures. Whereas the Plaintiffs' estimate draws from TikTok's own records, [5-1] at 5, Mark S.' estimate extrapolates from data collected by third-parties and makes unsupported assumptions about use of the TikTok app across age groups, [74] at 4–5. For example, Mark S.' model would require this Court to assume that, out of his projected universe of 32.5 million TikTok users aged ten to nineteen, ten-year-olds make up *exactly* one-tenth, eleven-year-olds another tenth, and so on.

[5] Additionally, the settlement administrator notes receipt of 193,928 claims, of which it estimates 168,607 "will be deemed valid and approved for payment." [81-2] at 4. This further suggests that the class here satisfies numerosity.

ii. Commonality

***4** A court may certify a class only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Plaintiffs meet this requirement of commonality by demonstrating that "class members 'have suffered the same injury' " and that their claims "depend upon a common contention ... of such a nature that it is capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Determination of the "truth or falsity" of that common contention "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. Rule 23 requires only one common question to satisfy commonality. *Id.* at 359.

Here, Plaintiffs allege that Defendants "surreptitiously tracked, collected, and disclosed the personally identifiable information and/or viewing data of children under the age of 13," "without parental consent." [1] ¶ 1. All members of the Proposed Settlement Class share statutory claims based upon Defendants' alleged violations of federal and California privacy law. *Id.* ¶¶ 70–77, 86–103. The core issue of whether Defendants collected and shared class members' personally identifiable information without parental consent remains central to these claims. Accordingly, the Proposed Settlement Class meets the Rule 23(a)(2)'s commonality requirement.

iii. Typicality

Rule 23 also requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This typicality requirement ensures "that the named representative's claims have the same essential characteristics of the class at large." *Oshana*, 472 F.3d at 514 (quoting *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 597 (7th Cir. 1993)). A named plaintiff has a "typical" claim if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members" and has "the same legal theory" at its core. *Lacy v. Cook Cty.*, 897 F.3d 847, 866 (7th Cir. 2018) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

Plaintiffs have established typicality. Every member of the Proposed Settlement Class, including the named Plaintiffs, alleges that Defendants "tracked, collected, and disclosed" their "personally identifiable information and/or viewing data" without parental consent while they were "under the age of 13," or that they are the parent or legal guardian of such a person. [1] ¶¶ 1–3, 18–37, 49–51; [5] at 6–8. Because the class members' claims all arise from the same course of conduct, and the class members base their claims upon the same legal theories, this Court finds that the Proposed Settlement Class meets the typicality requirement.

iv. Adequacy

To determine adequacy, courts consider two factors: "(1) the adequacy of the named plaintiffs as representatives of the proposed class's myriad members, with their differing and separate interests, and (2) the adequacy of the proposed class counsel." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011), *as modified* (Sept. 22, 2011). A named plaintiff will not serve as an adequate representative of a proposed class when her claims are "antagonistic or conflicting" with those of the other class members, *Rosario*, 963 F.2d at 1018, or when she remains "subject to a defense that would not defeat unnamed class members," *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011). The adequacy of class counsel turns on counsel's qualifications, experience, and ability to conduct the litigation. *See Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 491 (N.D. Ill. 2015) (citing *Rosario*, 963 F.2d at 1018).

***5** The named plaintiffs here share the same injuries as other members of the Proposed Settlement Class; each of the Plaintiffs contends either that Defendants collected, used, and disclosed their personally identifiable information while they were under the age of thirteen and without parental consent, or that they are the parent or legal guardian of such a person. [1] ¶¶ 2–3. Nothing in the record suggests that the named Plaintiffs have claims antagonistic to or conflicting with those of the class as a whole, or that defenses not applicable to the claims of other class members apply to those of the named Plaintiffs.

Nor does the record support a finding of inadequacy as to Class Counsel. Plaintiffs present unrefuted evidence of their counsel's expertise in litigating consumer class actions, many of which involve privacy rights, [5-1] at 10–20, and there has been no credible allegation of "a lack of integrity" on the part of Class Counsel, or other allegation that would cast "serious doubt on their trustworthiness as representatives of the class," exists. [6] *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011).

6 In his objections to the settlement, Mark S. asserts that the "current putative class representatives have failed to fairly and adequately protect the interests of the class," [24] at 28, and that "class counsel and Defendants acted in concert" to reach a settlement that "serves to benefit class counsel and Defendants, without consideration" of the Proposed Settlement Class, *id.* at 39. As discussed in greater detail below, these allegations lack merit.

c. Rule 23(b) Requirements

Here Plaintiffs seek to certify the Proposed Settlement Class under Rule 23(b)(3), which requires that common questions predominate over individual ones and that a class action suit

constitutes a superior method for resolving the dispute. Fed. R. Civ. P. 23(b)(3). This Court addresses each requirement in turn below.

i. Predominance

To certify a class under Rule 23(b)(3), a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This assessment focuses upon the " 'the legal or factual questions that qualify each class member's case as a genuine controversy,' with the purpose being to determine whether a proposed class is 'sufficiently cohesive to warrant adjudication by representation.' " *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 814 (7th Cir. 2012) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997)). Although the predominance requirement resembles "Rule 23(a)'s requirements for typicality and commonality," this criterion "is far more demanding." *Id.* (quoting *Amchem*, 521 U.S. at 623–24).

A class satisfies the predominance requirement when "common questions represent a significant aspect" of a case and can be "resolved for all members" of a "class in a single adjudication." *Id.* (quoting 7AA Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1778 (3d ed. 2011)). A question "becomes a common question" when the "same evidence will suffice for each member to make a prima facie showing." *Id.* at 815 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). If, on the other hand, "members of a proposed class will need to present evidence that varies from member to member" in order to "make a prima facie showing on a given question," that question remains an individual one. *Id.* (quoting *Blades*, 400 F.3d at 566).

But the case management and judicial economy concerns at the heart of the predominance requirement matter less when plaintiffs seek to certify a class for settlement purposes only. *See* Fed. R. Civ. P. 23(b) advisory committee's note to 1966 amendment. In deciding whether to certify a settlement-only class, "a district court *need not inquire* whether the case, if tried, would present intractable management problems," an inquiry typically necessary to satisfy Rule 23(b)(3)'s predominance requirement. *Douglas v. W. Union Co.*, 328 F.R.D. 204, 211 (N.D. Ill. 2018) (emphasis added) (quoting *Amchem*, 521 U.S. at 620). Accordingly, "individualized issues" that may bar certification for adjudication purposes will not necessarily bar certification for settlement. *See* 2 William Rubenstein, *Newberg on Class Actions* § 4:63 (5th ed. 2021) (hereinafter *Newberg*). In fact, courts "regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns." *Id.*

***6** Plaintiffs' Video Privacy Protection Act ("VPPA") claims turn on whether Defendants "knowingly disclose[d]" Plaintiffs' "personally identifiable information" without the "informed ... consent" of their parents or legal guardians. 18 U.S.C. § 2710(b). From these claims, this Court identifies two key questions: (1) whether Defendants collected and disclosed Plaintiffs' personally identifiable information; and (2) whether Defendants obtained consent from the parents of users under the age of thirteen before doing so.

The question of whether Defendants obtained parental consent before collecting personally identifiable information of under-thirteen users remains common to all class members. Clearly, individualized issues would no doubt arise at trial. For example, this Court would likely need "individual proof" that each Plaintiff "actually uploaded or generated any information that was collected by TikTok" in order to determine whether Defendants collected and disclosed Plaintiffs' personally identifiable information. [34] at 9. In the trial context, where case management concerns help guide the predominance analysis, the need for such individualized proof might weigh against certification. Not so here.

Nor do individualized damages questions bar certification here. Courts in every circuit "have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations." 2 *Newberg* § 4:54; *see also, e.g.*, *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017) (noting district court's error in ruling that "class certification was precluded based on the need for damages to be assessed individually"). In the settlement-class context, the need for individualized damages presents even less of a problem because case management concerns have minimal import.

Similarly, differences between the federal and state law claims present in this case do not prevent certification. Although class certification will sometimes "be inappropriate" when recovery "depends on law that varies materially from state to state," the settlement context presents no need to "draw fine lines among state-law theories of relief." *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 746–47 (7th Cir. 2001). Thus,

"the fact that ... claims ... implicate the laws of different states" will not "defeat predominance for the purpose of certifying a settlement class." *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 974 (N.D. Ill. 2011).

ii. Superiority

To certify a class under Rule 23(b)(3), this Court must also find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This occurs when a class action achieves "economies of time, effort, and expense" and promotes "uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 304 (N.D. Ill. 2010) (quoting *Amchem*, 521 U.S. at 615). Where plaintiffs seek to certify a class for settlement purposes only, trial-related concerns do not factor into a court's analysis of superiority. *Amchem*, 521 U.S. at 620.

Here the superiority requirement is satisfied. The Proposed Settlement Class represents millions of similar lawsuits. Because certification of the Proposed Settlement Class and approval of the Proposed Settlement will resolve these claims in one fell swoop, a class action constitutes the most efficient means of adjudicating this controversy. The Proposed Settlement Class meets the requirements set out in Rule 23(a) and Rule 23(b)(3), and this Court hereby certifies the class for the purpose of settlement only.

2. Notice

***7** Federal Rule of Civil Procedure 23 requires notice to a class when it is certified under Rule 23(b)(3), when the parties reach a settlement, and when class counsel files a fee petition. Fed. R. Civ. P. 23(c)(2)(B), (e), (h)(1). Separately, the Class Action Fairness Act ("CAFA") requires that certain government agencies receive notice of a proposed class action settlement in a federal case. 28 U.S.C. § 1715. For the reasons explained below, this Court finds that the parties provided adequate notice to the Proposed Settlement Class.

a. Rule 23

i. Form of the Notice

Under Rule 23(c)(2)(B), absent members of a "class proposed to be certified for settlement under Rule 23(b)(3)" must receive "the best notice" of class certification "that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B) (notice of certification). Notice of the settlement itself or notice of a fee petition must meet a similar standard. *See* Fed. R. Civ. P. 23(e)(1)(B) (requiring notice of settlement "in a reasonable manner to all class members who would be bound by the proposal"); Fed. R. Civ. P. 23(h)(1) (requiring notice of class counsel's motion for attorneys' fees to "be ... directed to class members in a reasonable manner").

Of course, the members of the class must receive the best notice practicable "not just because the Rules require it, but 'as a matter of due process.' " *Kaufman v. Am. Exp. Travel Related Servs., Inc.*, 283 F.R.D. 404, 406 (N.D. Ill. 2012). Rule 23 incorporates constitutional due process standards. *See Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 145 (N.D. Ill. 2010). A "reasonable" notice effort, one that satisfies both Rule 23 and constitutional due process requirements, should reach at least seventy percent of the class. Fed. Jud. Ctr., Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide at 1, 3 (2010).

This Court previously approved the parties' plan for a "single, combined notice advising the class of the proposed certification and settlement of (b)(3) classes under both Rule 23(e)(1) and (c)(2)(B)," [5] at 27, finding that the notice plan satisfied "all requirements provided in Rule 23(c)(2)(A) and due process," and finding it "reasonable within the meaning of Rule 23(e)(1)(B)," [13] ¶ 8. [7]

7 Settlement class actions typically employ combined notices encompassing notice of certification, settlement, and fees. 3 *Newberg* § 8:1.

Here, Angeion Group, LLC ("Angeion"), a class action and settlement administration firm, developed and implemented the initial notice program. [5-1] at 182. Plaintiffs attest that Defendants had "no way to directly contact or identify class members." [5] at 10. Accordingly, Angeion's notice program relied primarily upon internet advertisements. [5-1] at 186. Angeion constructed the target audience for the advertisements (estimated at some 6,070,000 individuals)

by using a media database to identify key demographic information about the Proposed Settlement Class. *See id.* at 186–87. Angeion then purchased internet advertisements designed to reach at least 70% of the members of its target audience, "on average 3.0 times each." *Id.* at 186–88. By Angeion's estimates, the more than 13 million digital banner ad impressions delivered through its notice program reached approximately 72% of its target audience "with an average frequency of 3.00 times each." [81-2] at 2. Additionally, after this Court's prior order denying Plaintiffs initial motion for final approval, Angeion's SNP delivered over 6.6 million more impressions. *Id.* at 3.

***8** Both the initial notice program and the SNP also included a website linked to the internet advertisements and a toll-free twenty-four-hour telephone hotline. *Id.* at 3–4. The website contained "general information about this class action," relevant "Court documents," "important dates and deadlines pertinent to [the] Settlement," an online claim form, and a contact page allowing individuals to send questions to a dedicated email address. *Id.* at 3, 17. Similarly, the hotline provided callers with essential information regarding the Proposed Settlement and responses to frequently asked questions. *Id.* at 3–4. In connection with the SNP, Angeion updated both the settlement website and hotline to inform class members of the new settlement-related deadlines. *Id.* As of August 12, 2021, Angeion reported over 435,635 visits to its website from 233,851 unique visitors and 253 calls to its hotline, "totaling 836 minutes of call time." *Id.*

Having reviewed the form of notice, this Court finds the notice here to be the best notice practicable under the circumstances.

ii. Content of the notice

Rule 23 not only controls the form of notice, but also its content. The combined notice at issue here notified members of the Proposed Settlement Class of certification, settlement, and attorneys' fees. Because Rule 23 has different requirements for notice of certification, settlement, and fees, this Court evaluates each component of the combined notice in turn below.

A. Certification and Settlement

When plaintiffs send notice of class certification to a class "proposed to be certified for purposes of settlement under Rule 23(b)(3)," that notice must "clearly and concisely ... in plain, easily understood language" state the following:

> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;
>
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
>
> (v) that the court will exclude from the class any member who requests exclusion;
>
> (vi) the time and manner for requesting exclusion; and
>
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). In contrast, Rule 23 says nothing about the content of a settlement notice. Accordingly, this Court has "nearly complete discretion to determine the ... content of [a settlement] notice to class members." *Kaufman*, 283 F.R.D. at 406. Other courts have found the contents of a settlement notice "sufficient" if the notice "informs the class members of 'the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.' " *Lucas v. Vee Pak, Inc.*, No. 12-CV-09672, 2017 WL 6733688, at *15 (N.D. Ill. Dec. 20, 2017) (quoting *In re AT&T*, 270 F.R.D. at 351).

This Court has reviewed the internet banner advertisements displayed as part of the notice program, archived versions of the settlement website linked to those advertisements and dating back to the notice period, and the long form notice and claim form both posted on said website. The content of these materials meets Rule 23's requirements as to certification and settlement notice. [8]

8 To the extent the initial notice contained incorrect deadlines, this Court's extension of the deadlines and the SNP administered by Angeion ensured that class members had adequate notice of certification and settlement.

B. Fees

Under Rule 23, this Court "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Where class counsel seeks such an award, the claim "must be made by motion under Rule 54(d)(2)" with notice "served on all parties and ... directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). In the Seventh Circuit, class counsel must file the Rule 54 petition before the deadline for objections to the settlement. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 637–38 (7th Cir. 2014). And, of course, the initial notice that class counsel intends to seek fees should also "be sent in advance" of the deadline for objections. 3 *Newberg* § 8:24.

***9** Although Rule 23 does not detail the content of a fee notice, that notice should at the very least "advise class members that their counsel will seek fees" and state "the general level at which the fee will be sought," "inform class members of the date on which the full fee petition will be filed and how class members can gain access to it," and "inform class members of the precise deadline by which they must file objections and the required structure of those objections." *Id.* § 8:25. The fee petition itself must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award," "state the amount sought or provide a fair estimate of it," and "disclose, if the court so orders, the terms of any agreement about fees for the services for which the claims is made." Fed. R. Civ. P. 54(d)(2)(B)(ii)–(iv).

The class here received sufficient notice of fees. In the settlement notice distributed through the Notice Program, Class Counsel informed the class that the Proposed Settlement would "provide $1,100,000" to pay class members claims, "Plaintiffs' attorneys' fees, costs, a service award for the named plaintiffs, and the administrative costs of the settlement." [81-2] at 19. The notice further stated that:

> Class Counsel intends to request up to 33% of the Settlement Fund for attorneys' fees and reimbursement of reasonable, actual out-of-pocket expenses incurred in the litigation. The Court will decide the amount of fees and expenses to award.
>
> Class Counsel will also request that a Service Award of $2,500.00 each ($5,000 total) be paid to the Class Representatives for their services as representatives on behalf of the Settlement Class.

Id. at 25. Although the settlement notice does not appear to provide class members with information about the *filing* of the full fee petition, this Court finds notice of fees sufficient, given the clear indication of the amount of fees sought by Class Counsel and instructions on how to object. *Id.* at 24–25; [81-2] at 3.

Class Counsel filed its renewed fee petition on June 4, 2021. [69]. Because Class Counsel filed this motion two weeks in advance of the June 19 deadline for class members to object or opt out, *see* [81-2] at 5, members of the Proposed Settlement Class had ample opportunity to voice their concerns with respect to fees. Thus, this Court finds that Class Counsel's motion meets the requirements of Rule 54(d)(2)(B).

Because both the form and the content of the notice meet Rule 23's requirements, this Court finds that Plaintiffs have provided adequate notice to the Proposed Settlement Class.

b. CAFA

Under the Class Action Fairness Act of 2005, "each defendant that is participating in [a] proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement" no later than ten days "after a proposed settlement of a class action is filed in court." 28 U.S.C. § 1715(b). In the absence of a state level "primary regulator, supervisor, or licensing authority" with jurisdiction over the defendant, "the appropriate State official shall be the State attorney general." *Id.* § 1715(a)(2). Notice to the class should include:

> (1) a copy of the complaint and any materials filed with the complaint ...;
>
> (2) notice of any scheduled judicial hearing in the class action;
>
> (3) any proposed or final notification to class members of--
>
> (A) (i) the members' rights to request exclusion from the class action ...; and
>
> (B) a proposed settlement of a class action;
>
> (4) any proposed or final class action settlement;

> (5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;
>
> (6) any final judgment or notice of dismissal;
>
> (7) ... (B) ... a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and
>
> ***10** (8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

Id. § 1715(b). Class members may "refuse to comply with and may choose not to be bound by a settlement agreement ... in a class action" if defendants fail to provide the notice required under CAFA. *Id.*

Here, the Settlement Administrator, acting on behalf of Defendants, sent notice of the settlement to the Attorney General of the United States and the attorneys general of all fifty states. [81-2] at 1–2. The Settlement Administrator did so on December 16, 2019, *id.*, eleven days after Plaintiffs filed their motion for preliminary approval of the Proposed Settlement with this Court, [5]. Although CAFA requires notice to issue within ten days of filing a proposed settlement, the delay here is not fatal to final approval of the Proposed Settlement. *See*, *e.g.*, *Beaty v. Cont'l Auto. Sys. U.S., Inc.*, No. CV-10-S-2440-NE, 2012 WL 1886134, at *5, 9 (N.D. Ala. May 21, 2012) (granting final approval of class action settlement where defendant provided notice to the relevant attorneys general sixteen days after filing of the proposed settlement with the court). The content of the notice meets CAFA's requirements, [81-2] at 7–8, and, to the date of this order, no attorneys general have objected to the Proposed Settlement, *id.* at 2–3. Accordingly, defendants served proper notice under CAFA.

