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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

STEVEN FOX, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

FIFTH THIRD BANCORP, GREG D. CARMICHAEL, TAYFUN TUZUN, MARK D. HAZEL, NICHOLAS K. AKINS, B. EVAN BAYH III, JORGE L. BENITEZ, KATHERINE B. BLACKBURN, EMERSON L. BRUMBACK, JERRY W. BURRIS, GARY R. HEMINGER, JEWELL D. HOOVER, EILEEN A. MALLESCH, MICHAEL B. MCCALLISTER, and MARSHA C. WILLIAMS.

Defendants.

Case No. 2020CH05219

Judge: Hon. Celia G. Gamrath

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

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Plaintiff Dr. Steven Fox ("Plaintiff"), on behalf of himself and all other members of the proposed Settlement Class, respectfully submits this memorandum in support of his motion for: (i) final approval of the proposed Settlement of the above-captioned class action (the "Action"); (ii) approval of the proposed plan of allocation for distributing the proceeds of the Settlement to eligible claimants (the "Plan of Allocation"); and (iii) final certification of the Settlement Class. [1]

The Motion is based on the following memorandum of law and the Declaration of Alfred L. Fatale III in Support of (I) Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, (the "Fatale Declaration"), submitted herewith.[2] A proposed final order and judgment, negotiated by the Parties as part of the Settlement, is also submitted herewith.

INTRODUCTION

As detailed in the Stipulation, Plaintiff and Defendants have agreed to settle all claims asserted, or that otherwise could have been asserted, against Defendants[3] in exchange for the payment of $5,500,000 (the "Settlement Amount"), for the benefit of the Settlement Class.

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[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated May 9, 2023 (the "Stipulation"), filed with the Court on May 11, 2023.

[2] The Fatale Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; and the risks and uncertainties of continued litigation; among other things. Citations to "¶" in this memorandum refer to paragraphs in the Fatale Declaration. All exhibits referenced herein are annexed to the Fatale Declaration. For clarity, citations to exhibits that themselves have attached exhibits, will be referenced herein as "Ex.__-__." The first numerical reference is to the designation of the entire exhibit attached to the Fatale Declaration and the second alphabetical reference is to the exhibit designation within the exhibit itself.

[3] Fifth Third Bancorp ("Fifth Third" or the "Company"), Greg D. Carmichael, Tayfun Tuzun, Mark D. Hazel Nicholas K. Akins, B. Evan Bayh III, Jorge L. Benitez, Katherine B. Blackburn, Emerson L. Brumback, Jerry W. Burris, Gary R. Heminger, Jewell D. Hoover, Eileen A. Mallesch, Michael B. McCallister, and Marsha C. Williams (collectively, the "Individual Defendants" and, together with Fifth Third, the "Defendants").

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Defendants have not admitted any wrongdoing as part of the Settlement and have denied and continue to deny each and every one of the claims alleged in the Action, including all claims in the Complaint.

As described herein, the Settlement is a favorable recovery for the Settlement Class, especially when viewed in light of the risks and costs attendant to further, protracted litigation. The Settlement was reached after well-informed negotiations between highly experienced counsel and reflects a reasoned compromise based on Plaintiff's and Lead Counsel's knowledge of the strengths and weaknesses of the case gained through an extensive investigation, the drafting of a thorough and detailed Complaint, motion practice, review of discovery produced to date, and consultations with experts on valuation, damages, and causation issues.

To achieve the recovery here, Lead Counsel, among other things: (i) conducted a thorough investigation of the allegations, including gathering and analyzing information about the Company and the Defendants; (ii) prepared and filed a detailed class action Complaint; (iii) successfully opposed Defendants' comprehensive motion to dismiss the Complaint; (iv) filed a motion for class certification; (v) moved to strike six of Defendants' eight affirmative defenses; (vi) consulted with experts on damages and causation issues; (vii) engaged in discovery, including document requests, interrogatories, and requests for admission, a motion to compel, and the exchange and analysis of over 30,000 pages of documents; and (viii) engaged in settlement discussions under the guidance of a highly regarded and experienced mediator. At the time the Settlement was reached, Lead Counsel had a deep understanding of the strengths and weaknesses of the claims and defenses in the Action. *See generally* Fatale Declaration at §§III-V.

For the reasons discussed below, Plaintiff and Lead Counsel—based on their evaluation of the facts and governing law—respectfully request that the Court grant final approval of the

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

PRELIMINARY APPROVAL AND THE NOTICE PROGRAM

On May 17, 2023, the Court entered an order preliminarily approving the Settlement and approving the proposed forms and methods of providing notice to the Settlement Class (the "Preliminary Approval Order"). Pursuant to and in compliance with the Preliminary Approval Order, through records produced by Fifth Third and information provided by brokerage firms and other nominees, the Court-appointed Claims Administrator KCC, LLC ("KCC") caused, among other things, the Notice and Claim Form (together, the "Notice Packet") to be mailed by first-class mail to potential Settlement Class Members. *See* Declaration of Lance Cavallo Regarding (A) Mailing of Notice and Claim Form; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received to Date, dated August 9, 2023 ("Mailing Decl."), Ex. 2 at ¶¶2-7. A total of 128,110 Notice Packets have been mailed as of August 8, 2023. *Id*. at ¶8. On June 15, 2023, the Summary Notice was published in *The Wall Street Journal* and was disseminated over the internet using *PR Newswire*. *Id*. at ¶9 and Exhibit B attached thereto. The Notice and Claim Form were also posted, for review and easy downloading, on the website established by KCC for purposes of this Settlement. *Id*. at ¶11.

The Notice described, *inter alia*, the claims asserted in the Action, the contentions of the Parties, the course of the litigation, the terms of the Settlement, the maximum amounts that would be sought in attorneys' fees and expenses, the Plan of Allocation, the right to object to the Settlement, and the right to seek to be excluded from the Settlement Class. *See generally* Ex. 2-A. The Notice also gave the deadlines for objecting, seeking exclusion, submitting claims, and advised potential Settlement Class Members of the scheduled Settlement Hearing. *Id*. While the

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deadline for requesting exclusion or objecting to the Settlement has not yet passed, to date there have been no requests for exclusion and no objections to the proposed Settlement or the Plan of Allocation.

ARGUMENT

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

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

"There is strong public policy in favor of settling and avoiding costly and time-consuming litigation." *McCormick v. Adtalem Glob. Educ., Inc*., No. 1-20-1197, 2022 WL 1417513, at *4 (Ill. App. Ct. May 4, 2022); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F. 3d 768, 784 (3d Cir. 1995) ("the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation").[4] Section 2-806 of the Illinois Code of Civil Procedure requires "that any action brought as a class action shall not be compromised or dismissed except with the approval of the court and, unless excused for good cause shown, upon notice as the court may direct." And, "the proponents of a class settlement must show that the compromise is fair, reasonable, and in the best interests of all who will be affected by it, including absent class members." *Lee v. Buth-Na-Bodhaige, Inc*., 2019 IL App (5th) 180033 (Ill. App. Ct. 2019).[5]

"Class action settlements are reviewed on a case-by-case basis, with consideration of several factors …." *Lee*, 2019 IL App (5th) 180033 at 662. These factors include: "(1) the strength

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[4] Illinois courts recognize that the Illinois class action statute is patterned after Rule 23 of the Federal Rules of Civil Procedure, so they rely upon Federal case law as "persuasive authority." *See, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 125 (Ill. 2005); *Mashal v. City of Chicago,* 2012 IL 112341, ¶27 (Ill. 2012).

[5] Internal citations omitted and emphasis is added throughout unless otherwise noted.

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of the case for Plaintiff and the Settlement class on the merits balanced against the money or other relief offered in the settlement; (2) the defendant's 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 a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; (8) the stage of proceedings and amount of discovery completed." *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (Ill App. Ct. 1990).

As set forth below, these factors strongly favor approval of the Settlement.

B. Application of the Factors Supports Final Approval of the Settlement

1. The Strength of Plaintiff's Case in Light of Risks of Continued Litigation Balanced Against the Proposed Recovery

The Settlement creates a total settlement fund of $5,500,000 and will provide a substantial benefit to the Settlement Class, particularly in light of the risks posed by continued litigation. Indeed, "[t]he strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved." *Steinberg v. Sys. Software Assocs., Inc.*, 306 Ill. App. 3d 157, 170 (Ill. App. Ct. 1999).