3. Proposed Settlement Fair, Reasonable, and Adequate

Under Rule 23(e), a court may approve a settlement "only on finding that it is fair, reasonable, and adequate." Because the rule did not provide further guidance, courts were left to develop their own tests for fairness, reasonableness, and adequacy. 4 *Newberg* § 13:48. The Seventh Circuit developed the following:

> (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) stage of the proceedings and the amount of discovery completed.

Wong v. Accretive Health, Inc., 773 F.3d 859, 863 (7th Cir. 2014) (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982)). The Seventh Circuit deems the first factor most important. *Id.*

The 2018 revisions to Rule 23(e) added factors that courts must consider when determining whether a proposed settlement is "fair, reasonable, and adequate," namely whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate ...; and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). But, as the Advisory Committee's notes state, this amendment did "not ... displace any factor" developed by a given circuit court. Fed. R. Civ. P. 23(e)(2) advisory committee's notes to 2018 amendment. Accordingly, to determine whether the proposed settlement meets the "fair, reasonable, and adequate" standard, this Court will consider both the factors set forth in Rule 23(e)(2) and, to the extent not duplicative, the factors developed by the Seventh Circuit. [9]

9 Specifically, the post-2018 four-prong test for the adequacy of relief, Fed. R. Civ. P. 23(e)(2)(C), captures the "strength of the case" and the "complexity, length, and expense of further litigation" factors already considered by the Seventh Circuit. This Court's assessment of the

adequacy of representation, Fed. R. Civ. P. 23(a)(2)(A), will incorporate the "stage of proceedings and amount of discovery completed" factor previously considered by the Seventh Circuit.

a. Adequate Representation

***11** Although courts make "an initial evaluation of counsel's capacities and experience" when appointing class counsel, at the final approval stage courts focus "on the actual performance of counsel acting on behalf of the class." *Id.* Courts may consider a number of factors when evaluating the adequacy of representation, including the "nature and amount of discovery," which "may indicate whether counsel negotiating on behalf of the class had an adequate information base." Fed. R. Civ. P. 23(e)(2)(A) advisory committee's notes to 2018 amendment.

As discussed above, and in this Court's March 2021 opinion and order, this Court has already found representation here adequate in the context of both class certification and Mark S.' motion to intervene. So too here. The parties engaged in substantial informal discovery and information sharing over a five-month period and Class Counsel surveyed hundreds of potential class members. [5] at 9; [48] at 11:2–7, 19:9–12. This shows that Class Counsel had "an adequate information base" while negotiating for the settlement at issue here. Class Counsel also has extensive experience with class action litigation, including cases involving data privacy. [33] at 26–29; [33-9] at 3–9. Thus, based upon the record as whole, Class Counsel and the named Plaintiffs have adequately represented the Proposed Settlement Class.

b. Negotiation at Arm's Length

By evaluating whether the parties negotiated the proposal at arm's length, courts aim to "root out settlements that may benefit the plaintiffs' lawyers at the class's expense." 4 *Newberg* § 13:50. The best evidence of a "truly adversarial bargaining process" is the "presence of a neutral third-party mediator." *Id.*; *see also* Fed. R. Civ. P. 23(e)(2)(B) advisory committee's notes to 2018 amendment (noting that "the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests").

The record here reflects an arm's length negotiation. After several months of informal discovery, the parties participated in mediation led by Gregory P. Lindstrom, a neutral, third-party mediator. [33] at 33–34. In the time leading up to that all-day mediation, the parties met jointly with Lindstrom and submitted "multiple rounds of briefing" regarding contested issues. [47] at 19:12–20. And Class Counsel represents that the Proposed Settlement resulted from a proposal the mediator made after the parties hit a "dead end" during mediation. *Id.* at 19:21–25.

This Court will discuss the benefits of the Proposed Settlement and the proposed fees for Class Counsel in due course, but at this juncture, this Court finds no evidence of improper side deals or other misconduct, and there is nothing in the record that might suggest something less than an arm's length negotiation. Accordingly, this factor weighs in favor of approval of the Proposed Settlement.

c. Adequacy of Relief

Under Rule 23, courts consider the following factors when assessing the adequacy of a settlement proposal:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3)[.]

Fed. R. Civ. P. 23(e)(2)(C). This court discusses each factor in turn below.

i. Costs, risks, and delay of trial

***12** Although Rule 23 first included this factor in 2018, courts in the Seventh Circuit have long considered "the strength of plaintiff's case on the merits balanced against the amount offered in the settlement" to be the "most important factor relevant to the fairness of a class action settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Relatedly, courts also considered

the "likely complexity, length and expense of the litigation." *Id.* Accordingly, Seventh Circuit analysis of these two factors will inform this Court's assessment of the "costs, risks, and delay of trial" within the meaning of Rule 23.

Courts measure the strength of a plaintiff's case by determining the "net expected value of continued litigation to the class." *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 196 (N.D. Ill. 2018) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002)). With this figure in hand, courts then "estimate the range of possible outcomes and ascribe a probability to each point on the range." *Kolinek*, 311 F.R.D. at 493 (quoting *Synfuel Techs.*, 463 F.3d at 653). But this is not an exact science. Courts are expected "only to estimate and come to a 'ballpark valuation' " of continued litigation. *Id.* (quoting *Reynolds*, 288 F.3d at 285).

This analysis also requires valuation of the settlement proposal. Here, the Proposed Settlement requires Defendants to pay $1.1 million into a settlement fund. [5-1] at 26. After payment of fees and awards, eligible class members who have made timely claims will receive pro rata shares of the remaining funds. *Id.* at 27–28. If each of the approximately six million class members submitted a valid claim, this would result in a recovery of $0.18 per person. [10] Of course, that did not happen here. The Settlement Administrator notes receipt of 193,928 claim forms, of which it anticipates "approximately 168,607 ... will be deemed valid and approved for payment." [81-2] at 4. After deduction of the costs of notice and claims administration; counsels' proposed fees and costs; and service awards for the class representatives from the settlement, this equates to a per claimant recovery of $3.06. *See* [81] at 5–6.

10 If this Court approves the proposed attorneys' fees, costs, and service awards, per class member recovery would fall to $0.08.

This Court now turns to the expected valuation of continued litigation. This valuation starts with the complaint. Plaintiffs assert the following: Count I—violation of the Video Privacy Protection Act, 18 U.S.C. § 2710; Count II—intrusion upon seclusion; Count III—violation of the California constitutional right to privacy; Count IV—violation of the California Consumers Legal Remedies Act; and Count V—violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. [1] ¶¶ 70–110.

Of these claims, only two allow for statutory damages. Plaintiffs may recover a minimum of $2,500 per VPPA violation, *see* 18 U.S.C. § 2710(c)(2)(A), and $1,000 per violation of the California Consumers Legal Remedies Act, *see* Cal. Civ. Code § 1780(a)(1). Two other claims allow for actual damages with no statutory minimums. *See* 815 Ill. Comp. Stat. § 505/10a(a) (noting availability of actual damages for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act); *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1061 (N.D. Cal. 2014) (noting availability of actual damages for intrusion upon seclusion claims under California law). [11]

11 While some of these claims also allow for "the potential for treble damages" or other punitive damages, that "should not be taken into account" when "determining a settlement value." *Carnegie v. Household Int'l, Inc.*, 445 F. Supp. 2d 1032, 1035 (N.D. Ill. 2006); *see also Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-CV-660, 2018 WL 6606079, at *4 & n.1 (S.D. Ill. Dec. 16, 2018) (collecting cases). Accordingly, the possibility of punitive damages does not factor into analysis of the adequacy of relief here.

***13** Here, the parties' failure to present valuations of the claims complicates this Court's efforts to determine the value of continued litigation. But the statutory damages here offer some guidance. If all class members proved they each suffered at least one VPPA violation and one violation of the California Consumers Legal Remedies Act, they would stand to recover at least $3,500 each, totaling $21 billion.

Of course, this lofty valuation reflects just one possible outcome and, given the record here, a remote one at that. The record here indicates a much smaller recovery at trial, perhaps even zero. The arbitration and class action waiver agreement entered into by TikTok users is perhaps the biggest obstacle to recovery; if Defendants were to enforce this agreement, it would bring the litigation here to a grinding halt, with Plaintiffs forced to pursue their claims individually and through arbitration.

Plaintiffs would likely have little success challenging the arbitration and class action agreement, given the strong presumption in favor of enforceability. *E.g.*, *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235, 238–39 (2013) (holding arbitration and class action waiver agreement enforceable despite fact that the costs of individualized

proceedings outweighed any individual litigant's possible recovery). And, at least with respect to the VPPA and Illinois state law claims, the minor class members would have little chance of disaffirming the agreement because they cannot return the benefits obtained from TikTok. *See, e.g.*, *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp., 2d 894, 898–900 (S.D. Ill. 2012) (holding that minor plaintiffs could not disaffirm forum-selection clause in Facebook user agreement because they had already accepted the benefits of the contract by using Facebook); *Sheller ex rel. Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 153–54 (N.D. Ill. 1997) (refusing to allow minor Plaintiffs to disaffirm arbitration clause in employment application where they had already enjoyed the benefit of employment). *But see, e.g.*, *Coughenour v. Del Taco, LLC*, 271 Cal. Rptr. 3d 602, 605, 609–10 (Cal. Ct. App. 2020) (affirming trial court's order denying a defendant's motion to compel minor plaintiff to arbitrate pursuant to arbitration clause in employment agreement, because California law provides "for a minor's right of disaffirmance allowing for a minor to disaffirm a contract before reaching majority age or within a reasonable time afterward" (internal quotation omitted)), *review denied* (Mar. 10, 2021).

Class certification would also present a further obstacle to this matter proceeding to trial. If Plaintiffs were to seek class certification for the purpose of trial rather than settlement, this Court would have to consider whether "the case, if tried, would present intractable management problems." *Douglas v. W. Union Co.*, 328 F.R.D. 204, 211 (N.D. Ill. 2018) (quoting *Amchem*, 521 U.S. at 620). With this increased focus on manageability, "individualized issues" that would not prevent certification of a settlement-only class "may bar certification for adjudication." 2 *Newberg* § 4:63. As discussed above, significant individual issues exist here, namely whether each class members had their personally identifiable information collected by Defendants and, if so, the nature of actual damages.

Even if Plaintiffs could fully litigate their individual claims at trial, further impediments would threaten recovery. Defendants assert the preemption of Plaintiffs' state-law claims by the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506; that the alleged conduct is not within the scope of VPPA or the cited state consumer protection laws; that the alleged conduct does not amount to a common law invasion of privacy or a violation of Plaintiffs' rights under the California Constitution; and that Plaintiffs could not recover actual damages. [34] at 4–7. If Plaintiffs failed to rebut these claims at trial, they would substantially limit recovery and eliminate other claims entirely.

***14** Lastly, the recovery here of $0.08 per class member, or $3.06 per claimant, after factoring in attorneys' fees and other costs, resembles recovery obtained by plaintiffs in similar class action litigations arising from the unauthorized collection or exposure of personal information. *See, e.g.*, *In re Google Plus Profile Litigation*, No. 5:18-cv-6164, 2021 WL 242887, at *5 (N.D. Cal. Jan. 25, 2021) (stating that projected per claimant of $2.50 for settlement of California unfair competition and privacy-related claims stemming from "alleged exposure of Google+ users' Profile Information" did not form "a basis for rejecting a settlement, considering the risks of proceeding to trial"), *appeal dismissed* (May 6, 2021); *Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939, 943–44 (N.D. Cal. 2013) (finding settlement of California privacy, unfair competition, and unjust enrichment claims stemming from alleged misappropriation of Facebook users' names and likenesses fair and adequate where monetary relief would allow for recovery of $0.60 per class member, or $15 per claimant, post fees), *aff'd sub nom. Fraley v. Batman*, 638 F. App'x 594 (9th Cir. 2016); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 258, 268–69 (E.D.N.Y. 2009), *aff'd sub nom. Lobur v. Parker*, 378 F. App'x 63 (2d Cir. 2010) (finding settlement of claims alleging cable company's collection and disclosure of customers' personally identifiable information—and failure to give notice of such practices—in violation of privacy provisions of Cable Communications Policy Act fair and adequate where monetary relief would allow for recovery of $0.52 per class member, or $5.00 per claimant, post fees and cy pres relief). This too weighs in favor of a finding the relief here adequate. [12]

12 At the August 31, 2021 fairness hearing, Mark S. questioned the estimate of $3.06 per claimant, a figure based, in part, upon the Settlement Administrator's estimates as to the number of invalid claims. Mark S. suggested, without evidence, that the Settlement Administrator and Plaintiffs had overestimated this number and that the true calculation would yield a lower per claimant recovery. But even if the Settlement Administrator found all 193,928 claims valid, each claimant would still recover $2.66. That amount remains on par with the per claimant recovery in similar class action litigations.

In sum, parties must compromise to reach a settlement. Accordingly, "courts need not—and indeed should not —'reject a settlement solely because it does not provide a complete victory to plaintiffs." *In re Capital One Tel. Consumer Prot. Act. Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015) (quoting *In re AT&T*, 270 F.R.D. 330 at 347). This rings particularly true here, where Plaintiffs would face mighty challenges to any recovery if this case were to proceed to trial.

ii. Effectiveness of Proposed Method of Distribution

To determine whether a proposed settlement provides adequate relief, courts must also examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C)(ii). Of particular concern are methods of processing claims so complex that they discourage class members from pursuing valid claims. *See* Fed. R. Civ. P. 23(e)(2)(C) advisory committee's note to 2018 amendment. A requirement that potential claimants "fill out a form in order to collect from the settlement fund" seldom raises such concerns. 4 *Newberg* § 13:53; *see also, e.g.*, *Kolinek*, 311 F.R.D. at 499 (holding that it was "neither unfair nor reasonable" to ask claimants to submit a "short and direct" claim form that required claimants to provide their names, address, and signature, and to check a box if they wished to make a claim). Nor will a requirement that class members attest to their eligibility for recovery. *See, e.g.*, *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814 (E.D. Wis. 2009) (describing requirement on claim forms that claimants "verify ... that they meet class requirements" as not "improper").

In addition to the method of submitting a claim, courts must also consider how claims are paid out. Courts are "especially wary" of complex claims processes paired with either "claims-made settlements," distributing only the "amount actually claimed by the class members," or reversionary funds. 4 *Newberg* § 13:53. On the other hand, a settlement that requires defendants to disgorge a predetermined sum "is more likely to be found fair, reasonable, and adequate." *Id.*; *see also, e.g.*, *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1351 (S.D. Fla. 2011) ("The absence of a claims-made process further supports the conclusion that the Settlement is reasonable.").

***15** Under the terms of the Proposed Settlement, Defendants will pay the sum certain of $1.1 million into a settlement fund. [5-1] at 24. After payment of settlement administration expenses, taxes, and allocation of fee and service awards, the class members will receive the balance of the settlement fund, with awards distributed equally on a pro rata basis to all class members who submit a valid claim. [5] at 20; [5-1] at 27. No reversion will take place here; instead, this Court "may direct the Settlement Administrator to pay the residue to an appropriate cy pres recipient or other recipient as the Court may decide in its discretion." [5-1] at 28.

Members of the Proposed Settlement Class could make a claim by submitting a completed claim to the Settlement Administrator via the settlement website or U.S. mail. [28-2] at 22. The form required class members to provide their name, residential address, email address, and signature. By signing, the prospective claimant attested that they met the eligibility requirements for the Proposed Settlement Class and that they had not submitted more than one claim. [28-2] at 28.

The proposed method of distribution here is straightforward and unlikely to have discouraged anyone from submitting a claim. And, because no possibility of reversion exists here, it creates little incentive for gamesmanship by Defendants or class counsel. Accordingly, this factor weighs in favor of finding the relief here adequate.

iii. Proposed Attorneys' Fee Award

The proposed attorneys' fee award also weighs in favor of finding the relief adequate. As this Court discusses in greater detail below, the proposed attorneys' fees of $200,000, payable upon approval by the Court, are reasonable in light of the Class Counsel's work, their investment of resources in the case, their prosecution of the action for the benefit of the Class, the risks that they faced in the litigation, and the overall benefit of the Settlement achieved. [13] Most importantly, with respect to the Court's consideration of the Settlement's fairness, the approval of attorneys' fees remains entirely separate from approval of the Settlement; as noted in the Proposed Settlement, any "order or proceeding relating to the amount of any award of attorneys' fees, costs, or expenses or inventive awards [sic] ... shall not operate to modify, terminate, or cancel this Agreement." [5-1] at 31.

13 As discussed below, Class Counsel initially requested a fee award of $363,000. [29]. Class Counsel subsequently reduced that request to

$332,965, to cover the cost of the SNP, and then settled on the present value of $200,000. [81] at 1–2; 5–6.

iv. Agreements

When evaluating the adequacy of relief, courts must also take "any agreement required to be identified under Rule 23(e)(3)" into account. Fed. R. Civ. P. 23(e)(2)(C)(iv). Under Rule 23(e)(3), the "parties seeking approval" of a settlement "must file a statement identifying any agreement made in connection with the proposal." Fed. R. Civ. P. 23(e)(3). Although Plaintiffs did not file such a statement here, other submissions to this Court state that, aside from the Proposed Settlement, "no other settlements or other agreements have been contemporaneously made between the Parties." [28-2] at 9. Thus, this factor weighs in favor finding the relief here adequate.

d. Equitable Treatment of Class Members

Before finding a proposed settlement fair, reasonable, and adequate, courts must also consider whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Generally, a settlement that provides for pro rata shares to each class member will meet this standard. *E.g.*, *Burnett v. Conseco Life Ins. Co.*, No. 18-CV-0200, 2021 WL 119205, at *9 (S.D. Ind. Jan. 13, 2021). Because class representatives do more work and take more risks than the average class member, service awards to named class members will generally not "raise a red flag." 4 *Newberg* § 13:53. Of course, courts may "become suspicious" of a service award if the disparity between this payment and the average settlement distribution "is very large" or if "absent class members receive nothing or de minimis relief." *Id.*

***16** The Proposed Settlement provides for pro rata shares to each member of the Proposed Settlement Class. [5-1] at 27. Such distribution plans indicate equitable treatment of class members relative to each other. Accordingly, this Court turns its focus to the service awards requested by Class Counsel. Counsel moves for awards of $2,500 each for the two named Plaintiffs. [29] at 14. If approved by this Court, [14] these payments would create a sizeable disparity between the named Plaintiffs and claimants who will likely receive $3.06.

14 This Court discusses below whether this amount is reasonable given the named Plaintiffs' contributions to this litigation.

On balance, this Court finds that the Proposed Settlement treats class members equitably. Without the involvement of the named Plaintiffs, the other class members would gain nothing. And service awards have real value when they "induce individuals to become named representatives." *Redman v. RadioShack Corp.*, No. 11-CV-6741, 2014 WL 497438, at *12 (N.D. Ill. Feb. 7), *rev'd on other grounds*, 768 F.3d 622 (7th Cir. 2014). While the gap between the proposed service awards and the average distribution may be large here, it does not render treatment of class members inequitable. *See, e.g.*, *Graves v. United Indus. Corp.*, No. 17-CV-6983, 2020 WL 953210, at *8–9 (C.D. Cal. Feb. 24, 2020) (finding that proposed settlement treated class members equitably where all class members would receive approximately $7 each and class representatives would receive service awards ranging from $3,000 to $5,000). Service awards aside, all class members here will receive equal shares from the settlement fund.

e. Amount of Opposition and Reaction of Members of the Class

As noted above, the Seventh Circuit developed its own set of factors to assess the fairness, reasonableness, and adequacy of settlement proposals. Those factors include "the amount of opposition to the settlement" and "the reaction of members of the class to the settlement." *Wong*, 773 F.3d at 863 (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982)).