Based upon their investigation, prosecution, review of discovery produced to date, and mediation of the case, Plaintiff and Lead Counsel have concluded that the terms and conditions of the Settlement are fair, reasonable, and adequate to Plaintiff and the other members of the Settlement Class, and in their best interests. While Plaintiff believes that the claims asserted against Defendants are strong, he recognizes that this Action, like most securities class actions, still presented a number of risks to establishing both liability and damages. *See Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 2001 WL 1568856, at *2 (N.D. Ill. Dec. 10, 2001) (Courts have recognized that "[s]ecurities fraud litigation is long, complex and uncertain"). In entering into the Settlement, Plaintiff and Lead Counsel have taken into account the uncertain

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outcome of the litigation, including in particular the difficulty of proving violations of the federal securities laws alleged in the Complaint as well as the strength of the defenses that Defendants have asserted or could have asserted during the motion for class certification, motion for summary judgment, and trial. These risks and challenges are discussed in detail in the Fatale Declaration at §VI. Defendants have denied and continue to deny any wrongdoing or that they committed any act or omission giving rise to any liability or any violation of law, including the securities laws.

Here, for example, Defendants would have strenuously challenged Plaintiff's allegations that the Registration Statement contained any material omissions or misrepresentations. Defendants deny that they made any false or misleading statements in the Registration Statement. Significantly, Defendants would argue that a federal court has already concluded that the statements in the Registration Statement were not false and misleading and could not serve as a basis for an action under the federal securities laws. ¶¶69-72.

Additionally, Plaintiff and Lead Counsel recognize that Plaintiff's claims hinge on his ability to demonstrate that Fifth Third employees engaged in widespread misconduct by opening unauthorized customer accounts. Defendants would continue to maintain that Fifth Third employees did not engage in widespread misconduct related to cross-selling or the opening of unauthorized accounts with analysis from experts. Defendants would also maintain that, to the extent any Fifth Third employees opened unauthorized accounts, they did so many years ago, in very small numbers, and any customers affected long ago received reimbursement for any fees they paid. ¶¶73-75.

More specifically, since the Action was commenced, Fifth Third has disclosed that to the extent its employees opened any unauthorized accounts, almost all of the potentially authorized accounts were opened prior to 2015. As disclosed through the CFPB Action, Fifth Third hired

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Ernst & Young ("E&Y") in 2020 to conduct a "Red Flag Account Review" of potentially unauthorized accounts. According to Fifth Third's disclosure, E&Y found fewer than 800 potentially unauthorized accounts, with less than $2,600 in total fees associated with those accounts. ¶76.

Further, Defendants have reported publicly that third-party experts examined all accounts opened between 2010 through 2016 and concluded that less than 0.02% of accounts opened between 2010 through 2016 may have been unauthorized. Thus, Defendants would argue that to the extent Fifth Third employees opened unauthorized accounts between 2015 and 2018, the number of accounts improperly opened was immaterial, would in no event have had a material adverse effect on the Company, and undermine the CFPB's allegations. ¶¶78-79.

Defendants would have put forth additional arguments to undermine their alleged liability had the litigation continued, including that: (i) the securities laws do not generally require a company to disclose the existence of a government inquiry or accuse itself of wrongdoing; (ii) Plaintiff may be unable to establish that Fifth Third had an obligation under Regulation S-K to disclose the CFPB investigation at the time of the Registration Statement; and (iii) Plaintiff may be unable to show that a "trend" of unauthorized account openings existed at the time of the Registration Statement, that the Company had knowledge of such a trend, or that the Company reasonably expected the alleged trend to have a material impact on the Company's net sales, revenues or income. ¶¶80-82. Indeed, with respect to the "trend," Defendants would argue that to the extent Plaintiff could prove one even existed, such trend had come to an end by 2015 and would have had no bearing on the Company's continuing operations in 2018. *Id*. Defendants' position could find support in the Court's statements that Plaintiff would be required to show that

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at the time of the Offering Fifth Third was in "material default or violation" of consumer finance laws. ¶73.

Plaintiff would have also confronted challenges with respect to damages and negative causation, including arguments that factors other than the allegedly undisclosed misconduct caused the decline of Fifth Third's share price after the Offering. In seeking to reduce or eliminate the recoverable damages in the Action, Defendants would likely have argued that some or all of the decline in Fifth Third's stock price from the Offering through the commencement of the Action was attributable to unrelated events and information. For example, Defendants would have argued and presented evidence that the COVID-19 pandemic, not the disclosure of the CFPB investigation, caused the alleged decline in Fifth Third's stock price. Defendants would have sought to support this argument with stock price data demonstrating that the price of Fifth Third stock rose immediately after disclosure of the CFPB's investigation and immediately after the filing of the CFPB's civil enforcement action. ¶¶87-88.