Here, the fact that so few members of the Proposed Settlement Class objected to or opted out of the Proposed Settlement suggests strong support. Only seven class members opted out of the Proposed Settlement, [81-2] at 28–54, and only one individual formally filed objections with the Court, [24]; [74]. An additional ten individuals submitted objections to Class Counsel but did not file their objections with this Court. [81-1] ¶ 2. These ten objections, virtually identical in both form and substance, [28-2] at 15–33, [15] smack of "an organized campaign, rather than the sentiments of the class at large," 4 *Newberg* § 13:58 (quotation omitted). Objections like these will "not necessarily doom a proposed settlement." *Id.*

15 Eight of the ten putative objectors state that the proposed recovery stated in the notice program

> "is not acceptable" and all ten state that they are "requesting mediation."

This Court will discuss the substance of these objections below. Most important here: the miniscule number of objections relative to the size of the class (estimated at some six million members). [5-1] at 6. The overwhelming support by class members weighs strongly in favor of the fairness, reasonableness, and adequacy of the Proposed Settlement.

f. Opinion of Competent Counsel

Seventh Circuit courts assessing the fairness, reasonableness, and adequacy of a settlement proposal must also consider the "opinion of competent counsel." *Wong*, 773 F.3d at 863 (quoting *Gautreaux*, 690 F.2d at 631). What matters here is that "experienced counsel—particularly counsel experienced in class action litigation—have reached" the settlement "and are proposing it." 4 *Newberg* § 13:58.

***17** Class Counsel here "strongly endorse" the Proposed Settlement. [28] at 24. And, as this Court has already noted, Class Counsel has extensive experience with class action litigation, experience that includes data privacy litigation. Thus, this factor weighs in favor of approval of the Proposed Settlement.

C. Objections to the Settlement

Mark S., a member of the Proposed Settlement Class, filed objections to the Proposed Settlement with this Court on May 11, 2020, [24], and supplemented these objections on June 19, 2021, [74]. Mark S. argued his objections at the first fairness hearing in this matter held on August 4 and August 7, 2020 and at the supplemental fairness hearing held on August 31, 2021. Separately, ten members of the Proposed Settlement Class sent objections to Class Counsel via U.S. mail. Because these ten objections, largely identical in form and substance, share the same procedural and substantive defects, this Court will discuss these objections together.

1. Mark S.' Objections

This Court begins with Mark S.' objections.

a. Adequacy of Representation

Mark S. asserts that Class Counsel has not adequately represented the Proposed Settlement Class. [24] at 28; [74] at 11. For that reason, Mark S. argues that this Court should not certify the class or find the Proposed Settlement fair, reasonable, and adequate. Specifically, Mark S. argues that Class Counsel failed to act with "integrity," [24] at 30–31, that Class Counsel reached a settlement that requires members of the Proposed Settlement Class to release certain claims not alleged here, *id.* at 31, and that the Proposed Settlement is a "racket" that does not make the class members whole, *id.* at 29–30. This last argument is better understood as an objection to the adequacy of relief, not the adequacy of representation and will be addressed in due course.

i. Class Counsel's Integrity

To support his argument that Class Counsel acted without integrity, Mark S. alleges that Class Counsel "largely copied" the complaint filed in this case. *Id.* at 30. Mark S. also cites "the unlawful filing schedule that required the filing of objections *before* the filing of counsel's fee petition." *Id.* Lastly, Mark S. alleges that Class Counsel misrepresented the value of the Proposed Settlement to the class. *Id.* at 31.

This Court turns first to the allegations of copying. Courts do not look kindly upon plagiarism, and many "have found such behavior unacceptable and a violation of the Rules of Professional Conduct that govern attorneys' behavior." *Consol. Paving, Inc. v. County of Peoria*, No. 10-CV-1045, 2013 WL 916212, at *6 (C.D. Ill. Mar. 8, 2013) (collecting cases). Here, Mark S. alleges that Class Counsel's complaint "largely copied" the complaint in a prior FTC enforcement action. [24] at 30.

To support this accusation, Mark S. identifies twenty-one instances of similar language between the two complaints. [24-8]. This language, however, comprises a small portion of the complaint filed here. [1]. It bears no resemblance to the wholesale copying of pages of legal analysis punished by courts in other cases. *See, e.g.*, *A.L. v. Chi. Pub. Sch. Dist. No. 299*, No. 10 C 494, 2012 WL 3028337, at *6 (N.D. Ill. July 24, 2012) (reducing attorneys' fee award by 90% where "Plaintiff's counsel lifted verbatim large portions of Plaintiffs' briefs directly from judicial decisions, without appropriate attribution").

***18** Even if this Court accepts Mark S.' allegations as true, they cast little doubt on the quality of Class Counsel's

representation. As discussed above, Class Counsel reached a settlement *before* filing the complaint in this matter. Any alleged copying sheds little light on the quality of representation with respect to the settlement (or the preceding months of informal discovery and negotiation).

Turning next to the filing schedule, Mark. S. correctly notes that the filing schedule, as originally submitted by Class Counsel, permitted Class Counsel to file their fee petition after the deadline for objections. [24] at 30–31. Notwithstanding the original schedule, Class Counsel did ultimately file the fee petition several weeks before the revised June 2, 2020 deadline for objections. But Class Counsel failed to notify the class of the updated deadline. [16]

16 In light of the supplemental notice ordered by this Court, [61]; [62], members of the Proposed Settlement Class have now had ample opportunity to object to the fees and cost awards proposed by Class Counsel. And on the matter of integrity, Class Counsel first deducted the costs of the SNP from its proposed attorneys' fee award, [69], and then further reduced the award sought so that, after more class members filed claim forms during the SNP, the recovery per claimant would remain in line with the relief initially projected, [81] at 5–6. Based on the record, this Court finds Mark S.'s attack on the integrity of Class Counsel unfounded.

While Mark S.' points to these errors as purported proof of Class Counsel's "inadequate representation and lack of integrity," this argument does not square with the record. Most notably, Class Counsel discussed the fees it would seek in its notice to the class. In the Settlement Notice, Class Counsel stated its "intent to request up to 33% of the Settlement Fund for attorneys' fees and reimbursement of reasonable, actual out-of-pocket expenses incurred in the litigation" and that it would also "request that a Service Award of $2,500 each ($5,000 total) be paid to the Class Representatives for their services." [28-2] at 24. Given that these figures align with those in fee petition, this Court does not view Class Counsel's inadvertent errors above as a deliberate attempt to obfuscate fees or deprive class members of a meaningful opportunity to object.

Lastly, this Court examines the alleged misrepresentation of the value of the Proposed Settlement to the class. Specifically, Mark S. alleges that Class Counsel neglected to inform the class that the Proposed Settlement would result in a recovery of $0.11 per class member. [24] at 41. Once again, Mark S.' bold assertion falls flat. The eleven-cent figure rests on the assumption that *all six million* members of the Proposed Settlement Class would submit valid claims. But in "most class actions," most class members "will never step forward and file claims for relief." 4 *Newberg* § 12:17. Having reviewed Class Counsel's initial projections for recovery per claimant and their most recent estimates of $3.06, this Court sees no evidence of misrepresentation.

Mark S.' audacious claim that Class Counsel acted without integrity has no support in the record here. The evidence cited by Mark S. gives this Court no reason to revisit its earlier findings that Class Counsel provided adequate representation.

ii. Failure to Allege Claims

***19** Mark S. also argues that Class Counsel has not adequately represented the class because it negotiated a settlement that requires class members to release "significant" unalleged "claims held by the Child Victims, including breach of contract, unjust enrichment and violation of deceptive business practices and privacy statutes," specifically the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. § 1075/1–60, the Illinois Biometric Information Privacy Act (BIPA), 740 Ill. Comp. Stat. § 14/1–99, and the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. § 510/1–7. [24] at 31, 33–34. But, as other courts have noted, adequate representation does not require lead plaintiffs to allege every single claim available. *See, e.g.*, *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247, 2012 WL 2512750, at *5 (D. Minn. June 29, 2012) (describing objector's contention that adequate representation requires class representatives to "raise every state law claim available" as untenable and noting that such a rule would cause "nationwide class-action litigation" to "effectively cease" (quotation omitted)), *aff'd*, 716 F.3d 1057 (8th Cir. 2013); *Bruce v. Wells Fargo Bank, N.A.*, No. 05 CV 243, 2006 WL 8452671, at *4 (N.D. Ind. Dec. 20, 2006) (discussing Seventh Circuit's rejection of argument that a named plaintiff is "inadequate" if he fails "to allege all available claims"). This is especially true of claims that have little chance of success, like those pushed by Mark S. here.

Moreover, Mark S. neglects to explain how Class Counsel could have pled these unalleged claims. In fact, most of the claims do not appear viable at all. To start, the Illinois Children's Privacy Protection and Parental Empowerment Act

explicitly states that it "shall not be considered or construed to provide any private right of action." 325 Ill. Comp. Stat. § 17/20. Clearly, any claim brought by Plaintiffs under that act would fail. So, even if such claims are within the scope of the relief, members of the Proposed Settlement Class give up nothing here.

The putative Illinois Right of Publicity Act claim identified by Mark S. also suffers from fatal defects. To bring a claim under the act, a plaintiff must allege that a defendant used the plaintiff's identity for a "commercial purpose" within the meaning of the act. 765 Ill. Comp. Stat. § 1075/30. But here none of the named Plaintiffs allege such facts. Nor, for that matter, does Mark S.

Lastly, in light of representations by the parties, members of the Proposed Settlement Class remain free to pursue their BIPA claims in the pending MDL. [68].

Once again, Mark S.' assertions about the adequacy of Class Counsel's representation lack merit and give this Court no reason to revisit its earlier findings on this issue.

b. Adequacy of Relief

Mark S. also objects that the Proposed Settlement does not provide adequate relief. Namely, he argues that the Proposed Settlement does not properly value class members' claims, offers no meaningful benefit to the class, does not disclose requested attorneys' fees, and is not the product of arm's length negotiation. [24] at 32–39; [74] at 8–9. This Court addresses each argument in turn.

i. Valuation of Claims

Mark S. argues that the value of the settlement is too small when compared to the statutory damages available for the claims.[17] *Id.* at 33–34. But settlement is a compromise; the fact that a proposed settlement amounts "to a fraction of potential recovery does not" automatically render it "inadequate and unfair." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 584 (N.D. Ill. 2011). What's more, in the absence of a settlement, class members would likely not have the chance to litigate their class claims at trial. Instead, the arbitration and class action waiver here would force members of the Proposed Settlement Class to pursue their claims individually and through arbitration. And each class member would have to bear the costs of discovery, expert testimony, and so on. The idea that all class members would secure complete recovery through arbitration, "is but one potentiality, and ... a dubious one at that." *Kolinek*, 311 F.R.D. at 494.

17 Additionally, Mark S. cites the availability of punitive damages as a basis for challenging the valuation of the alleged claims. Punitive damages, however, "are generally not appropriate in measuring the fairness of a proposed class action settlement." *Mangone v. First USA Bank*, 206 F.R.D. 222, 229–30 (S.D. Ill. 2001).

***20** Mark S. also relies upon the valuation of certain unalleged claims to support his argument that the value of the settlement is too low. But, as this Court discussed above, these claims either fail or remain available in the TikTok MDL (meaning that Mark S. can still pursue them).

Lastly, Mark S. relies upon the value of the TikTok MDL proposed settlement to assert that the Proposed Settlement here grossly undervalues class members claim. [74] at 8–9. But the TikTok MDL stems from different conduct and involves different claims. Unlike the TikTok MDL, this case does not challenge the collection of biometric information in violation of BIPA. Instead, this case results "solely" from "the unlawful collection of minors' personal information on the [TikTok] app without first obtaining parental consent." [48] at 16:9–20. Mark S.' argument misses these important distinctions and provides no basis to deny Plaintiffs' motion for final approval.

ii. Meaningful Benefit to Class

Mark S. also claims that the Proposed Settlement provides no meaningful benefit to the class. [24] at 36–37; [74] at 9. Specifically, Mark S. argues that the settlement only provides for recovery of four cents per class member, [74] at 9, and that other privacy related settlements have "provided materially different relief" than the cash payments "contemplated by the Proposed Settlement." [24] at 36–37.

Turning first to the argument about the amount of recovery, this Court has already noted that recovery per *claimant*, not recovery per class member, forms the appropriate yardstick by which to measure the settlement. By that metric, the recovery of $3.06 per claimant is a meaningful benefit, and,

as discussed above, one comparable to similar recoveries in other privacy-related settlements.

In arguing that the Proposed Settlement should provide more than just a cash benefit to class members, Mark S. cites other privacy-related settlements that required Defendants to amend the offending business practices at the heart of the litigation. [24] at 37; *e.g.*, *In re VIZIO, Inc. Consumer Privacy Litig.*, No. 16-ML-2693, 2019 WL 3818854, at *10–11 (C.D. Cal. Aug. 14, 2019) (settlement providing cash payments to claimants and requiring changes to defendants' business practices including deletion information collected from consumers and revision of disclosures to consumers regarding data collection policies). But the FTC already obtained such relief. *See generally* Stipulated Order for Civil Penalties, *United States v. Musical.ly*, No. 19-cv-01439 (C.D. Cal. Mar. 27, 2019), ECF No. 10 (requiring TikTok to delete data obtained in violation of COPPA and mandating compliance reporting to the FTC). Mark S.' argument that the Proposed Settlement must require Defendants to change their business practices boarders on the frivolous, given that Defendants are already enjoined from the conduct that gave rise to this litigation.

iii. Disclosure of Attorneys' Fees

Mark S. argues that Class Counsel's failure to timely disclose its proposal for attorneys' fees precludes this Court from finding the Proposed Settlement adequate. [24] at 39; *see also* Fed. R. Civ. P. 23(e)(2)(C)(iii). Class Counsel had yet to file its petition for attorneys' fees when Mark S. filed his objections. But, as this Court has already discussed, notice to the Proposed Settlement Class clearly stated Class Counsel's intention to seek fees totaling up to 33% of the Proposed Settlement fund, in addition to costs and service awards of $2,500 for each of the named Plaintiffs. *See* [28-2] at 24. And Class Counsel subsequently filed its fee petition on May 12, 2020. [29]. Accordingly, this Court had sufficient information to assess the adequacy of relief under Rule 23. Also, given the delay of the fairness hearing until August 2020 and the supplemental notice ordered by this Court, members of the Proposed Settlement Class have now had more than an ample opportunity to object to the attorneys' fees sought by Class Counsel.

iv. Arm's Length Negotiation

***21** Mark S. argues that the "Proposed Settlement ... does not satisfy the requirement of Rule 23(e)(2)(B) that negotiations be at arm's length" because it "serves to benefit class counsel and Defendants, without consideration of the Child Victims." [24] at 39; *see also* [74] at 15. Further, Mark S. asserts that "class counsel and Defendants attempted to cloak the Proposed Settlement with neutrality." [24] at 39. This Court finds no basis for these allegations. As noted above, this Court finds the Proposed Settlement fair, reasonable, and adequate; and finds that it provides class members with a material benefit. The fact that the parties reached the Proposed Settlement after extensive informal discovery and mediation led by a neutral third party only further evidences an arm's length negotiation.

c. Notice to the Class

Mark S. asserts that this Court should reject the proposed settlement because of defects in notice to the Proposed Settlement Class. Mark S. cites: (1) the failure to inform class members of the correct deadlines to object or opt-out, [24] at 41–42; [74] at 6–7, 12; and (2) a method of notice that failed to provide individual notice and ultimately targeted the wrong people, [24] at 40–41; [74] at 10–12. This Court addresses each purported defect in turn.

i. Content of the Notice

In his initial objections to the Proposed Settlement, Mark S. claimed notice inadequate because the settlement administrator failed to update the settlement website and hotline to reflect various pandemic-related orders, issued by the Chief Judge of this Court, that shifted all deadlines in civil cases. [24] at 41–42. This Court agreed. [61]; [62]. But this Court's order requiring supplemental notice, and the subsequent SNP, have remedied this defect by providing members of the Proposed Settlement Class with additional notice of the Proposed Settlement and additional time to object or opt-out. Accordingly, this failure to provide the correct deadlines no longer serves as a reason to deny Plaintiffs' motion for final approval.

In his supplemental objections, Mark S. raises a much narrower issue. In accordance with this Court's April 2021 order, members of the Proposed Settlement Class could "opt-out of or object to the settlement no later than 45 days after the SNP begins." [68]. As the SNP began on May 5, 2021, this

forty-five-day deadline fell on June 19, 2021, a Saturday. *See* [81-2] at 4. Accordingly, Rule 6(a)(1)(C) rolled the deadline to opt-out or object to the Proposed Settlement to "the end of the next day that is not a Saturday, Sunday, or legal holiday." Although Rule 6 pushed this deadline to Monday, June 21, 2021, the settlement website and settlement hotline both indicated a June 19 deadline. *Id.* at 3–5.

This failure to comply with the letter of Rule 6 does not render notice inadequate. The Court required that members of the Proposed Settlement Class receive an additional forty-five days to object or opt-out, and they did. The error identified by Mark S. did not compromise class members' due process rights or their rights within the meaning of Rule 23 and does not warrant additional notice or denial of the motion for final approval. *Cf. Tennille v. W. Union Co.*, 785 F.3d 422, 439–40 (10th Cir. 2015) (holding that errors within settlement notice did not materially affect class members' right to file objections where settlement notice which mistakenly stated that objectors must "be willing to agree to sit for a deposition, within the *county or state* in which you reside," rather than "the *County* in which he, she, or it resides" and the settlement website did not include the correct information); *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236, 1247 (D. Kan. 2015) (finding that error on settlement notice listing incorrect address for the location of the final fairness hearing, "while not the ideal," did not constitute "a material defect in the notice" and did "not require the Court to withhold approval of the settlement" or "warrant the cost of an additional round of notice to the class members"); *Arnett v. Bank of Am., N.A.*, No. 3:11-CV-1372, 2014 WL 4672458, at *3 n.7 (D. Or. Sept. 18, 2014) (concluding that error in notice stating that the final approval hearing would take place on Friday, September 9, 2014, instead of Tuesday, September 9, 2014, "did not render the Class Notice insufficient"); *In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 295 n.16 (E.D. Pa. 2012) (finding that "inadvertent typo as to the end date for the Class Period" in settlement notice did not require "additional notice").

ii. Form of the Notice

***22** Mark S. claims the form of notice here inadequate because it did not provide individual notice, targeted the wrong people, and failed to take advantage of "traditional notice methods, such as newspaper publication and television advertisements." [24] at 40–41; *see also* [74] at 10–12. Again, his assertions miss the mark.

Turning first to individual notice, Rule 23 does not require individual notice for (b)(3) classes; instead, the rule simply requires "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Courts routinely find forms of notice other than individual notice sufficient to meet this standard. *See, e.g.*, *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) (stating that "notice by publication ... may be substituted" when the individual members of a class cannot be identified through reasonable effort). These alternatives can also satisfy due process. *See In re AT&T*, 789 F. Supp. 2d at 968 ("Due process does not require that every class member receive notice.")

Mark S. asserts that Defendants "undoubtedly had, and have, the capability to identify" those members of the Proposed Settlement Class who used TikTok while they were under the age of thirteen (as opposed to their parents). [24] at 41. Of course, if the Defendants did have the ability to identify members of the Proposed Settlement Class, then individual notice may very well have constituted the "best notice" within the meaning of Rule 23. But this conclusory remark regarding Defendants' ability to identify class members, once again, fails.

Even if Defendants possess the "email addresses, first and last names and geolocation information" associated with child members of the Proposed Settlement Class, *id.*, as Mark S. asserts, this information would not help to identify those TikTok users who belong to the class. As Defendants note, "the only way Plaintiffs' information could have been collected was if Plaintiffs affirmatively lied about their age and deceived TikTok's technical barriers" meant to prevent children under the age of 13 from using TikTok. [34] at 1–2. Because of this misrepresentation, *all* personal information collected during the relevant time period would *appear* to belong to TikTok users who do *not* fall within the Proposed Settlement Class.

Sending notice by email using these records would "provide individual notice to an overinclusive group of individuals." *Yeoman v. Ikea U.S. W., Inc.*, No. 11-CV-0701, 2013 WL 5944245, at *5 (S.D. Cal. Nov. 5, 2013) (quotation omitted). And courts routinely find such "overly broad or over-inclusive" individual notice "improper and not required by Rule 23." *Id.* (first citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987); then citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1099 (5th Cir. 1977); and then citing *In re Domestic Air Transp.*

Antitrust Litig., 141 F.R.D. 534, 539 (N.D. Ga. 1992)); *see also, e.g.*, *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-CV-2200, 2019 WL 1512265, at *2 (N.D. Cal. Apr. 8, 2019) ("Direct notice is inappropriate when it is overly broad or overinclusive."); *Jermyn v. Best Buy Stores, L.P.*, No. 08 CIV 0214, 2010 WL 5187746, at *7 (S.D.N.Y. Dec. 6, 2010) ("As discussed, individual notice to an overinclusive group is not required by Rule 23.").

***23** Individual notice to "an overinclusive list of class members may be proper," if not necessarily required by Rule 23, when "the list 'indisputably contain[s] the universe of class members.' " *Schneider*, 2019 WL 1512265, at *2 (alteration in original) (quoting *Marcaz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 60–61 (D. Conn. 2001)). But that principle does not apply here. As Defendants note, many users declined to provide valid email addresses when creating TikTok accounts. [48] at 39:13–25. Accordingly, any attempt to provide individual notice via user email addresses maintained by TikTok, in addition to reaching many individuals who do not fall within the Proposed Settlement Class, would *not include* the full universe of class members.

For the same reasons, notice through the TikTok app also fails to constitute the "best notice" within the meaning of Rule 23. Defendants now acknowledge their ability to provide notice via the TikTok app's "Inbox" feature or through push notifications. *See* Defendant TikTok, Inc.'s Supplemental Answers to the Court's Questions About Plaintiffs' Motion for Preliminary Approval of Class Settlement at 1–3, *In re TikTok, Inc. Consumer Privacy Litig.*, No. 20-CV-4699 (N.D. Ill. Mar. 23, 2021), ECF No. 139. [18] But because this notice would go out to *all* app users, not just those belonging to the Proposed Settlement Class, it would constitute the type of overly broad notice that, as discussed above, courts find improper and not required by Rule 23. At the same time, it would miss those class members who no longer use the TikTok app or, depending on their individual settings, do not use the app during the notice period. *Id.* at 2.

18 Defendants made this representation in the TikTok MDL. At the final fairness hearing held on August 31, 2021, Objector Mark S. and Defendants disputed the legality of notice via this method to the class at issue in this litigation. Later, in response to a supplemental notice filed by Mark. S., *see* [88], Defendants pointed out that "[u]nlike the MDL, which includes *all* TikTok users, this action was brought only on behalf of users under 13. Users under age 13 are restricted to TikTok's under-13 mode ... due to legal restrictions under COPPA." [89] at 1–2 (emphasis in original). Given these restrictions, "users under 13 cannot therefore receive such notifications from TikTok" and "in-app notice of the MDL settlement was *not* received by class members under 13 and could not have been distributed to the class members here." *Id.* at 2.

Mark S. also suggests that Defendants could "manually review videos" submitted by TikTok users during the relevant time period "to identify Child Victims." [24] at 41. But this utterly impractical idea would require the reviewers of a vast sum of videos (drawn from a class of approximately six million members) to simply guess each user's age and ignores the fact that only a fraction of the Proposed Settlement Class submitted videos or otherwise had their personal information collected. [34] at 9. Rule 23 does not require such extremes, but rather "best notice that is *practicable* under the circumstances."

2. Other Objections

In addition to the objections Mark S. filed with this Court, ten individuals claiming membership in the Proposed Settlement Class mailed their objections to Class Counsel. [28] at 22. These individuals did not actually file their objections, as this Court required, nor did they provide copies to the Settlement Administrator. *Id.*; [28-1] at 2-3. This Court explained the procedure for filing objections in its order granting the motion for preliminary approval, [13] ¶ 10, and notice to the class explicitly stated these simple requirements, [28-2] at 24. This failure to comply with procedural requirements provides reason enough to disregard these objections, and thus, this Court disregards them. *See, e.g.*, *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1303 n.6 (S.D. Cal. 2017) (declining to consider objections to settlement not properly filed with the court), *aff'd*, 881 F.3d 1111 (9th Cir. 2018).

***24** In the alternative, however, this Court also rejects these objections on the merits. Eight of the ten objections state that the potential recovery per claimant is too low and request mediation. [28-1] at 15–16, 18, 20, 22, 26, 28, 30. Courts routinely overrule similarly bare objections to settlements. *See, e.g.*, *Snyder v. Ocwen Loan Servicing, LLC*, No. 14 CV 8461, 2019 WL 2103379, at *9 (N.D. Ill. May 14, 2019) (overruling objection to settlement based on "relatively low per-claim award" in part because "objectors' reservations about the amount of the settlement could have been resolved

by simply opting out of the class and filing separate suits"). The two other individuals' objections similarly merit no consideration, as they merely request "mediation," but state no real issues with the settlement. [28-1] at 24, 32. These too do not merit further consideration or discussion.

This Court, having certified the Proposed Settlement Class and having found notice adequate and the Proposed Settlement fair, reasonable, and accurate, now grants Plaintiffs' supplemental motion for final approval [81].

III. Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards

Plaintiffs seek $200,000 in attorneys' fees, $16,133.53 in costs, and $5,000 in service awards ($2,500 to each of the two named Plaintiffs). [69]; [81]; [84]. This Court addresses each request in turn.

A. Attorneys' Fees

Rule 23(h) permits courts to "award reasonable attorney's fees" that are authorized by law or by the parties' agreement, and when a lawyer "recovers a common fund for the benefit of persons other than himself or his client" he "is entitled to a reasonable attorney's fee from the fund as a whole." *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 831 (7th Cir. 2018) (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Courts in common fund cases "determine reasonableness" by awarding counsel the " 'market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.' " *Kolinek*, 311 F.R.D. at 500 (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)).

Although this Court has discretion to use "either a percentage of the fund or lodestar methodology," the "percentage method is employed by the vast majority of courts in the Seventh Circuit." *Hale*, 2018 WL 6606079, at *7 (internal quotations omitted). Regardless of the method used, the Seventh Circuit notes a "presumption" that "attorneys' fees awarded to class counsel should not exceed a third," or "at most a half of the total amount of money going to class members and their counsel," *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014), with the "typical" fee "between 33 and 40 percent," *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 458 (7th Cir. 2018) (quoting *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998)). Because administrative costs and service awards taken out of the common fund "are not a direct benefit to the class," courts should also deduct these costs before awarding any attorneys' fees. *See Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 199 & n.4 (N.D. Ill. 2018) (first citing *Redman*, 768 F.3d at 622, 630; and then citing *Pearson*, 772 F.3d at 780–81).

1. Market Rate

Several factors inform the appropriate market rate, namely: "the risk of nonpayment, the quality of the attorney's performance, the amount of work necessary to resolve the litigation, and the stakes of the case." *Camp Drug Store*, 897 F.3d at 832–33. Additionally, courts also consider the "normal rate of compensation in the market." *Id.* Applied here, these factors support a market rate of 33.3%.

a. Risk of Nonpayment

As the "risk of walking away empty-handed" increases, so too must the fee award in order to "attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). Initially, the fact that this litigation followed the FTC's February 2019 settlement with TikTok could suggest that class counsel risked little because it simply "benefitted from the work of others," *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 848 (N.D. Ill. 2015) (same) (noting that one "proxy" for assessing the risk of nonpayment "is whether the litigation followed on the heels of some prior criminal or civil proceeding involving the same parties or subject matter"). But this Court nonetheless finds a substantial risk of nonpayment here.

***25** Plaintiffs' case relied upon a novel legal argument involving COPPA, which itself does not provide for a private right of action. *See Hubbard v. Google LLC*, 508 F. Supp. 3d 623, 629 (N.D. Cal. 2020). Plaintiffs also faced significant legal hurdles, including the possible preemption of their claims by the FTC's settlement with TikTok and class action and arbitration waivers entered into by class members, that could have prevented them prevailing at trial. Of course, other case management problems, also discussed above, could have prevented Plaintiffs from even certifying a class for trial.

b. Quality of Performance and Amount of Work

Here, Class Counsel has negotiated a non-reversionary settlement agreement that provides a benefit to the Proposed

Settlement Class. The settlement is the product of over two years of work, including substantial pre-suit discovery, interviews of more than 800 potential claimants, months of negotiation, and mediation. Given the difficulty of success at trial, this settlement constitutes a significant achievement and reflects highly upon Class Counsel's performance.

c. Stakes of the Case

Here, the stakes in the case are large, given the complexity of the legal issues, the costs of bringing this case to trial, and the potential loss to Class Counsel should they have litigated the case to judgment and not prevailed.

d. Normal Rate of Compensation

In the Seventh Circuit, and elsewhere, courts "regularly award percentages of 33.33% or higher to counsel in class action litigation." *Hale*, 2018 WL 606079, at *10 n.4 (collecting cases); *In re Dairy Farmers*, 80 F. Supp. 3d at 846 & n.3 (same). And Class Counsel asserts that their "representation agreements for cases in this District, including ... this case" include rates that "generally fall within the one-third to 40% range." [29-1] ¶ 11.

2. Plaintiffs' Request

Although this Court finds that a fee of 33.3% constitutes the appropriate market rate, Plaintiffs here request fees totaling $200,000, [81] at 5–6, a figure that represents 27.2% of the common fund, net administrative fees and service awards. Such an award satisfies the presumption that "attorneys' fees awarded to class counsel should not exceed a third or at most a half of the *total amount of money going to class members and their counsel*." *Pearson*, 773. F. 3d at 782 (emphasis added). And because Plaintiffs' request falls short of the market rate (a rate that would generate $244,294.96 in fees), it more than makes up for the $30,035 in administrative costs associated with the SNP. [70] ¶ 10. As the SNP resulted from an error on the part of Class Counsel or the Settlement Administrator, any fee award should ensure that the Proposed Settlement Class does not bear the costs of the SNP. Plaintiffs' proposal does just that.

3. Mark S.' Objections

Mark S.' objections to Plaintiffs' fee petition distill to just one: Plaintiffs' "request for 43% of the net settlement value is outrageous when considered in connection with the facts underlying the Proposed Settlement." [74] at 12–15. The objection is not supported in the facts. As this Court has already found, based upon the very same facts, a fee equal to 33% of the net settlement represents the market rate. At 27.2% of the net settlement (not 43%), Plaintiffs' modified fee request of $200,000 comes in below that market rate. And this lowered request ensures that class members do not have to foot the bill for any notice-related errors. This Court overrules Mark S.' objections and grants Plaintiffs' request for a $200,000 attorneys' fee award.

B. Costs

***26** Class Counsel requests "$16,133.53 in reimbursable expenses related to (1) legal research; (2) court fees; (3) travel to mediation; and (4) mediator's fees." [69] at 14; [84-2] ¶ 17. Rule 23(h) also permits courts to "award ... nontaxable costs that are authorized by law or by the parties' agreement." By now, it "is well established that counsel who create a common fund ... are entitled to the reimbursement of litigation costs and expenses." *Hale*, 2018 WL 6606079, at *14 (quotation omitted). Class counsel should support any request for expenses with sufficient records to allow courts to carry out their "duty to ensure that the expenses are reasonable." *In re Dairy Farmers*, 80 F. Supp. 3d at 853. Generally, "bills with the level of detail that paying clients find satisfactory" will do. *Id.* (quoting *In re Synthroid*, 264 F.3d at 722).

Here, Class Counsel has provided records with sufficient detail for this Court to fulfill its oversight role. And these expenses comprise less than 1.5% of the common fund here (or roughly 2.2% of the common fund net administrative costs and service awards), a portion smaller than the "average" of "4 percent of the relief for the class." *In re AT&T*, 792 F. Supp. 2d at 1041 (alteration in original) (quoting Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 70 (2004)). In light of the facts of this case, the Court finds the claimed expenses reasonable.

C. Service Awards

Because a "named plaintiff is an essential ingredient of any class action," courts will deem a service award "appropriate if it is necessary to induce an individual to participate in the suit." *Camp Drug Store*, 897 F.3d at 834 (quoting *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998)). To decide whether a plaintiff's participation merits an award, courts examine "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Id.* (quoting *Cook*, 142 F.3d at 1016).

Here, Class Counsel requests two $2,500 service awards, one for each of the named Plaintiffs. [69]. But the named Plaintiffs' efforts, while certainly deserving of some remuneration, do not warrant awards of this size. Here, Plaintiffs:

> (1) provided information to Class Counsel for the complaint and other pleadings; (2) reviewed pleadings and other documents, including the complaint; (3) communicated on a regular basis with counsel and kept themselves informed of progress in the litigation and settlement negotiations; and (4) reviewed and approved the proposed settlement

[70] ¶ 14.

The named Plaintiffs do not appear to have missed school or work as a result of their participation in this litigation, nor did they sit for depositions, produce discovery, or submit affidavits, all factors that often justify awards of this size. *See, e.g.*, *Faulkner v. Ensign U.S. Drilling Inc.*, No. 16-CV-3137, 2020 WL 550592, at *3 (D. Colo. Feb. 4, 2020); *Blair v. Rent-A-Center, Inc.*, No. 17-CV-2335, 2020 WL 408970, at *3 (N.D. Cal. Jan. 24, 2020); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456, 505 (E.D. La. 2020). And this case does not involve particularly "sensitive and personal" allegations that might otherwise justify such a large award in the absence of any participation in discovery. *See N.P. v. Standard Innovation Corp.*, No. 16-CV-8655, 2017 WL 10544061, at *5 (N.D. Ill. July 25, 2017). Accordingly, this Court declines to award the requested amounts and instead awards each named Plaintiff $1,000, with the extra $3,000 remaining in the Settlement Fund.

IV. Objector Mark S.' Motion for Attorneys' Fees and Service Award

The risk of collusion over attorneys' fees and the terms of a class action settlement makes it "desirable to have as broad a range of participants in the fairness hearing as possible." *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 226 (N.D. Ill. 2019) (quoting *Reynolds*, 288 F.3d at 288), *aff'd sub nom. Walker v. Nat'l Collegiate Athletic Ass'n*, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019). Allowing "lawyers who contribute materially to the proceeding" to recover fees encourages such participation. *Id.* (quoting *Reynolds*, 288 F.3d at 288). But when objectors do seek fees, "principles of restitution" require that they "produce an improvement in the settlement worth *more* than the fee they are seeking." *Id.* (emphasis added) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008)).

***27** Here, Mark S.' bases his fee request on the "700%", or $6,256,000, "increase in compensation" his counsel purportedly secured for members of the Proposed Settlement Class by forcing Defendants to allow class members to "participate in" both this settlement and the pending TikTok MDL settlement "regardless of which settled first." [71] at 1. Charitably, Mark S. "only" requests "an award of 25% of the increased benefit—namely $1,564,000." *Id.* at 2. Perhaps recognizing that a request for attorneys' fees *$464,000 greater* than the value of the Proposed Settlement would gain little traction here, Mark S. lowers his request further to a mere "15% of those fees" or $234,600. *Id.*

Even *if* Mark S. could somehow take credit for Defendants' agreement to permit a "double recovery" for members of the Proposed Settlement Class (which he cannot), his request is utterly misplaced. If Mark S. truly believes himself responsible for class members' right to recovery in the TikTok MDL, he can go seek attorneys' fees in that action.

As Mark S. notes in his response to Plaintiffs' Rule 11 motion, at least one court has awarded fees to a settlement objector who "ask[ed] for and obtain[ed] a modified release," ultimately enabling class members in that action to preserve claims that otherwise would have been released. *Great Neck Capital Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 414–15 (E.D. Wis. 2002); *see* [78] at 14. In that case, the district

court found that this constituted "a benefit" for the "class as a whole." *Great Neck*, 212 F.R.D. at 414–16. But Mark S. gets no such credit here.

On October 30, 2020, the "settling parties" in the TikTok MDL, a group that includes Defendants, wrote in a joint status report that they had "expressly negotiated the right of class members" in this action "to participate in the MDL settlement class, such that" this Court's approval of the Proposed Settlement Agreement would not "preclude participation in the MDL settlement, and approval of the MDL settlement" would not "preclude participation" in this settlement. Joint Status Report at 3, 20-CV-04699, *In re TikTok, Inc., Consumer Privacy Litig.* (N.D. Ill. Oct. 30, 2020), ECF No. 99. The settling parties do not mention Mark S., and Mark S. does not claim involvement in those negotiations. So, when Defendants informed *this Court* of their commitment to allowing a "double recovery," [63] at 7–8, they were simply restating a position they had landed on months before and, more importantly, without any help from Mark S.

At the August 31, 2021 fairness hearing, Mark S. claimed that he also provided a benefit to the class by getting Class Counsel to reduce its fee request to $200,000. Objectors can confer "a benefit on the class" by successfully "challenging an award of attorneys' fees to lead class counsel." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 272 F. Supp. 2d 563, 565 (D.N.J. 2003), *aff'd*, 103 F. App'x 695 (3d Cir. 2004); *see also In re Easysaver Rewards Litig.*, No. 09-CV-2094, 2021 WL 230013, at *3 (S.D. Cal. Jan. 22, 2021) ("The Court finds Objector is entitled to fees here. Although Objector did not prevail on many of his challenges to the settlement, he did succeed in convincing the Court to significantly reduce class counsel's fee award."). But that did not happen here.

Here, this Court has not reduced Class Counsel's fee award at all. Instead, Class Counsel requested $332,965 in fees, [69], and then, of their own volition, cut their request to $200,000, [81] at 5–6. Class Counsel represents that, after the SNP led to a near doubling in the number of claims, it reduced its fee request so that per claimant recovery would remain in line with Plaintiffs' initial projections. [81] at 6. This reasoning remains consistent with the record. Of course, the timing here—Class Counsel reduced its request *after* Mark S. objected to their fee petition—could suggest Mark S. had some hand in Class Counsel's decision. But such mere speculation cannot justify taking money away from members of the Proposed Settlement Class to place in Mark S.' pocket (or that of his counsel).