With respect to aggregate estimated damages, Plaintiff's consulting damages expert has estimated that if Plaintiff and the class were to prevail in establishing liability at trial, maximum aggregate damages (assuming Defendants were unable to prove any negative causation) would be approximately $287.9 million.[6] The Settlement recovers approximately 2% of these maximum estimated damages. However, Lead Counsel and Plaintiff's consulting damages expert analyzed various possible negative causation arguments, which would undoubtedly have been pressed by Defendants, which, if successful, could have completely eliminated damages.[7] ¶¶87-100.

[6] Fifth Third is a substantial banking institution and neither Plaintiff nor Lead Counsel have a reason to believe it could not pay a judgment in the amount of $287.9 million.

[7] Although loss causation is not an element of Plaintiff's Securities Act claims, the statute provides Defendants with an affirmative defense of negative causation. *See* 15 U.S.C. § 77k(e) ("if the defendant proves that any portion or all of such damages represents other than the

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In order to resolve most of the disputed issues regarding negative causation and damages, the Parties would have had to rely heavily on complex expert testimony. As noted above, though Plaintiff's consulting damages expert estimated maximum class-wide statutory damages of approximately $287.9 million, Defendants and their experts would likely have made several credible arguments that damages should be much lower, if not zero. While Lead Counsel would work extensively with Plaintiff's damages expert with a view towards presenting compelling arguments to the jury and prevailing on these matters at trial, Defendants would have also put forth well-qualified experts of their own showing that any damages Plaintiff could have recovered should be significantly, if not entirely, reduced after disaggregation.

For example, Defendants would have likely marshalled a very strong argument that the loss in stock value was not related to any alleged falsity in the Registration Statement because when the market learned of the CFPB investigation and Fifth Third's internal investigation, the price of Fifth Third's stock increased rather than decreased. When Fifth Third disclosed to investors, on March 2, 2020, that the CFPB had informed the bank that the agency intended to file an enforcement action in relation to alleged unauthorized account openings, Fifth Third's stock price increased by 5.4%. Likewise, after Fifth Third responded to the CFPB action in a press release denying the charges and disclosing the results of its own investigation into alleged

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depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable"); 15 U.S.C. § 77l(b) ("if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable").

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unauthorized account openings, the stock again rose by 5.2% on March 10, 2020. ¶¶91-96. At the same time, the Nation's financial markets were starting to confront the COVID-19 pandemic and between March 2, 2020 and March 10, 2020, inclusive, the Nasdaq (on which Fifth Third is listed) dropped by 2.6%. ¶95. Thus, there was a very significant risk that a jury would agree with Defendants that any decline in Fifth Third's stock price was the result of factors unrelated to the allegedly false and misleading Registration Statement and, even had liability been proven, damages could have been reduced to zero dollars.

Reaching a settlement at this juncture thus avoids these uncertainties, and the challenges involved in overcoming numerous hurdles at the summary judgment phase, trial, and in likely appeals. Moreover, even if Plaintiff were to prevail at all future stages of the litigation, any potential recovery (in the absence of a settlement) would only occur years into the future, substantially delaying payment to the Settlement Class, and only after costly appeals.

Thus, the Settlement Amount of $5,500,000, when viewed in the context of the risks and the uncertainties involved in this Action, favors final approval of the Settlement.

2. Complexity, Length, and Expense of Further Litigation

Final approval is also supported by the complexity, expense, and likely duration of continued litigation. Indeed, "[o]ne of the principal purposes of an early settlement is to avoid costly and lengthy discovery." *GMAC Mortg. Corp. v. Stapleton,* 236 Ill. App. 3d 486, 498 (Ill. App. Ct. 1992). The Settlement will provide relief to the Settlement Class while avoiding potentially years of complex litigation and appeals. *See Goldsmith v. Tech. Sols. Co*., No. 92 C 4374, 1995 WL 17009594, at *4 (N.D. Ill. Oct. 10, 1995) ("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.").

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Defendants have not yet responded to Plaintiff's motion for class certification[8] and the Parties have not yet engaged in class or expert discovery, summary judgment proceedings, or trial – all of which pose significant costs for all involved and years of effort, with a chance of no recovery for Plaintiff and the Settlement Class. The Settlement, however, eliminates all of the risk and provides certain, measurable relief to the Settlement Class now.