***28** This Court observes that Mark S. *might* have obtained a benefit for this class by raising serious questions about the timing of notice, *e.g.*, [38] at 12, as discussed in this Court's March 29, 2021 order, [62]. [19] But only a *substantial* benefit will justify attorneys' fees. And where, as here, "no monetary benefit has been provided to the class," this Court must take "special care" when deciding whether to award fees to an objector. *In re Leapfrog Enters., Inc. Sec. Litig.*, No. C-03-5421, 2008 WL 5000208, at *3 (N.D. Cal. Nov. 21, 2008) (citing *Polonski v. Trump Taj Mahal Assocs.*, 137 F.3d 139, 147 (3d Cir. 1998)).

19 "Might" represents the appropriate word here, because this Court would have identified this issue without Mark S.' help, as part of its independent review of the adequacy of notice.

The record here confirms that Mark S. did not obtain a substantial benefit for the Proposed Settlement Class. Although his initial objections to the Proposed Settlement did note the Plaintiffs' failure to extend deadlines in accordance with certain, pandemic-related court orders, his efforts changed nothing about the overall value of the Proposed Settlement. Mark S. himself seems to think little of this contribution—in his fifteen-page motion for attorneys' fees and a service award, Mark S. devotes all of two sentences to his efforts to improve notice. [71] at 4, 6. And he offers no suggestion at all as to how this Court should value this purported benefit. In any event, because he has not shown that he has "secured a benefit for the class *that outweighs the fees he is seeking*," *Kolinek*, 311 F.R.D. at 503–04 (emphasis added), this Court denies his request for attorneys' fees.

Mark S. also requests a service award of $2,500. [71] at 15. Because Mark S.'s request lacks any information about actions Mark S. (rather than his counsel) "has taken to protect the interest of the class," or the "amount of time and effort" he "expended in pursuing the litigation," *Camp Drug Store*, 897 F.3d at 834 (quoting *Cook*, 142 F.3d at 1016), this Court has no basis upon which to grant his request. Accordingly, this Court also denies Mark S.' request for a service award.

V. Plaintiffs' Motion for Rule 11 Sanctions

Pursuant to Rule 11, Plaintiffs move for sanctions against Scott Drury, Mark S.' attorney, and Drury's law firm, Loevy &

Loevy. [20] [76]. Rule 11 allows courts to impose sanctions on any attorney or law firm who presents any paper to the court in which "the claims, defenses, and other legal contentions are" not warranted by either "existing law" or by "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2); *see* Fed R. Civ. P. 11(c)(1). Courts can also impose sanctions when the "factual contentions" in such papers lack "evidentiary support." Fed. R. Civ. P. 11(b)(3). And under Rule 11(b)(1), even if a paper "is support[ed] by the facts and the law" and results from a "careful ... pre-filing investigation," a paper filed "for any improper purpose is sanctionable." *Diamond v. Nicholls*, 483 F. Supp. 3d 577, 597 (N.D. Ill. 2020) (quoting *Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 931–32 (7th Cir. 1989)).

20 Plaintiffs have complied with Rule 11's safe harbor requirements. [75].

Here, Plaintiffs allege that Drury's petition for fees and a service award, filed on behalf of Mark S.: (1) "violates Rule 11(b)(2)" because "the claims and legal contentions" in the petition "are not warranted by existing law, and the arguments are patently frivolous"; (2) "violates Rule 11(b)(3)" because "there is no evidence to support Drury's contention that his actions in the case created any additional value for the Settlement Class,"; and (3) "violates Rule 11(b)(1)" because "it is filed for an improper purpose," specifically "seeking attorneys' fees for work that plainly did not increase the settlement in this case" and "needlessly increases the cost of litigation." [76] at 1–2.

***29** First, this Court considers the purported Rule 11(b)(2) violation. As noted above, Mark S. argument that he deserves fees for his contributions to this litigation, while ultimately unavailing, has some support in existing law. Courts have awarded objectors fees when their efforts result in improved notice, *see, e.g.*, *In re Homestore.com, Inc. Sec. Litig.*, No. CV 01-11115, 2004 WL 2792185, at *1 (C.D. Cal. Aug. 10, 2004), or when they help class members preserve claims that initially fell with the scope of a settlement's release clause, e.g., *Great Neck*, 212 F.R.D. at 414–16. And *Great Neck*, discussed in greater detail above, provides *some* support, albeit indirectly, for Drury's use of the TikTok MDL settlement when calculating the value of his benefit to the class. *Cf.* 212 F.R.D. at 416 (describing the "problem of determining an appropriate award" for the objector as "particularly difficult" because the value of the claims carved out of the settlement release thanks to the objector had yet to "be determined" in a separate lawsuit). Accordingly, this Court finds that Drury's filing did not violate Rule 11(b)(2).

Turning next to the purported Rule 11(b)(3) violation, as this Court noted above, Drury might have provided a minimal benefit to the class by bringing attention to defects in notice. And Drury, by moving to enforce this Court's preliminary injunction or, alternatively, for consolidation with the TikTok MDL, [51], may have played some minimal role in getting the Defendants to state on the record their commitment to allowing class members here to pursue claims in the TikTok MDL. Ultimately, however, this "benefit" cannot justify fees for Drury because the Defendants had already made this commitment in a separate proceeding and without Drury's help. But this Court "cannot say" that Drury's "claims were 'so devoid of factual support that sanctions were appropriate.' " *Diamond*, 483 F. Supp. 3d at 597 (quoting *Great Eastern Entertainment Co., Inc. v. Naeemi*, No. 14 C 4731, 2015 WL 6756283, at *2 (N.D. Ill. Nov. 5, 2015)).

Lastly, this Court needs to examine whether Drury brought his fee petition for an improper purpose, namely by seeking fees "for work that plainly did not increase the settlement in this case" or "needlessly increas[ed] the cost of litigation." This first argument largely centers on whether Drury had a legal and factual basis for his fee petition. As discussed, both in the context of Drury's fee petition and Plaintiffs' Rule 11 motion, courts have awarded objectors fees for benefits to the class that do not necessarily increase the monetary value of a settlement. While Drury's arguments failed here, he did not make arguments devoid of any legal and factual support. The fact that he made unsuccessful arguments does not, in and of itself, merit Rule 11 sanctions. Nor does the record here otherwise contain evidence that Drury filed this fee petition simply to increase the costs of litigation or delay proceedings as Plaintiffs allege with factual support. Based upon the record, this Court denies Plaintiffs' motion for sanctions.

VI. Conclusion

For the reasons explained above, this Court grants Plaintiffs' supplemental motion for final approval of the Proposed Settlement Agreement [81]. This Court also grants Plaintiffs' supplemental motion for attorneys' fees, costs, and service awards [69], awarding Plaintiffs $200,000 for attorneys' fees, $16,133.53 for costs, and service awards in the amount of $1,000 for each of the two named Plaintiffs. This Court denies Mark S.' motion for attorneys' fees and service award [71] and denies Plaintiff's Rule 11 motion [75]. A separate order and judgment consistent with this opinion shall issue.

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EXHIBIT O

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United States District Court, C.D. California.

Edward TODD
v.
STAAR SURGICAL COMPANY, et al.

CV 14-5263 MWF (GJSx)
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Attorneys and Law Firms

Jeremy A. Lieberman, Marc I. Gross, Michael J. Wernke, Pomerantz LLP, New York, NY, Lionel Zevi Glancy, Robert Vincent Prongay, Kevin F. Ruf, Glancy Prongay and Murray LLP, Los Angeles, CA, Patrick V. Dahlstrom, Pomerantz LLP, Chicago, IL, for Edward Todd.

Dan E. Marmalefsky, Kai S. Bartolomeo, Morrison and Foerster LLP, Los Angeles, CA, for STAAR Surgical Company, et al.

Proceedings (In Chambers): ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION [176] AND MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES [177]

The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

***1** Before the Court is Lead Plaintiff Edward Todd's Motion for Final Approval of Class Action Settlement and Plan of Allocation ("Settlement Motion" (Docket No. 176)), and Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Fee Motion" (Docket No. 177)), both filed on September 11, 2017. On October 16, 2017, Lead Plaintiff filed a Notice of Non-Opposition and Reply in Further Support of the Settlement Motion and Fee Motion. ("Reply" (Docket No. 181)). On **October 23, 2017**, the Court held a hearing on the Settlement Motion and the Fee Motion. No objectors appeared at the hearing.

Having reviewed the briefs and considered the arguments presented at the hearing, the Court **GRANTS** the Settlement Motion. The proposed settlement is fair, reasonable, and adequate to serve the interests of the class members. The Court also **GRANTS** the Fee Motion. The requested attorneys' fees and costs constitute fair compensation for counsel's efforts and reimbursement for their expenses, and the incentive award requested is reasonable.

I. BACKGROUND

The Court discussed the background facts extensively in its previous Order Approving Preliminarily the Settlement of a Class Action ("Preliminary Approval Order"), filed July 11, 2017(Docket No. 175), and Order Granting Motion for Class Certification ("Class Certification Order"), filed January 5, 2017. (Docket No. 168).

Lead Plaintiff Todd filed this security class action on behalf of investors who acquired STAAR securities between November 1, 2013 and June 30, 2014. (Second Amended Complaint ("SAC") ¶ 1 (Docket No. 88)). The SAC alleges violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934 arising from Defendants' statements that STAAR complied with FDA regulations, when in fact, the FDA had observed serious compliance violations. (SAC ¶ 2). Lead Plaintiff alleges that these misleading statements artificially inflated the value of STAAR securities, which declined sharply once the FDA's investigation became public. (*Id.*).

On January 5, 2017, the Court certified a class of all investors who acquired STAAR securities between November 1, 2013 and June 30, 2014; appointed Todd as the Lead Plaintiff; and appointed Pomerantz LLP as class counsel. (Class Cert. Order at 21). On July 11, 2017, the Court preliminarily approved the Settlement Agreement. (Preliminary Approval Order at 1).

II. THE SETTLEMENT

The Proposed Settlement establishes a fund of $7 million for payment of attorneys' fees, class notice, and an incentive fee to Lead Plaintiff, with the remainder reserved for payment of Class Members' claims. Class Members claim portions of the fund by timely submitting a proof of claim. (Preliminary Approval Order at 5).

In exchange for the payment described above, Class Members agree to release "any and all claims, rights, demands, obligations, damages, actions or causes of action, or liabilities whatsoever ... that arise out of or relate in any way to the purchase or sale of STAAR Securities during the Class Period." (Preliminary Approval Order at 22).

***2** Notice was provided to settlement Class Members in the manner approved by the Court in the Preliminary Approval Order. Short-form notices were sent via first-class mail to potential Class Members, and a summary notice was published in the *Globe Newswire* and *Investor's Business Daily*. Copies of the long-form notice and proof of claim were posted in downloadable form on a specially created settlement website. (Settlement Mot. at 7). Approximately 13,767 notice packets were mailed to potential Class Members. (Reply at 1).

Lead Plaintiff seeks an Incentive Award of $10,000. (Fee Mot. at 1). Class Counsel seeks fees in the amount of $1,750,000 or 25% of the Settlement Fund, and reimbursement of expenses incurred in the amount of $216,239.71. (*Id.*).

III. DISCUSSION

A. Final Approval of Class Action

Before approving a class action settlement, Rule 23 of the Federal Rules of Civil Procedure requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). "To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted) (applying the factors announced in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

"The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quoting *Hanlon*, 150 F.3d at 1026). "The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair." *Linney v. Cellular Alaska P'ship*, Nos. C–96–3008 DLJ, C–97–0203 DLJ, C–97–0425 DLJ, C–97–0457 DLJ, 1997 WL 450064, *5 (N.D. Cal. July 18, 1997), *aff'd,* 151 F.3d 1234, 1234 (9th Cir. 1998).

"In addition, the settlement may not be the product of collusion among the negotiating parties." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000).

The Proposed Settlement is the outcome of an arms-length negotiation conducted with the help of experienced mediator Michelle Yoshida of Phillips ADR. (Settlement Mot. at 6, 9). "The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed. Express Corp.*, No. C 03 2878 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007). Moreover, Class Counsel are experienced securities class action litigators who recommend the Proposed Settlement as fair, reasonable, and adequate. (Settlement Mot. at 19). The Court is satisfied that the proposed settlement is not the product of collusion between the parties. The arms-length nature of the negotiation resulting in the proposed settlement and the recommendation of experienced class action counsel supports final approval. *See Linney*, 1997 WL 450064, at *5.

***3** Moreover, consideration of the *Hanlon* factors dictates final approval of the proposed settlement:

1. Strength of Plaintiff's case and risk, expense, complexity, and likely duration of further litigation

When assessing the strength of a plaintiff's case, the court does not reach "any ultimate conclusions regarding the contested issues of fact and law that underlie the merits of this litigation." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1388 (D. Ariz. 1989). Lead Plaintiff acknowledges that, despite the strength of his case, continued litigation of this action would present risks both as to maintaining class action status and ultimately prevailing with a finding liability. (Settlement Mot. at 10–15).

Lead Plaintiff recognizes that securities class actions in particular are difficult and uncertain to litigate. (Settlement Mot. at 10). Securities class actions are typically complex and expensive. (*Id.* at 14). If the parties were to proceed with further litigation, Lead Plaintiff acknowledges that significant party and judicial resources would be expended in extensive deposition and expert discovery, further motion practice, trial, and likely appeals following trial. (*Id.* at 14–15).

Lead Plaintiff also recognizes the high standard for proving fraud, especially the elements of scienter, causation, and damages. (*Id.* at 11–12). For example, as Lead Plaintiff suggests, Defendants would likely challenge scienter by arguing that they were unaware of any significant FDA violations at the time they made their representations of compliance, and that, to the extent Defendants were aware of the violations, Defendants did not believe the violations were significant or that Defendants would not be able to resolve them easily. (*Id.* at 12).

The Court finds that this factor weighs in favor of final approval of the Proposed Settlement.

2. Amount offered in settlement

The Court concludes the $7 million in cash offered in the Proposed Settlement is fair and reasonable. The Court looks at "the complete package taken as a whole, rather than the individual component parts" in making this determination. *Officers for Justice*, 688 F.2d at 628 (9th Cir. 1982). Class Counsel engaged a consultant to estimate the potentially recoverable damages in this action, and that consultant estimated that the maximum recoverable damages if Lead Plaintiff prevailed on all claims and overcame all defenses would be $36 million. (Settlement Mot. at 16). The $7 million amount offered in the Proposed Settlement therefore represents almost 20% of the maximum recoverable damages. This is significantly greater than the 7.3% median settlement recovery as a percentage of estimated damages in securities class actions in 2016 where estimated damages were less than $50 million (*Id.* at 17 (citing "Securities Class Action Settlements: 2016 Review and Analysis," at 8, Figure 7)). *See also In re Cendant Corp. Litig.*, 264 F.3d 201, 240 (3d Cir. 2001) (observing that typical recoveries in securities class actions range from 1.6% to 14% of total losses).

Considering the risk that, if this litigation were to continue, Lead Plaintiff would not prevail on all claims and overcome all defenses, it is likely that the recoverable damages would ultimately be less than $36 million. Moreover, continued litigation would result in considerable additional expenses.

***4** The Court therefore finds this factor weighs in favor of final settlement approval.

3. Extent of discovery completed and stage of the proceedings

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney*, 151 F.3d at 1239. Lead Plaintiff contends that the parties have engaged in substantial discovery, including, *inter alia*, review of tens of thousands of documents, extensive deposition preparation, collaboration with experts regarding FDA regulations. (Settlement Mot. at 18). The parties engaged in extensive adversarial motion practice, including regarding class certification and discovery disputes. The parties also researched, prepared, and drafted comprehensive mediation briefs. (*Id.* at 18–19). The Court concludes the parties had ample information with which to make informed settlement decisions. This factor weighs in favor final settlement approval.

4. Experience and views of Lead Counsel

Lead Plaintiff's counsel has extensive securities class action litigation experience, and has resolved dozens of complex securities cases. (Declaration of Michael J. Wernke ¶ 102, Exs. 5-A, 5-B (Docket Nos. 178, 178-5)). Counsel conducted detailed discovery in the course of this action, and engaged in extensive mediated negotiations before ultimately reaching and recommending this Proposed Settlement. (*Id.* at ¶¶ 103). This factor weighs in favor of final settlement approval.

5. Reaction of the class members to the proposed settlement

No Class Members have objected to or opted out of the Proposed Settlement, and no Class Members have objected to the proposed award of attorneys' fees and expenses. (Reply at 1–2). The deadline for filing any objections was September 25, 2017. (*Id.*). "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class

settlement action are favorable to the class members." *Nat'l Rural Telecomm'cns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *see also Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming settlement with 45 objections out of 90,000 notices sent).

B. Plan of Allocation

The Plan of Allocation was approved in the Preliminary Order. The Plan distributes the settlement proceeds on a *pro rata* basis, calculating a Claimant's relative loss proximately caused by Defendants' alleged conduct, based on factors such as when and at what price the Claimant purchased and sold STAAR common stock. (Settlement Mot. at 24–25). "[P]lans that allocate money depending on the timing of purchases and sales of the securities at issue are common." *In re Datatec Sys., Inc. Sec. Litig.*, 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007).

The proposed Plan of Allocation was fully described in the notices mailed to the Class, and no Class Members have objected. (Settlement Mot. at 24–25). The plan was formulated in consultation with an independent damages expert. (*Id.*).

The Court concludes the Plan of Allocation is fair, reasonable, and adequate.

C. Attorney's Fees and Reimbursement of Litigation Expenses

***5** In the Ninth Circuit, there are two primary methods to calculate attorney's fees: the lodestar method and the percentage-of-recovery method. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015) (citation omitted). "The lodestar method requires 'multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.' " *Id.* (citation omitted).

"Under the percentage-of-recovery method, the attorneys' fees equal some percentage of the common settlement fund; in this circuit, the benchmark percentage is 25%." *Id.* (citation omitted). However, the "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). "The Ninth Circuit has identified a number of factors that may be relevant in determining if the award is reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee; (5) the burdens carried by class counsel; and (6) the awards made in similar cases." *Martin v. Ameripride Services, Inc.*, No. 08cv440–MMA (JMA), 2011 WL 2313604, at *8 (S.D. Cal. June 9, 2011) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, at 1048–50 (9th Cir. 2002)). The choice of "the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." *Vizcaino*, 290 F.3d at 1048.

Class Counsel seeks fees in the amount of $1,750,000, or 25% of the $7 million settlement fund. (Fee Mot. at 1). The Court sees no reason to depart from the Ninth Circuit's 25% benchmark. This fee amount is reasonable and fair, especially considering the excellent recovery $7 million represents. (*Id.* at 9.–10). As discussed above, the risks of an inferior award—if any—if the parties were to continue litigation are high. Maintaining class action status, as well as ultimately obtaining a finding of liability, remains uncertain. (*Id.* at 11–14). Class Counsel exercised considerable skill in the litigation of the motion for class certification and substantial discovery (including discovery disputes), and they did so against experienced, highly skilled opposing counsel and on an entirely contingent basis. (*Id.* at 15–18).

Class Counsel also seeks reimbursement of expenses in the amount of $216,239.71. (Fee Mot. at 21). Attorneys may recover their reasonable expenses that would typically be billed to paying clients in non-contingency matters. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994). Approximately 67%, or $144,803.01 of the total expenses relate to expenses for experts and consultants, an important part of litigation involving technical FDA regulation issues. Approximately 4.2%, or $9,033.35 of the total expenses relate to mediation fees. The remaining $62,403.35 relates to necessary travel, filing fees, investigator fees, and document storage and maintenance fees. (Wernke Decl. ¶¶ 132–135, Exs. 5-A, 5-B). Attorneys routinely bill clients for such expenses, and it is therefore appropriate to allow Class Counsel to recover these costs from the settlement fund.