3. The Settlement Was Negotiated at Arm's-Length and Without Collusion

The Settlement was negotiated at arm's-length with the assistance of an experienced mediator, Jed D. Melnick, Esq.[9] During the mediation process, the participants submitted confidential mediation statements and participated in mediated settlement negotiations before the Mediator. The Parties participated in an all-day mediation session on August 22, 2022. While the Parties did not reach an agreement to resolve the Action during the session, settlement discussions, facilitated by the Mediator, continued until they reached an agreement in principle to settle the claims, memorialized in a Term Sheet on January 19, 2023, and subject to the negotiation of a formal settlement agreement.

The arm's-length nature of the settlement negotiations, and the involvement of an experienced mediator, support the conclusion that the Settlement was achieved free of collusion, and warrants preliminary approval. *See Shaun Fauley Sabon, Inc. v. Metro Life Ins. Co.,* 2016 IL App 2d 150236 (Ill. App. Ct. 2016) (finding no collusion where the record showed good faith

[8] Although Plaintiff believed a motion for class certification would be meritorious, Defendants would likely contest class certification, and thus it was not a foregone conclusion. *See In re Northfield Labs., Inc. Sec. Litig.*, 267 F.R.D. 536, 549 (N.D. Ill. May 18, 2010) (denying class certification).

[9] *See, e.g.*, *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051(CM) (GWG), 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (discussing and approving settlement with participation of "highly qualified mediator" Jed D. Melnick, Esq.).

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arm's length negotiations); *Mangone v. First USA Bank*, 206 F.R.D. 222, 226 (S.D. Ill. 2001) (a settlement proposal arrived after arm's-length negotiations by fully informed, experienced, and competent counsel may be properly presumed to be fair and adequate).

Moreover, Lead Counsel developed a deep understanding of the facts of the case and merits of the claims through their analysis of, *inter alia*: (i) the investigation conducted prior to filing the Complaint; (ii) extensive briefing on Defendants' motion to dismiss; (iii) documents produced by Defendants and the CFPB; (iv) analysis of Defendants' mediation statement and exhibits; and (v) consultations with an expert in damages and causation. Additionally, Labaton Sucharow is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record. ¶134. Lead Counsel's belief in the fairness and reasonableness of the Settlement supports final approval. *See Wong v. Accretive Health, Inc.*, 773 F.3d 859, 864 (7th Cir. 2014) (counsel accepting mediator's proposal were highly experienced and weighed in favor of affirming district court's approval of securities settlement).

4. Reaction of Settlement Class

The reaction of the class to a proposed settlement is also a factor that should be weighed in considering its fairness and adequacy. *See, e.g.*, *Accretive*, 773 F.3d at 863 (the "amount of opposition to the settlement" and "the reaction of members of the class to the settlement" are also relevant considerations). The Court-appointed Claims Administrator has mailed copies of the Notice Packet to potential Settlement Class Members and their nominees. *See* Ex. 2 at ¶¶2-8. As of August 8, 2023, KCC has mailed 128,110 copies of the Notice Packet. *Id*. at ¶8. On June 15, 2023 the Summary Notice was published in *The Wall Street Journal* and transmitted over the internet using *PR Newswire*. *Id*. at ¶9.

While the deadline set by the Court for Settlement Class Members to object (August 24, 2023) has not yet passed, to date, there have been no objections to the Settlement or Plan of

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Allocation and no requests for exclusion from the Settlement Class. *See Mangone,* 206 F.R.D. at 226-27 (finding "the Settlement was strongly supported by the Class as evidenced by the extremely low percentage of opt outs and objections.").[10]

5. Stage of Litigation and Amount of Discovery Completed

As detailed in the Fatale Declaration, Plaintiff and Lead Counsel have diligently pursued this Action since its inception. Plaintiff filed the Complaint, which was based in large part on an independent investigation of publicly available information, and withstood Defendants' Motion to Dismiss. Plaintiff thereafter filed multiple motions, including a motion to strike and a motion to certify the class, which was pending when the Parties began mediation.

With respect to discovery, Plaintiff served, and Defendants responded to, requests for the production of documents, requests for admissions, and interrogatories. The scope of discovery was highly contentious and, even at early stages of discovery, included a fully litigated motion to compel. As a result of Plaintiff's discovery efforts, Defendants produced over 30,000 pages of documents, which Plaintiff reviewed prior to the Parties reaching the Settlement. This document discovery was further supplemented by documents produced by the CFPB pursuant to Freedom of Information requests. ¶¶44-54. In sum, Plaintiff had a firm understanding of the likelihood of success and the potential recovery at trial at the time the Settlement was entered into.

* * *

For all the foregoing reasons, Plaintiff respectfully requests that the Court finally approve the proposed Settlement and the proposed Plan of Allocation.