***6** Class Members were notified that Class Counsel would seek fees of up to 25% of the settlement amount, and reimbursement of litigation expenses up to $350,000. No Class Members have objected to the requested fee or expenses. (Fee Mot. at 20–21).

Accordingly, the Court finds that Class Counsel's fee and expenses request is fair and reasonable.

D. Incentive Awards

Lead Plaintiff seeks an Incentive Award of $10,000 in connection with his lost time in his representation of the Class. (Fee Mot. at 23). "[N]amed plaintiffs ... are eligible for reasonable incentive payments" as part of a class action settlement. *Staton*, 327 F.3d at 977 (9th Cir. 2003). When evaluating the reasonableness of an incentive award, courts may consider factors such as "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, ... the amount of time and effort the plaintiff expended in pursuing the litigation ... and reasonabl[e] fear[s of] workplace retaliation." *Id.*

The Fee Motion cites to numerous cases in which service awards of $10,000 or more are found reasonable. (Fee Mot. at 24 (citing, *e.g.*, *In re Veritas Software Corp. Sec. Litig.*, 396 Fed.Appx. 815, 816 (3d Cir. 2010) ($15,000 awarded to each lead plaintiff); *Buccellato v. AT&T Operations, Inc.*, 2011 WL 4526673, at *4 (N.D. Cal. June 30, 2011) ($20,000 awarded to lead plaintiff); *In re Xcel Energy, Inc. Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (awarding $100,000 to lead plaintiffs because of "the important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on behalf of persons other than themselves"))). In light of the extensive caselaw supporting a $10,000 incentive award, and the significant time and effort Lead Plaintiff expended to support this litigation (including reviewing and commenting on the complaints and significant briefs, traveling to Los Angeles to prepare and sit for deposition, and communicating with counsel to oversee the litigation) (Fee Mot. at 23), the Court finds the award of $10,000 appropriate.

IV. CONCLUSION

The Court **GRANTS** the Settlement Motion and the Fee Motion.

The Court awards Class Counsel $1,750,000 in fees and $216,239.71 costs, to be paid from the settlement fund. The Court awards Lead Plaintiff Edward Todd an incentive payment of $10,000.

A separate judgment will issue.

IT IS SO ORDERED.

All Citations

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End of Document

EXHIBIT P

COURT EXHIBIT # #3

DATE : 1/11/10
TIME : 12:40 pm
CASE : 02CV5571
VERDICT Form

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IN RE VIVENDI UNIVERSAL, S.A.
SECURITIES LITIGATION

02 Civ. 5571(RJH) (HBP)

VERDICT FORM

This Document Relates To:

ALL ACTIONS

----------x

Question No. 1A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 1 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓
Mr. Hannezo	Yes ____	No ✓

Question No. 1B: If you answered "yes" to Question No. 1A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 1A for any defendant, do not answer Question No. 1B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 2A.

Question No. 2A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 2 on Table A?

Vivendi Yes ✔ No ____

Question No. 2B: If you answered "yes" to Question No. 2A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 2A for any defendant, do not answer Question No. 2B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 3A.

Question No. 3A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 3 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ____

Question No. 3B: If you answered "yes" to Question No. 3A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 3A for any defendant, do not answer Question No. 3B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 4A.

Question No. 4A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 4 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 4B: If you answered "yes" to Question No. 4A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 4A for any defendant, do not answer Question No. 4B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 5A.

Question No. 5A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 5 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ____

Question No. 5B: If you answered "yes" to Question No. 5A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 5A for any defendant, do not answer Question No. 5B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 6A.

Question No. 6A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 6 on Table A?

Vivendi Yes ✔ No ____

Question No. 6B: If you answered "yes" to Question No. 6A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 6A for any defendant, do not answer Question No. 6B with respect to that defendant.

Vivendi Knowingly ____ Recklessly ✘

PLEASE PROCEED TO QUESTION NO. 7A.

Question No. 7A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 7 on Table A?

Vivendi Yes ✔ No ____

Question No. 7B: If you answered "yes" to Question No. 7A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 7A for any defendant, do not answer Question No. 7B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 8A.

Question No. 8A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 8 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ____

Question No. 8B: If you answered "yes" to Question No. 8A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 8A for any defendant, do not answer Question No. 8B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 9A.

Question No. 9A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 9 on Table A?

Vivendi Yes ✓ No ____

Question No. 9B: If you answered "yes" to Question No. 9A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 9A for any defendant, do not answer Question No. 9B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 10A.

Question No. 10A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 10 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ✔

Question No. 10B: If you answered "yes" to Question No. 10A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 10A for any defendant, do not answer Question No. 10B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 11A.

Question No. 11A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 11 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 11B: If you answered "yes" to Question No. 11A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 11A for any defendant, do not answer Question No. 11B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 12A.

Question No. 12A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 12 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ✔

Question No. 12B: If you answered "yes" to Question No. 12A for any defendant, indicate whether that defendant acted knowingly or recklessly **(choose one)** by placing an X on the appropriate line. If you answered "no" to Question No. 12A for any defendant, do not answer Question No. 12B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 13A.

Question No. 13A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 13 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 13B: If you answered "yes" to Question No. 13A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 13A for any defendant, do not answer Question No. 13B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 14A.

Question No. 14A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 14 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 14B: If you answered "yes" to Question No. 14A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 14A for any defendant, do not answer Question No. 14B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 15A.

Question No. 15A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 15 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 15B: If you answered "yes" to Question No. 15A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 15A for any defendant, do not answer Question No. 15B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 16A.

Question No. 16A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 16 on Table A?

Vivendi Yes ✓ No ____

Question No. 16B: If you answered "yes" to Question No. 16A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 16A for any defendant, do not answer Question No. 16B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 17A.

Question No. 17A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 17 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 17B: If you answered "yes" to Question No. 17A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 17A for any defendant, do not answer Question No. 17B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 18A.

Question No. 18A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 18 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 18B: If you answered "yes" to Question No. 18A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 18A for any defendant, do not answer Question No. 18B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 19A.

Question No. 19A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 19 on Table A?

Vivendi Yes ✔ No ____

Question No. 19B: If you answered "yes" to Question No. 19A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 19A for any defendant, do not answer Question No. 19B with respect to that defendant.

Vivendi Knowingly ____ Recklessly ✔

PLEASE PROCEED TO QUESTION NO. 20A.

Question No. 20A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 20 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ✔

Question No. 20B: If you answered "yes" to Question No. 20A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 20A for any defendant, do not answer Question No. 20B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 21A.

Question No. 21A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 21 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 21B: If you answered "yes" to Question No. 21A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 21A for any defendant, do not answer Question No. 21B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly ✗
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 22A.

Question No. 22A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 22 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 22B: If you answered "yes" to Question No. 22A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 22A for any defendant, do not answer Question No. 22B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 23A.

Question No. 23A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 23 on Table A?

Vivendi	Yes ✔	No ____
Mr. Hannezo	Yes ____	No ✔

Question No. 23B: If you answered "yes" to Question No. 23A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 23A for any defendant, do not answer Question No. 23B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly ✘
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 24A.

Question No. 24A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 24 on Table A?

Vivendi Yes ✓ No ____

Question No. 24B: If you answered "yes" to Question No. 24A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 24A for any defendant, do not answer Question No. 24B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 25A.

Question No. 25A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 25 on Table A?

Vivendi Yes ✔ No ____

Question No. 25B: If you answered "yes" to Question No. 25A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 25A for any defendant, do not answer Question No. 25B with respect to that defendant.

Vivendi Knowingly ____ Recklessly ✘

PLEASE PROCEED TO QUESTION NO. 26A.

Question No. 26A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 26 on Table A?

Vivendi Yes ✓ No ____

Question No. 26B: If you answered "yes" to Question No. 26A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 26A for any defendant, do not answer Question No. 26B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 27A.

Question No. 27A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 27 on Table A?

Vivendi Yes ✓ No ____

Question No. 27B: If you answered "yes" to Question No. 27A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 27A for any defendant, do not answer Question No. 27B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 28A.

Question No. 28A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 28 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 28B: If you answered "yes" to Question No. 28A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 28A for any defendant, do not answer Question No. 28B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 29A.

Question No. 29A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 29 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 29B: If you answered "yes" to Question No. 29A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 29A for any defendant, do not answer Question No. 29 with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 30A.

Question No. 30A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 30 on Table A?

Vivendi Yes ✓ No ____

Question No. 30B: If you answered "yes" to Question No. 30A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 30A for any defendant, do not answer Question No. 30B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 31A.

Question No. 31A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 31 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 31B: If you answered "yes" to Question No. 31A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 31A for any defendant, do not answer Question No. 31B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 32A.

Question No. 32A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 32 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 32B: If you answered "yes" to Question No. 32A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 32A for any defendant, do not answer Question No. 32B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 33A.

Question No. 33A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 33 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 33B: If you answered "yes" to Question No. 33A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 33A for any defendant, do not answer Question No. 33B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 34A.

Question No. 34A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 34 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 34B: If you answered "yes" to Question No. 34A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 34A for any defendant, do not answer Question No. 34B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 35A.

Question No. 35A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 35 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 35B: If you answered "yes" to Question No. 35A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 35A for any defendant, do not answer Question No. 35B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 36A.

Question No. 36A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 36 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 36B: If you answered "yes" to Question No. 36A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 36A for any defendant, do not answer Question No. 36B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 37A.

Question No. 37A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 37 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ✔

Question No. 37B: If you answered "yes" to Question No. 37A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 37A for any defendant, do not answer Question No. 37B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 38A.

Question No. 38A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 38 on Table A?

Vivendi Yes ✓ No ____

Question No. 38B: If you answered "yes" to Question No. 38A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 38A for any defendant, do not answer Question No. 38B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 39A.

Question No. 39A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 39 on Table A?

Vivendi Yes ✓ No ____

Question No. 39B: If you answered "yes" to Question No. 39A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 39A for any defendant, do not answer Question No. 39B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 40A.

Question No. 40A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 40 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 40B: If you answered "yes" to Question No. 40A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 40A for any defendant, do not answer Question No. 40B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 41A.

Question No. 41A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 41 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 41B: If you answered "yes" to Question No. 41A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 41A for any defendant, do not answer Question No. 41B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 42A.

Question No. 42A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 42 on Table A?

Vivendi	Yes ✔	No ____
Mr. Messier	Yes ____	No ✔

Question No. 42B: If you answered "yes" to Question No. 42A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 42A for any defendant, do not answer Question No. 42B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 43A.

Question No. 43A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 43 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 43B: If you answered "yes" to Question No. 43A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 43A for any defendant, do not answer Question No. 43B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 44A.

Question No. 44A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 44 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓
Mr. Hannezo	Yes ____	No ✓

Question No. 44B: If you answered "yes" to Question No. 44A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 44A for any defendant, do not answer Question No. 44B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 45A.

Question No. 45A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 45 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓
Mr. Hannezo	Yes ____	No ✓

Question No. 45B: If you answered "yes" to Question No. 45A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 45A for any defendant, do not answer Question No. 45B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 46A.

Question No. 46A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 46 on Table A?

Vivendi Yes ✓ No ____

Question No. 46B: If you answered "yes" to Question No. 46A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 46A for any defendant, do not answer Question No. 46B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 47A.

Question No. 47A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 47 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 47B: If you answered "yes" to Question No. 47A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 47A for any defendant, do not answer Question No. 47B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 48A.

Question No. 48A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 48 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 48B: If you answered "yes" to Question No. 48A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 48A for any defendant, do not answer Question No. 48B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 49A.

Question No. 49A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 49 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 49B: If you answered "yes" to Question No. 49A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 49A for any defendant, do not answer Question No. 49B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 50A.

Question No. 50A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 50 on Table A?

Vivendi Yes ✓ No ____

Question No. 50B: If you answered "yes" to Question No. 50A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 50A for any defendant, do not answer Question No. 50B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 51A.

Question No. 51A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 51 on Table A?

Vivendi Yes ✔ No ____

Question No. 51B: If you answered "yes" to Question No. 51A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 51A for any defendant, do not answer Question No. 51B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 52A.

Question No. 52A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 52 on Table A?

Vivendi	Yes ✔	No ____
Mr. Hannezo	Yes ____	No ✔

Question No. 52B: If you answered "yes" to Question No. 52A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 52A for any defendant, do not answer Question No. 52B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 53A.

Question No. 53A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 53 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 53B: If you answered "yes" to Question No. 53A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 53A for any defendant, do not answer Question No. 53B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 54A.

Question No. 54A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 54 on Table A?

Vivendi	Yes ✓	No ____
Mr. Hannezo	Yes ____	No ✓

Question No. 54B: If you answered "yes" to Question No. 54A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 54A for any defendant, do not answer Question No. 54B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Hannezo	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 55A.

Question No. 55A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 55 on Table A?

Vivendi Yes ✓ No ____

Question No. 55B: If you answered "yes" to Question No. 55A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 55A for any defendant, do not answer Question No. 55B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 56A.

Question No. 56A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 56 on Table A?

Vivendi Yes ✔ No ____

Question No. 56B: If you answered "yes" to Question No. 56A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 56A for any defendant, do not answer Question No. 56B with respect to that defendant.

Vivendi Knowingly ____ Recklessly X

PLEASE PROCEED TO QUESTION NO. 57A.

Question No. 57A: Have plaintiffs proven each element of their Section 10(b) claim against any defendant with regard to the statement(s) listed as Entry No. 57 on Table A?

Vivendi	Yes ✓	No ____
Mr. Messier	Yes ____	No ✓

Question No. 57B: If you answered "yes" to Question No. 57A for any defendant, indicate whether that defendant acted knowingly or recklessly (**choose one**) by placing an X on the appropriate line. If you answered "no" to Question No. 57A for any defendant, do not answer Question No. 57B with respect to that defendant.

Vivendi	Knowingly ____	Recklessly X
Mr. Messier	Knowingly ____	Recklessly ____

PLEASE PROCEED TO QUESTION NO. 58.

If you answered "no" for all the statements in Questions No. 1A through 57A, you have finished with the Verdict Form. Please turn to the last page, sign and date the Form, and inform the Court that you have finished.

If you answered "yes" for any statement in Questions No. 1A through 57A, please proceed to Question No. 58.

Question No. 58:

Please identify the daily inflation amount (in euros/dollars per share), if any, that you find was caused by the Section 10(b) violation(s) you identified in Questions No. 1A through 57A. You may consult PX-1486 and DX-1878 for guidance in answering this question.

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
10/30/2000	€ 0.15 per share	$ 0.13 per share
10/31/2000	€ 0.15 per share	$ 0.13 per share
11/01/2000	€ 0.15 per share	$ 0.13 per share
11/02/2000	€ 0.15 per share	$ 0.13 per share
11/03/2000	€ 0.15 per share	$ 0.13 per share
11/06/2000	€ 0.15 per share	$ 0.13 per share
11/07/2000	€ 0.15 per share	$ 0.13 per share
11/08/2000	€ 0.15 per share	$ 0.13 per share
11/09/2000	€ 0.15 per share	$ 0.13 per share
11/10/2000	€ 0.15 per share	$ 0.13 per share
11/13/2000	€ 0.15 per share	$ 0.13 per share
11/14/2000	€ 0.15 per share	$ 0.13 per share
11/15/2000	€ 0.15 per share	$ 0.13 per share
11/16/2000	€ 0.15 per share	$ 0.13 per share
11/17/2000	€ 0.15 per share	$ 0.13 per share
11/20/2000	€ 0.15 per share	$ 0.13 per share
11/21/2000	€ 0.15 per share	$ 0.13 per share
11/22/2000	€ 0.15 per share	$ 0.13 per share
11/23/2000	€ 0.15 per share	
11/24/2000	€ 0.15 per share	$ 0.13 per share
11/27/2000	€ 0.15 per share	$ 0.13 per share
11/28/2000	€ 0.15 per share	$ 0.13 per share
11/29/2000	€ 0.15 per share	$ 0.13 per share
11/30/2000	€ 0.15 per share	$ 0.13 per share
12/01/2000	€ 0.15 per share	$ 0.13 per share
12/04/2000	€ 0.15 per share	$ 0.13 per share
12/05/2000	€ 0.15 per share	$ 0.13 per share
12/06/2000	€ 0.15 per share	$ 0.13 per share
12/07/2000	€ 0.15 per share	$ 0.13 per share
12/08/2000	€ 0.15 per share	$ 0.13 per share
12/11/2000	€ 0.15 per share	$ 0.13 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
12/12/2000	€ 0.15 per share	$ 0.13 per share
12/13/2000	€ 0.15 per share	$ 0.13 per share
12/14/2000	€ 0.15 per share	$ 0.13 per share
12/15/2000	€ 0.15 per share	$ 0.13 per share
12/18/2000	€ 0.15 per share	$ 0.13 per share
12/19/2000	€ 0.15 per share	$ 0.13 per share
12/20/2000	€ 0.15 per share	$ 0.13 per share
12/21/2000	€ 0.15 per share	$ 0.13 per share
12/22/2000	€ 0.15 per share	$ 0.13 per share
12/26/2000		$ 0.13 per share
12/27/2000	€ 0.15 per share	$ 0.13 per share
12/28/2000	€ 0.15 per share	$ 0.13 per share
12/29/2000	€ 0.15 per share	$ 0.13 per share
01/02/2001	€ 0.15 per share	$ 0.13 per share
01/03/2001	€ 0.15 per share	$ 0.13 per share
01/04/2001	€ 0.15 per share	$ 0.13 per share
01/05/2001	€ 0.15 per share	$ 0.13 per share
01/08/2001	€ 0.15 per share	$ 0.13 per share
01/09/2001	€ 0.15 per share	$ 0.13 per share
01/10/2001	€ 0.15 per share	$ 0.13 per share
01/11/2001	€ 0.15 per share	$ 0.13 per share
01/12/2001	€ 0.15 per share	$ 0.13 per share
01/15/2001	€ 0.15 per share	
01/16/2001	€ 0.15 per share	$ 0.13 per share
01/17/2001	€ 0.15 per share	$ 0.13 per share
01/18/2001	€ 0.15 per share	$ 0.13 per share
01/19/2001	€ 0.15 per share	$ 0.13 per share
01/22/2001	€ 0.15 per share	$ 0.13 per share
01/23/2001	€ 0.15 per share	$ 0.13 per share
01/24/2001	€ 0.15 per share	$ 0.13 per share
01/25/2001	€ 0.15 per share	$ 0.13 per share
01/26/2001	€ 0.15 per share	$ 0.13 per share
01/29/2001	€ 0.15 per share	$ 0.13 per share
01/30/2001	€ 0.15 per share	$ 0.13 per share
01/31/2001	€ 0.15 per share	$ 0.13 per share
02/01/2001	€ 0.15 per share	$ 0.13 per share
02/02/2001	€ 0.15 per share	$ 0.13 per share
02/05/2001	€ 0.15 per share	$ 0.13 per share
02/06/2001	€ 0.15 per share	$ 0.13 per share
02/07/2001	€ 0.15 per share	$ 0.13 per share
02/08/2001	€ 0.15 per share	$ 0.13 per share
02/09/2001	€ 0.15 per share	$ 0.13 per share
02/12/2001	€ 0.15 per share	$ 0.13 per share
02/13/2001	€ 0.15 per share	$ 0.13 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
02/14/2001	€ 0.15 per share	$ 0.13 per share
02/15/2001	€ 0.15 per share	$ 0.13 per share
02/16/2001	€ 0.15 per share	$ 0.13 per share
02/19/2001	€ 0.15 per share	
02/20/2001	€ 0.15 per share	$ 0.13 per share
02/21/2001	€ 0.15 per share	$ 0.13 per share
02/22/2001	€ 0.15 per share	$ 0.13 per share
02/23/2001	€ 0.15 per share	$ 0.13 per share
02/26/2001	€ 0.15 per share	$ 0.13 per share
02/27/2001	€ 0.15 per share	$ 0.13 per share
02/28/2001	€ 0.15 per share	$ 0.13 per share
03/01/2001	€ 0.15 per share	$ 0.13 per share
03/02/2001	€ 0.15 per share	$ 0.13 per share
03/05/2001	€ 0.15 per share	$ 0.13 per share
03/06/2001	€ 0.15 per share	$ 0.13 per share
03/07/2001	€ 0.15 per share	$ 0.13 per share
03/08/2001	€ 0.15 per share	$ 0.13 per share
03/09/2001	€ 0.15 per share	$ 0.13 per share
03/12/2001	€ 0.15 per share	$ 0.13 per share
03/13/2001	€ 0.15 per share	$ 0.13 per share
03/14/2001	€ 0.15 per share	$ 0.13 per share
03/15/2001	€ 0.15 per share	$ 0.13 per share
03/16/2001	€ 0.15 per share	$ 0.13 per share
03/19/2001	€ 0.15 per share	$ 0.13 per share
03/20/2001	€ 0.15 per share	$ 0.13 per share
03/21/2001	€ 0.15 per share	$ 0.13 per share
03/22/2001	€ 0.15 per share	$ 0.13 per share
03/23/2001	€ 0.15 per share	$ 0.13 per share
03/26/2001	€ 0.15 per share	$ 0.13 per share
03/27/2001	€ 0.15 per share	$ 0.13 per share
03/28/2001	€ 0.15 per share	$ 0.13 per share
03/29/2001	€ 0.15 per share	$ 0.13 per share
03/30/2001	€ 0.15 per share	$ 0.13 per share
04/02/2001	€ 0.15 per share	$ 0.13 per share
04/03/2001	€ 0.15 per share	$ 0.13 per share
04/04/2001	€ 0.15 per share	$ 0.13 per share
04/05/2001	€ 0.15 per share	$ 0.13 per share
04/06/2001	€ 0.15 per share	$ 0.13 per share
04/09/2001	€ 0.15 per share	$ 0.13 per share
04/10/2001	€ 0.15 per share	$ 0.13 per share
04/11/2001	€ 0.15 per share	$ 0.13 per share
04/12/2001	€ 0.15 per share	$ 0.13 per share
04/16/2001		$ 0.13 per share
04/17/2001	€ 0.15 per share	$ 0.13 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
04/18/2001	€ 0.15 per share	$ 0.13 per share
04/19/2001	€ 0.15 per share	$ 0.13 per share
04/20/2001	€ 0.15 per share	$ 0.13 per share
04/23/2001	€ 0.15 per share	$ 0.13 per share
04/24/2001	€ 1.20 per share	$ 1.03 per share
04/25/2001	€ 1.20 per share	$ 1.03 per share
04/26/2001	€ 1.20 per share	$ 1.03 per share
04/27/2001	€ 1.20 per share	$ 1.03 per share
04/30/2001	€ 1.20 per share	$ 1.03 per share
05/01/2001		$ 1.03 per share
05/02/2001	€ 1.20 per share	$ 1.03 per share
05/03/2001	€ 1.20 per share	$ 1.03 per share
05/04/2001	€ 1.20 per share	$ 1.03 per share
05/07/2001	€ 1.20 per share	$ 1.03 per share
05/08/2001	€ 1.20 per share	$ 1.03 per share
05/09/2001	€ 1.20 per share	$ 1.03 per share
05/10/2001	€ 1.20 per share	$ 1.03 per share
05/11/2001	€ 1.20 per share	$ 1.03 per share
05/14/2001	€ 1.20 per share	$ 1.03 per share
05/15/2001	€ 1.20 per share	$ 1.03 per share
05/16/2001	€ 1.20 per share	$ 1.03 per share
05/17/2001	€ 1.20 per share	$ 1.03 per share
05/18/2001	€ 1.20 per share	$ 1.03 per share
05/21/2001	€ 1.20 per share	$ 1.03 per share
05/22/2001	€ 1.20 per share	$ 1.03 per share
05/23/2001	€ 1.20 per share	$ 1.03 per share
05/24/2001	€ 1.20 per share	$ 1.03 per share
05/25/2001	€ 1.20 per share	$ 1.03 per share
05/28/2001	€ 1.20 per share	
05/29/2001	€ 1.20 per share	$ 1.03 per share
05/30/2001	€ 1.20 per share	$ 1.03 per share
05/31/2001	€ 1.20 per share	$ 1.03 per share
06/01/2001	€ 1.20 per share	$ 1.03 per share
06/04/2001		$ 1.03 per share
06/05/2001	€ 1.20 per share	$ 1.03 per share
06/06/2001	€ 1.20 per share	$ 1.03 per share
06/07/2001	€ 1.20 per share	$ 1.03 per share
06/08/2001	€ 1.20 per share	$ 1.03 per share
06/11/2001	€ 1.20 per share	$ 1.03 per share
06/12/2001	€ 1.20 per share	$ 1.03 per share
06/13/2001	€ 1.20 per share	$ 1.03 per share
06/14/2001	€ 1.20 per share	$ 1.03 per share
06/15/2001	€ 1.20 per share	$ 1.03 per share
06/18/2001	€ 1.20 per share	$ 1.03 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
06/19/2001	€ 1.20 per share	$ 1.07 per share
06/20/2001	€ 1.20 per share	$ 1.07 per share
06/21/2001	€ 1.20 per share	$ 1.07 per share
06/22/2001	€ 1.20 per share	$ 1.07 per share
06/25/2001	€ 1.20 per share	$ 1.07 per share
06/26/2001	€ 1.20 per share	$ 1.07 per share
06/27/2001	€ 1.20 per share	$ 1.07 per share
06/28/2001	€ 1.20 per share	$ 1.07 per share
06/29/2001	€ 1.20 per share	$ 1.07 per share
07/02/2001	€ 1.20 per share	$ 1.07 per share
07/03/2001	€ 1.20 per share	$ 1.07 per share
07/04/2001	€ 1.20 per share	
07/05/2001	€ 1.20 per share	$ 1.07 per share
07/06/2001	€ 1.20 per share	$ 1.07 per share
07/09/2001	€ 1.20 per share	$ 1.08 per share
07/10/2001	€ 1.20 per share	$ 1.07 per share
07/11/2001	€ 1.20 per share	$ 1.07 per share
07/12/2001	€ 1.20 per share	$ 1.07 per share
07/13/2001	€ 1.20 per share	$ 1.07 per share
07/16/2001	€ 1.20 per share	$ 1.07 per share
07/17/2001	€ 1.20 per share	$ 1.07 per share
07/18/2001	€ 1.20 per share	$ 1.07 per share
07/19/2001	€ 1.20 per share	$ 1.07 per share
07/20/2001	€ 1.20 per share	$ 1.07 per share
07/23/2001	€ 2.40 per share	$ 2.14 per share
07/24/2001	€ 2.40 per share	$ 2.14 per share
07/25/2001	€ 2.40 per share	$ 2.14 per share
07/26/2001	€ 2.40 per share	$ 2.14 per share
07/27/2001	€ 2.40 per share	$ 2.14 per share
07/30/2001	€ 2.40 per share	$ 2.14 per share
07/31/2001	€ 2.40 per share	$ 2.14 per share
08/01/2001	€ 2.40 per share	$ 2.14 per share
08/02/2001	€ 2.40 per share	$ 2.14 per share
08/03/2001	€ 2.40 per share	$ 2.14 per share
08/06/2001	€ 2.40 per share	$ 2.14 per share
08/07/2001	€ 2.40 per share	$ 2.14 per share
08/08/2001	€ 2.40 per share	$ 2.14 per share
08/09/2001	€ 2.40 per share	$ 2.14 per share
08/10/2001	€ 2.40 per share	$ 2.14 per share
08/13/2001	€ 2.40 per share	$ 2.14 per share
08/14/2001	€ 2.40 per share	$ 2.14 per share
08/15/2001	€ 2.40 per share	$ 2.14 per share
08/16/2001	€ 2.40 per share	$ 2.14 per share
08/17/2001	€ 2.40 per share	$ 2.14 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
08/20/2001	€ 2.40 per share	$ 2.14 per share
08/21/2001	€ 2.40 per share	$ 2.14 per share
08/22/2001	€ 2.40 per share	$ 2.14 per share
08/23/2001	€ 2.40 per share	$ 2.14 per share
08/24/2001	€ 2.40 per share	$ 2.14 per share
08/27/2001	€ 2.40 per share	$ 2.14 per share
08/28/2001	€ 2.40 per share	$ 2.14 per share
08/29/2001	€ 2.40 per share	$ 2.14 per share
08/30/2001	€ 2.40 per share	$ 2.14 per share
08/31/2001	€ 2.40 per share	$ 2.14 per share
09/03/2001	€ 2.40 per share	
09/04/2001	€ 2.40 per share	$ 2.14 per share
09/05/2001	€ 2.40 per share	$ 2.14 per share
09/06/2001	€ 2.40 per share	$ 2.14 per share
09/07/2001	€ 2.40 per share	$ 2.14 per share
09/10/2001	€ 2.40 per share	$ 2.14 per share
09/11/2001	€ 0.00 per share	
09/12/2001	€ 0.00 per share	
09/13/2001	€ 0.00 per share	
09/14/2001	€ 0.00 per share	
09/17/2001	€ 0.00 per share	$ 0 per share
09/18/2001	€ 0.00 per share	$ 0 per share
09/19/2001	€ 0.00 per share	$ 0 per share
09/20/2001	€ 0.00 per share	$ 0 per share
09/21/2001	€ 0.00 per share	$ 0 per share
09/24/2001	€ 0.00 per share	$ 0 per share
09/25/2001	€ 0.00 per share	$ 0 per share
09/26/2001	€ 0.00 per share	$ 0 per share
09/27/2001	€ 0.00 per share	$ 0 per share
09/28/2001	€ 0.00 per share	$ 0 per share
10/01/2001	€ 2.40 per share	$ 2.14 per share
10/02/2001	€ 2.40 per share	$ 2.14 per share
10/03/2001	€ 2.40 per share	$ 2.14 per share
10/04/2001	€ 2.40 per share	$ 2.14 per share
10/05/2001	€ 2.40 per share	$ 2.14 per share
10/08/2001	€ 2.40 per share	$ 2.14 per share
10/09/2001	€ 2.40 per share	$ 2.14 per share
10/10/2001	€ 2.40 per share	$ 2.14 per share
10/11/2001	€ 2.40 per share	$ 2.14 per share
10/12/2001	€ 2.40 per share	$ 2.14 per share
10/15/2001	€ 2.40 per share	$ 2.14 per share
10/16/2001	€ 2.40 per share	$ 2.14 per share
10/17/2001	€ 2.40 per share	$ 2.14 per share
10/18/2001	€ 2.40 per share	$ 2.14 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
10/19/2001	€ 2.40 per share	$ 2.14 per share
10/22/2001	€ 2.40 per share	$ 2.14 per share
10/23/2001	€ 2.40 per share	$ 2.14 per share
10/24/2001	€ 2.40 per share	$ 2.14 per share
10/25/2001	€ 2.40 per share	$ 2.14 per share
10/26/2001	€ 2.40 per share	$ 2.14 per share
10/29/2001	€ 2.40 per share	$ 2.14 per share
10/30/2001	€ 4.68 per share	$ 4.17 per share
10/31/2001	€ 4.88 per share	$ 4.36 per share
11/01/2001	€ 5.09 per share	$ 4.55 per share
11/02/2001	€ 5.30 per share	$ 4.74 per share
11/05/2001	€ 5.50 per share	$ 4.93 per share
11/06/2001	€ 5.70 per share	$ 5.12 per share
11/07/2001	€ 5.91 per share	$ 5.31 per share
11/08/2001	€ 6.12 per share	$ 5.50 per share
11/09/2001	€ 6.33 per share	$ 5.69 per share
11/12/2001	€ 6.53 per share	$ 5.88 per share
11/13/2001	€ 6.74 per share	$ 6.07 per share
11/14/2001	€ 6.94 per share	$ 6.26 per share
11/15/2001	€ 7.15 per share	$ 6.45 per share
11/16/2001	€ 7.35 per share	$ 6.64 per share
11/19/2001	€ 7.56 per share	$ 6.83 per share
11/20/2001	€ 7.77 per share	$ 7.02 per share
11/21/2001	€ 7.97 per share	$ 7.21 per share
11/22/2001	€ 0.00 per share	
11/23/2001	€ 8.38 per share	$ 7.39 per share
11/26/2001	€ 8.59 per share	$ 7.58 per share
11/27/2001	€ 8.79 per share	$ 7.77 per share
11/28/2001	€ 9.00 per share	$ 7.96 per share
11/29/2001	€ 9.20 per share	$ 8.15 per share
11/30/2001	€ 9.41 per share	$ 8.34 per share
12/03/2001	€ 9.62 per share	$ 8.53 per share
12/04/2001	€ 9.82 per share	$ 8.72 per share
12/05/2001	€ 10.00 per share	$ 8.91 per share
12/06/2001	€ 10.00 per share	$ 9.10 per share
12/07/2001	€ 10.00 per share	$ 9.29 per share
12/10/2001	€ 10.64 per share	$ 9.48 per share
12/11/2001	€ 10.85 per share	$ 9.67 per share
12/12/2001	€ 11.00 per share	$ 9.86 per share
12/13/2001	€ 11.00 per share	$ 10.00 per share
12/14/2001	€ 11.00 per share	$ 10.00 per share
12/17/2001	€ 11.00 per share	$ 10.00 per share
12/18/2001	€ 11.00 per share	$ 10.00 per share
12/19/2001	€ 11.00 per share	$ 10.00 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
12/20/2001	€ 11.00 per share	$ 10.00 per share
12/21/2001	€ 11.00 per share	$ 10.00 per share
12/24/2001	€ 11.00 per share	$ 10.00 per share
12/26/2001		$ 0.00 per share
12/27/2001	€ 11.00 per share	$ 10.00 per share
12/28/2001	€ 11.00 per share	$ 10.00 per share
12/31/2001		$ 0.00 per share
01/02/2002	€ 11.00 per share	$ 10.00 per share
01/03/2002	€ 11.00 per share	$ 10.00 per share
01/04/2002	€ 11.00 per share	$ 10.00 per share
01/07/2002	€ 10.00 per share	$ 8.55 per share
01/08/2002	€ 10.00 per share	$ 8.55 per share
01/09/2002	€ 10.00 per share	$ 8.55 per share
01/10/2002	€ 10.00 per share	$ 8.55 per share
01/11/2002	€ 10.00 per share	$ 8.55 per share
01/14/2002	€ 10.00 per share	$ 8.55 per share
01/15/2002	€ 10.00 per share	$ 8.55 per share
01/16/2002	€ 10.00 per share	$ 8.55 per share
01/17/2002	€ 10.00 per share	$ 8.55 per share
01/18/2002	€ 10.00 per share	$ 8.55 per share
01/21/2002	€ 0.00 per share	
01/22/2002	€ 10.00 per share	$ 8.55 per share
01/23/2002	€ 10.00 per share	$ 8.55 per share
01/24/2002	€ 10.00 per share	$ 8.55 per share
01/25/2002	€ 10.00 per share	$ 8.55 per share
01/28/2002	€ 10.00 per share	$ 8.55 per share
01/29/2002	€ 10.00 per share	$ 8.55 per share
01/30/2002	€ 10.00 per share	$ 8.55 per share
01/31/2002	€ 10.00 per share	$ 8.55 per share
02/01/2002	€ 10.00 per share	$ 8.55 per share
02/04/2002	€ 10.00 per share	$ 8.55 per share
02/05/2002	€ 10.00 per share	$ 8.55 per share
02/06/2002	€ 10.00 per share	$ 8.55 per share
02/07/2002	€ 10.00 per share	$ 8.55 per share
02/08/2002	€ 10.00 per share	$ 8.55 per share
02/11/2002	€ 10.00 per share	$ 8.55 per share
02/12/2002	€ 10.00 per share	$ 8.55 per share
02/13/2002	€ 10.00 per share	$ 8.55 per share
02/14/2002	€ 10.00 per share	$ 8.55 per share
02/15/2002	€ 10.00 per share	$ 8.55 per share
02/18/2002	€ 0.00 per share	
02/19/2002	€ 10.00 per share	$ 8.55 per share
02/20/2002	€ 10.00 per share	$ 8.55 per share
02/21/2002	€ 10.00 per share	$ 8.55 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
02/22/2002	€ 10.00 per share	$ 8.55 per share
02/25/2002	€ 10.00 per share	$ 8.55 per share
02/26/2002	€ 10.00 per share	$ 8.55 per share
02/27/2002	€ 10.00 per share	$ 8.55 per share
02/28/2002	€ 10.00 per share	$ 8.55 per share
03/01/2002	€ 10.00 per share	$ 8.55 per share
03/04/2002	€ 10.00 per share	$ 8.55 per share
03/05/2002	€ 10.00 per share	$ 8.55 per share
03/06/2002	€ 10.00 per share	$ 8.55 per share
03/07/2002	€ 10.00 per share	$ 8.55 per share
03/08/2002	€ 10.00 per share	$ 8.55 per share
03/11/2002	€ 10.00 per share	$ 8.55 per share
03/12/2002	€ 10.00 per share	$ 8.55 per share
03/13/2002	€ 10.00 per share	$ 8.55 per share
03/14/2002	€ 10.00 per share	$ 8.55 per share
03/15/2002	€ 10.00 per share	$ 8.55 per share
03/18/2002	€ 10.00 per share	$ 8.55 per share
03/19/2002	€ 10.00 per share	$ 8.55 per share
03/20/2002	€ 10.00 per share	$ 8.55 per share
03/21/2002	€ 10.00 per share	$ 8.55 per share
03/22/2002	€ 10.00 per share	$ 8.55 per share
03/25/2002	€ 10.00 per share	$ 8.55 per share
03/26/2002	€ 10.00 per share	$ 8.55 per share
03/27/2002	€ 10.00 per share	$ 8.55 per share
03/28/2002	€ 10.00 per share	$ 8.55 per share
04/01/2002		$ 0.00 per share
04/02/2002	€ 10.00 per share	$ 8.55 per share
04/03/2002	€ 10.00 per share	$ 8.55 per share
04/04/2002	€ 10.00 per share	$ 8.55 per share
04/05/2002	€ 10.00 per share	$ 8.55 per share
04/08/2002	€ 10.00 per share	$ 8.55 per share
04/09/2002	€ 10.00 per share	$ 8.55 per share
04/10/2002	€ 10.00 per share	$ 8.55 per share
04/11/2002	€ 10.00 per share	$ 8.55 per share
04/12/2002	€ 10.00 per share	$ 8.55 per share
04/15/2002	€ 10.00 per share	$ 8.55 per share
04/16/2002	€ 10.00 per share	$ 8.55 per share
04/17/2002	€ 10.00 per share	$ 8.55 per share
04/18/2002	€ 10.00 per share	$ 8.55 per share
04/19/2002	€ 10.00 per share	$ 8.55 per share
04/22/2002	€ 10.00 per share	$ 8.55 per share
04/23/2002	€ 10.00 per share	$ 8.55 per share
04/24/2002	€ 10.00 per share	$ 8.55 per share
04/25/2002	€ 10.00 per share	$ 8.55 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
04/26/2002	€ 10.00 per share	$ 8.55 per share
04/29/2002	€ 10.00 per share	$ 8.55 per share
04/30/2002	€ 10.00 per share	$ 8.55 per share
05/01/2002		$ 0.00 per share
05/02/2002	€ 10.00 per share	$ 8.55 per share
05/03/2002	€ 9.00 per share	$ 7.85 per share
05/06/2002	€ 9.00 per share	$ 7.85 per share
05/07/2002	€ 9.00 per share	$ 7.85 per share
05/08/2002	€ 9.00 per share	$ 7.85 per share
05/09/2002	€ 9.00 per share	$ 7.85 per share
05/10/2002	€ 9.00 per share	$ 7.85 per share
05/13/2002	€ 9.00 per share	$ 7.85 per share
05/14/2002	€ 9.00 per share	$ 7.85 per share
05/15/2002	€ 9.00 per share	$ 7.85 per share
05/16/2002	€ 9.00 per share	$ 7.85 per share
05/17/2002	€ 9.00 per share	$ 7.85 per share
05/20/2002	€ 9.00 per share	$ 7.85 per share
05/21/2002	€ 9.00 per share	$ 7.85 per share
05/22/2002	€ 9.00 per share	$ 7.85 per share
05/23/2002	€ 9.00 per share	$ 7.85 per share
05/24/2002	€ 9.00 per share	$ 7.85 per share
05/27/2002	€ 9.00 per share	
05/28/2002	€ 9.10 per share	$ 7.85 per share
05/29/2002	€ 9.00 per share	$ 7.85 per share
05/30/2002	€ 9.00 per share	$ 7.85 per share
05/31/2002	€ 9.00 per share	$ 7.85 per share
06/03/2002	€ 9.00 per share	$ 7.85 per share
06/04/2002	€ 9.00 per share	$ 7.85 per share
06/05/2002	€ 9.00 per share	$ 7.85 per share
06/06/2002	€ 9.00 per share	$ 7.85 per share
06/07/2002	€ 9.00 per share	$ 7.85 per share
06/10/2002	€ 9.00 per share	$ 7.85 per share
06/11/2002	€ 9.00 per share	$ 7.85 per share
06/12/2002	€ 9.00 per share	$ 7.85 per share
06/13/2002	€ 9.00 per share	$ 7.85 per share
06/14/2002	€ 9.00 per share	$ 7.85 per share
06/17/2002	€ 9.00 per share	$ 7.85 per share
06/18/2002	€ 9.00 per share	$ 7.85 per share
06/19/2002	€ 9.00 per share	$ 7.85 per share
06/20/2002	€ 9.00 per share	$ 7.85 per share
06/21/2002	€ 8.00 per share	$ 6.96 per share
06/24/2002	€ 6.21 per share	$ 5.17 per share
06/25/2002	€ 6.21 per share	$ 5.17 per share
06/26/2002	€ 7.00 per share	$ 5.63 per share