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[10] As provided in the Preliminary Approval Order, Plaintiffs will file reply papers no later than September 7, 2023, addressing any objections and any requests for exclusion.

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

The Court previously granted preliminary certification of the Settlement Class for settlement purposes pursuant to Section 2-801, *et seq*. of the Illinois Code of Civil Procedure. *See* Preliminary Approval Order at ¶¶2-4. Nothing has occurred since then to cast doubt on whether the applicable prerequisites of the Illinois Code of Civil Procedure have been met. Accordingly, for all the reasons stated in Plaintiff's Unopposed Motion for (I) Preliminary Approval of Settlement, (II) Certification of the Settlement Class, and (III) Approval of the Notice to the Settlement Class, and Plaintiff's August 10, 2020, Motion to Certify the Class, Plaintiff requests that the Court finally certify the Settlement Class for purposes of carrying out the Settlement, appoint Dr. Steven Fox as Class Representative, appoint Labaton Sucharow as Class Counsel and The Law Office of Michael D. Smith, P.C. as Liaison Counsel.

III. THE PLAN OF ALLOCATION FOR DISTRIBUTING RELIEF TO THE SETTLEMENT CLASS IS FAIR, ADEQUATE, AND REASONABLE AND SHOULD BE APPROVED

At the final Settlement Hearing, the Court will be asked to approve the proposed Plan of Allocation for distributing the proceeds of the Settlement to eligible Claimants. The proposed Plan of Allocation, which is reported in full in the Notice (*see* Ex. 2-A at 10-12), was drafted with the assistance of Plaintiff's consulting damages expert. It is designed to equitably distribute the Settlement proceeds among the members of the Settlement Class who were allegedly injured by Defendants' alleged misrepresentations and who submit valid Claim Forms that are approved for payment. The plan is consistent with the statutory measure of damages under Section 11 of the Securities Act.

As explained in the Fatale Declaration, the Claims Administrator will calculate Claimants' "Recognized Losses" using the transactional information provided by Claimants in their Claim

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Forms, which can be mailed to the Claims Administrator, submitted online using the settlement website, or, for large investors with hundreds of transactions, via e-mail to the Claims Administrator's electronic filing team. Because most securities are held in "street name" by the brokers that buy them on behalf of clients, the Claims Administrator, Plaintiff's Counsel, and Defendants do not have Settlement Class Members' transactional data and a claims process is required. Because the Settlement does not recover 100% of alleged damages, the Claims Administrator will determine each eligible claimant's *pro rata* share of the Net Settlement Fund based upon each claimant's total Recognized Losses. ¶111.

Using the Plan of Allocation, the Claims Administrator will calculate a Recognized Loss Amount for each Claimant based on the information that is listed in the Claim Form and for which adequate documentation is provided. *Id*. Once the Claims Administrator has processed all submitted claims, notified Claimants of deficiencies or ineligibility, processed responses, and made claim determinations, distributions will be made to eligible Claimants in the form of checks and wire transfers. After an initial distribution of the Net Settlement Fund, if there is any balance remaining in the Net Settlement Fund (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of initial distribution, the Claims Administrator will, if feasible and economical, after payment of Notice and Administration Expenses and Taxes, if any, re-distribute the balance among eligible Claimants who have cashed their checks. These re-distributions will be repeated until the balance in the Net Settlement Fund is no longer feasible to distribute. *See* Stipulation at ¶26; Ex. 2-A at ¶71.

Any balance that still remains in the Net Settlement Fund after re-distribution(s) that is not feasible or economical to reallocate, after payment of any outstanding Notice and Administration Expenses or Taxes, will be donated as follows: 50% to the Consumer Federation of America, a

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private, non-profit, non-sectarian 501(c)(3) organization, and 50% to the Legal Aid Society of Metropolitan Family Services, or as otherwise approved by the Court. *Id.*[11]

CONCLUSION

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

DATED: August 10, 2023

Respectfully submitted,

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[11] Consistent with Section 2-807 of the Illinois Code of Civil Procedure, both organizations are well-established 501(c)(3) organizations that have existed for more than three years and have principal purposes of serving the public good and, among other things, promoting the interests of consumers such as members of the Settlement Class. *See generally,* https://www.metrofamily.org/legal-aid-society/about-las/; https://consumerfed.org/for-consumers/. The Legal Aid Society of Metropolitan Family Services is a recipient of funding under the Illinois Equal Justice Act. *See* https://iejf.org/civil-legal-aid-grants/grants-2022/.