Date	Amount of Inflation Per Ordinary Share	Amount of Inflation Per ADS
06/27/2002	€ 7.00 per share	$ 5.63 per share
06/28/2002	€ 7.00 per share	$ 5.63 per share
07/01/2002	€ 7.00 per share	$ 5.63 per share
07/02/2002	€ 7.00 per share	$ 5.63 per share
07/03/2002	€ 4.50 per share	$ 3.53 per share
07/04/2002	€ 0.00 per share	
07/05/2002	€ 2.92 per share	$ 2.49 per share
07/08/2002	€ 2.92 per share	$ 2.49 per share
07/09/2002	€ 2.92 per share	$ 2.49 per share
07/10/2002	€ 2.47 per share	$ 2.07 per share
07/11/2002	€ 2.47 per share	$ 2.07 per share
07/12/2002	€ 2.47 per share	$ 2.07 per share
07/15/2002	€ 1.75 per share	$ 2.07 per share
07/16/2002	€ 1.75 per share	$ 2.07 per share
07/17/2002	€ 1.75 per share	$ 2.07 per share
07/18/2002	€ 1.75 per share	$ 2.07 per share
07/19/2002	€ 1.75 per share	$ 2.07 per share
07/22/2002	€ 1.75 per share	$ 2.07 per share
07/23/2002	€ 1.75 per share	$ 2.07 per share
07/24/2002	€ 1.75 per share	$ 2.07 per share
07/25/2002	€ 1.75 per share	$ 2.07 per share
07/26/2002	€ 1.75 per share	$ 2.07 per share
07/29/2002	€ 1.75 per share	$ 2.07 per share
07/30/2002	€ 1.75 per share	$ 2.07 per share
07/31/2002	€ 1.75 per share	$ 2.07 per share
08/01/2002	€ 1.75 per share	$ 2.07 per share
08/02/2002	€ 1.75 per share	$ 2.07 per share
08/05/2002	€ 1.75 per share	$ 2.07 per share
08/06/2002	€ 1.75 per share	$ 2.07 per share
08/07/2002	€ 1.75 per share	$ 2.07 per share
08/08/2002	€ 1.75 per share	$ 2.07 per share
08/09/2002	€ 1.75 per share	$ 2.07 per share
08/12/2002	€ 1.75 per share	$ 2.07 per share
08/13/2002	€ 1.75 per share	$ 2.07 per share
08/14/2002	€ 0 per share	$ 0 per share

PLEASE PROCEED TO QUESTION NO. 59.

Question No. 59:

If you checked "Knowingly" in Questions 1B through 57B for **all** alleged misstatements or omissions, please proceed to Question No. ~~59~~ 60.

If you checked "Recklessly" in Question No. 1B through 57B for any of the alleged misstatements or omissions, you must determine what percentage of responsibility, if any, to assign to each defendant whom you found to have committed a Section 10(b) violation. In making this determination, you should consider the nature of the conduct of each person found to have caused or contributed to plaintiffs' loss, and the nature and extent of the causal relationship between each such person's conduct and plaintiffs' loss.

Vivendi	100	%
Mr. Messier	0	%
Mr. Hannezo	0	%
TOTAL	**100**	%

PLEASE PROCEED TO QUESTION NO. 60.

Question No. 60:

With respect to the Section 20(a) claim, have plaintiffs proven that defendant Mr. Messier is secondarily liable as a controlling person of Vivendi?

Yes ____ No ✓

PLEASE PROCEED TO QUESTION NO. 61.

Question No. 61:

With respect to the Section 20(a) claim, have plaintiffs proven that defendant Mr. Hannezo is secondarily liable as a controlling person of Vivendi?

Yes ____ No ✔____

PLEASE PROCEED TO THE NEXT PAGE.

VERIFICATION

Please sign your names on the lines below, fill in the date, and inform the Marshal that you have reached a verdict after all jurors have signed below.

1. Dreamary
2. Anne L. Armitage #2
3. Kawall Adams #3
4. Marion Haraz #4
5. Alberto Lopez #5
6. Wanda Hand #6
7. Sharon Shorter #7
8. Vernus Lee Miller #8
9. Heather Leonard #9

Dated: January 29, 2010.

EXHIBIT Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE VIVENDI UNIVERSAL, S.A. SECURITIES LITIGATION	C.A. No. 02 Civ. 5571 (PAE)

~~[PROPOSED]~~ FINAL JUDGMENT APPROVING CLASS ACTION SETTLEMENT OF ALL REMAINING CLAIMS

WHEREAS, this case was certified as a class action by Order dated May 7, 2007 (Dkt. 347), as amended by Order dated February 22, 2011 (Dkt. 1084); and

WHEREAS, on December 22, 2014, a Rule 54(b) Judgment was entered in favor of certain class members against Vivendi in the amount of $49,771,641.14, and dismissing the action on the merits and with prejudice as to defendants Messier and Hannezo (Dkt. 1231); and

WHEREAS, in 2015 and 2016, Vivendi filed summary judgment motions (Dkts. 1267 & 1280) contending that it had rebutted the presumption of reliance with respect to the claims of ninety-six class members who purchased Vivendi ADSs through two investment managers, Southeastern Asset Management, Inc. ("SAM") or Capital Guardian Trust Company ("Capital Guardian"), (the ninety-six claimants, "the Reliance Claimants," who are identified in the attached Exhibit A); and

WHEREAS, the Court granted Vivendi's motion with respect to SAM in an Opinion and Order dated August 11, 2015 (SAM, Dkt. 1272) and, with respect to Capital Guardian, in an Opinion and Order dated April 25, 2016 (Capital Guardian, Dkt. 1292) ("the Reliance Orders"); and

WHEREAS, on July 14, 2016, a Partial Final Judgment (Dkt. 1301) (the "Partial Final Judgment") was entered (a) in favor of Vivendi and against the Reliance Claimants; (b) in favor of Vivendi with respect to claims of other class members who did not file valid or timely claims; and (c) in favor of eight other class members against Vivendi in the amount of $1,288,166.04; and

WHEREAS, on August 10, 2016, Class Plaintiffs filed a notice of appeal (Dkt. 1304) from the Reliance Orders; by agreement of the Parties, the appeal was voluntarily withdrawn so that they may explore settlement; and

WHEREAS, the Parties entered into a Stipulation and Agreement of Settlement of Claims of Reliance Claimants, dated April 6, 2017 ("Settlement"); and

WHEREAS, the Court entered a Preliminary Approval, Notice, and Hearing Order with respect to the Settlement on April 12, 2017 (Dkt. 1311); and

WHEREAS, adequate notice of the proposed Settlement and of Class Plaintiff's motion for reimbursement of additional litigation expenses was given to the Reliance Claimants; and

WHEREAS, no objections by any Reliance Claimants to the proposed Settlement or motion for reimbursement of additional litigation expenses were submitted;

WHEREAS, the Court has given due consideration to the proposed Settlement; and

WHEREAS, the Court has determined that the proposed Settlement is fair, reasonable, and adequate to the Reliance Claimants; and

WHEREAS, the Court has given due consideration to the prior record herein and the papers submitted in support of the Settlement and related matters, including the Declaration of Arthur N. Abbey dated April 21, 2017, and the Declaration of Stephen J. Cirami dated April 21,

2017, as well as Class Plaintiffs' Memorandum of Law in Support of Motion for Approval of Settlement For Reliance Claimants and For Reimbursement of Additional Expenses,

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 Reliance Claimants.

2. **Incorporation of Settlement Documents:** This Final Judgment incorporates and makes a part hereof: the Settlement filed with the Court on April 6, 2017.

3. **Notice:** The Court finds that the dissemination of the Notice to the Reliance Claimants: (a) was implemented in accordance with the Preliminary Approval Order; (b) constituted the best notice practicable under the circumstances; (c) constituted notice that was reasonably calculated, under the circumstances, to apprise Reliance Claimants of the Settlement (including the releases provided for therein), of class counsel's ("Class Counsel") motion for reimbursement of additional litigation and claims administration expenses, of their right to object to the Settlement and/or Class Counsel's motion for additional reimbursement of litigation and claims administration expenses; and (d) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(7), and all other applicable law and rules.

4. **Final Settlement Approval and Dismissal of Claims:** In accordance with Rule 23, Fed. R. Civ. P., this Court fully and finally approves the Settlement (including, without limitation, the releases provided for therein, as against the Released Parties (as defined in Paragraph 6 of the Settlement), and the dismissal with prejudice of claims against Vivendi and

the Released Parties), and finds that the Settlement is, in all respects, fair, reasonable and adequate, and is in the best interests of the Reliance Claimants. The Parties are directed to implement, perform and consummate the Settlement in accordance with its terms.

5. The Action and all of the claims against Vivendi by the Reliance Claimants will be dismissed with prejudice, as of the Effective Date. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Settlement.

6. **Binding Effect:** The terms of the Settlement and of this Judgment shall be forever binding on Vivendi and the Reliance Claimants (regardless of whether or not any individual submits a claim form or seeks or obtains a distribution from the CRIS Account), as well as their respective successors and assigns.

7. **Releases:** The releases as set forth in Paragraph 6 of the Settlement (the "Releases"), together with the definitions contained in Paragraph 6 of the Settlement relating thereto, are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date as defined in the Settlement. Accordingly, this Court orders that, as of the Effective Date:

(a) The Lead Plaintiffs, solely in their capacity as representatives of the class, and the Reliance Claimants and each of their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, partners, general partners, managers, directors, investors and agents in their capacity as such, will release and shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged and dismissed each and every Settled and Released Claim against Vivendi and each and all of the Released Parties, whether or not the Plaintiffs or the Reliance Claimants execute and deliver a claim form to the Claims Administrator;

(b) Vivendi and each of the other Released Parties, and each of their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, partners, principals, directors, investors, investment advisors and agents in their capacity as such, will release and shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged and dismissed each and every Released Claim against the Reliance Claimants.

8. **Bar Order:** In accordance with the PSLRA, as codified at 15 U.S.C. § 78u-4(f)(7)(A), any and all claims (a) by any person or entity against any of the Released Parties, and (b) by any of the Released Parties against any person or entity, other than as set out in 15 U.S.C. § 78u-4(f)(7)(A)(ii), are hereby permanently barred, extinguished, discharged, satisfied, and unenforceable.

9. **Rule 11 Findings:** The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the commencement, maintenance, prosecution, defense and settlement of this action.

10. **No Admissions:** Neither this Judgment, the Settlement, any of their terms and provisions, any of the negotiations, proceedings or agreements connected therewith, nor any matters arising in connection with the settlement negotiations, proceedings, or agreement:

(a) shall be offered or received against Vivendi as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Vivendi to the Reliance Claimants of the validity of any claim of the Reliance Claimants that was or could

have been asserted against Vivendi in this action or of any liability, negligence, fault, or wrongdoing of Vivendi;

(b) shall be offered or received against Vivendi, or against the Reliance Claimants, as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against Vivendi, or against any of the Lead Plaintiffs, any of the Named Plaintiffs or the Reliance Claimants, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement; provided, however, that Vivendi, Lead Plaintiffs, Named Plaintiffs and the Reliance Claimants may refer to the Stipulation to effectuate the protection from liability granted thereunder or otherwise to enforce the terms of the Settlement;

(c) shall be construed against Vivendi, any Lead Plaintiff, any Named Plaintiff or the Reliance Claimants as an admission, concession, or presumption that the consideration to be given under the Settlement represents the amount which could be or would have been recovered after an appeal from the Reliance Orders;

11. Other than as set forth in this judgment and as to actions that may be required of Vivendi to transfer moneys from the CRIS Account as expeditiously as possible after the entry of the Reliance Judgment as defined in the Settlement, neither Vivendi nor any Released Party shall have any liability, obligation or responsibility with regard to the Settlement or any taxes that may be owed with respect thereto.

12. In the event that the Settlement is not approved as proposed or as modified or amended by agreement of the Parties after good faith efforts to do so, and if such non-approval is affirmed on any appeal, the Settlement may be deemed null and void by either

Party, in writing to the other and to the Claims Administrator, and the Settlement Amount plus interest earned and less any costs or taxes paid by Class Counsel and/or the Claims Administrator in connection with the administration of the Settlement Amount, shall be returned to Vivendi within ten (10) business days; and this judgment shall be vacated.

13. The motion for reimbursement of additional litigation and administration expenses is approved in the amount of $ 104,462.06, and payment of such expenses shall be made to Plaintiffs' Lead Counsel from the CRIS account as expeditiously as possible after the Effective Date.

14. This Court retains jurisdiction for purposes of effectuating this judgment and addressing any issues and procedures arising in connection with distribution of the aggregate damages, pre and post-judgment interest in accordance with the Settlement and the Stipulation and Order Terminating Action so ordered this date, including any motion for reimbursement of supplemental costs of administration for necessary services that may arise in connection with distribution of damages but which are not provided for in this Judgment, even after this judgment is final.

IT IS SO ORDERED, ADJUDGED, AND DECREED this 9th day of May, 2017

Paul A. Engelmayer

Paul A. Engelmayer
United States District Judge

EXHIBIT R

2014 WL 7717579
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

Linda WONG, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
ACCRETIVE HEALTH, INC., et al., Defendants.

No. 1:12–cv–03102
|
Signed April 30, 2014

Attorneys and Law Firms

James E. Barz, Robbins Geller Rudman & Dowd LLP, Chicago, IL, for Plaintiff.

Adam T. Humann, Andrew B. Clubok, Kristin Sheffield–Whitehead, Kirkland & Ellis LLP, New York, NY, Leonid Feller, Kirkland & Ellis LLP, Chicago, IL, for Defendants.

CLASS ACTION

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

SHARON JOHNSON COLEMAN, UNITED STATES DISTRICT JUDGE

***1** THIS MATTER having come before the Court on the motion of Lead Plaintiff for an award of attorneys' fees and expenses; the Court, having considered all papers filed and proceedings conducted herein, having found the settlement of the Action to be fair, reasonable, and adequate and otherwise being fully informed in the premises and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. All of the capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement dated September 19, 2013 (the "Stipulation").

2. The Court has jurisdiction over the subject matter of this application and all matters relating thereto, including all members of the Class who have not timely and validly requested exclusion.

3. Pursuant to and in full compliance with Rule 23 of the Federal Rules of Civil Procedure, the Court finds and concludes that due and adequate notice of Lead Plaintiff's motion for an award of attorneys' fees and expenses was directed to all Persons and entities who are Class Members, including individual notice to those who could be identified with reasonable effort, advising them of the application for fees and expenses and of their right to object thereto, and a full and fair opportunity was accorded to all Persons and entities who are members of the Class to be heard with respect to the motion for fees and expenses.

4. The Court hereby awards Lead Counsel attorneys' fees of 30% of the Settlement Fund and expenses of $63,911.14, together with the interest earned thereon for the same time period and at the same rate as that earned on the Settlement Fund until paid. Said fees shall be allocated among Lead Plaintiff's counsel by Lead Counsel in a manner which, in their good-faith judgment, reflects each counsel's contribution to the institution, prosecution, and resolution of the Litigation. The Court finds that the amount of fees awarded is fair and reasonable under the "percentage-of recovery" method considering, among other things that:

(a) the requested fee is consistent with percentage fees negotiated *ex ante* in the private market for legal services;

(b) the contingent nature of the Action favors a fee award of 30%;

(c) the Settlement Fund of $14 million was not likely at the outset of the Action;

(d) the awarded fee is in accord with Seventh Circuit authority and consistent with empirical data regarding fee awards in cases of this size;

(e) the quality legal services provided by Lead Counsel produced the settlement;

(f) the Lead Plaintiff appointed by the Court to represent the Class reviewed and approved the requested fee;

(g) the stakes of the litigation favor the fee awarded; and

(h) the reaction of the Class to the fee request supports the fee awarded.

5. The awarded attorneys' fees and expenses, and interest earned thereon, shall be paid to Lead Counsel from the Settlement Fund immediately after the date this Order is executed subject to the terms, conditions, and obligations of the Stipulation, which terms, conditions, and obligations are incorporated herein.

***2** 6. The Court has considered the objection filed by James Hayes, and finds it to be without merit. The objection is therefore overruled in its entirety.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2014 WL 7717579