SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In re INFINITY Q DIVERSIFIED ALPHA FUND SECURITIES LITIGATION	Index No. 651295/2021
	CLASS ACTION
This Document Relates To: The Consolidated Action.	Part 53: Justice Andrew S. Borrok
DOMINUS MULTIMANAGER FUND, LTD., Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. INFINITY Q CAPITAL MANAGEMENT LLC, et al., Defendants.	Index No. 652906/2022 Part 53: Justice Andrew S. Borrok CLASS ACTION

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

4894-7944-1989.v2

TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT 1

II. FACTUAL AND PROCEDURAL BACKGROUND.....3

III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED 4

A. The Likelihood of Success.....5

B. The Extent of Support from the Parties and the Judgment of Counsel.....7

C. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations 8

D. The Complexity and Nature of the Issues of Law and Fact Support Final Approval of the Settlement 8

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE 9

V. THE CLASS SHOULD BE CERTIFIED.....10

A. The Class Satisfies the Requirements of CPLR §901.....10

B. The Discretionary CPLR §902 Factors Also Support Certification 12

VI. PLAINTIFFS' COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFFS IS FAIR AND REASONABLE 13

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method.....13

B. The Relevant Factors Confirm that the Requested Fee Is Reasonable 14

1. The Risks of Prosecuting the Actions.....15

2. Plaintiffs' Counsel Did Not Have the Benefit of a Prior Judgment.....15

3. Plaintiffs' Counsel and Defense Counsel Are Preeminent Firms in the Securities Class Action Realm.....15

4. The Magnitude and Complexity of the Actions.....16

5. The Amount Recovered 17

6. The Actions' History and Work Done by Plaintiffs' Counsel.....18

Page

7. The Fees Charged to a Victorious Plaintiff....18

C. The Fee Request Is Reasonable Under the Lodestar Method....18

D. Plaintiffs' Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of the Actions....20

E. Service Award to Plaintiffs....20

VII. CONCLUSION....21

TABLE OF AUTHORITIES

Page

CASES

212 Inv. Corp. v. Kaplan,
2008 N.Y. Misc. LEXIS 3348 (Sup. Ct. N.Y. Cnty. May 27, 2008) 9

Blum v. Stenson,
465 U.S. 886 (1984) 14, 18

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

Charles v. Avis Budget Car Rental, LLC,
2017 N.Y. Misc. LEXIS 5082 (Sup. Ct. N.Y. Cnty. Dec. 14, 2017) 13, 14, 21

City of Austin Police Ret. Sys. v. Kinross Gold Corp.,
2015 U.S. Dist. LEXIS 181932 (S.D.N.Y. Oct. 15, 2015) 21

Clemons v. A.C.I. Found., Ltd.,
2017 N.Y. Misc. LEXIS 1788 (Sup. Ct. N.Y. Cnty. May 11, 2017) 18

Denburg v. Parker Chapin Flattau & Klimpl,
82 N.Y.2d 375 (1993) 4

Fernandez v. Hosp.,
2015 N.Y. Misc. LEXIS 2193 (Sup. Ct. N.Y. Cnty. June 20, 2015) 5, 13, 14, 19

Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
93 Misc. 2d 941 (Sup. Ct. N.Y. Cnty. 1978) 12

Hosue v. Calypso St. Barth, Inc.,
2017 WL 4011213 (Sup. Ct. N.Y. Cnty. Sept. 12, 2017) 5, 8, 21

IDT Corp. v. Tyco Grp., S.A.R.L.,
13 N.Y.3d 209 (2009) 4

In re Advanced Battery Techs. Sec. Litig.,
298 F.R.D. 171 (S.D.N.Y. 2014) 9

In re Bayer AG Sec. Litig.,
2008 U.S. Dist. LEXIS 101350 (S.D.N.Y. Dec. 15, 2008) 15

In re BHP Billiton Sec. Litig.,
2019 U.S. Dist. LEXIS 63598 (S.D.N.Y. Apr. 10, 2019),
aff'd sub. nom. City of Birmingham Ret. & Relief Sys. v. Davis,
806 F. App'x 17 (2d Cir. 2020) 19

4894-7944-1989.v2

Page

In re BISYS Sec. Litig.,
2007 U.S. Dist. LEXIS 51087 (S.D.N.Y. July 16, 2007) 19

In re Colt Indus. S'holder Litig.,
155 A.D.2d 154 (1st Dep't 1990),
aff'd, 77 N.Y.2d 185 (1991)....................5

In re Colt Indus. S'holder Litig.,
77 N.Y.2d 185 (1991) 4

In re Flag Telecom Holdings,
2010 U.S. Dist. LEXIS 119702 (S.D.N.Y. Nov. 8, 2010) 20

In re Nortel Networks Corp. Sec. Litig.,
539 F.3d 129 (2d Cir. 2008)....................13

In re Oracle Corp. Sec. Litig.,
2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009),
aff'd, 627 F.3d 376 (9th Cir. 2010) 15

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

In re WorldCom, Inc. Sec. Litig.,
388 F. Supp. 2d 319 (S.D.N.Y. 2005)....................9

Lopez v. Dinex Grp., LLC,
2015 N.Y. Misc. LEXIS 3657 (Sup. Ct. N.Y. Cnty. Oct. 6, 2015) 13, 19, 20, 21

Maley v. Del Glob. Techs. Corp.,
186 F. Supp. 2d 358 (S.D.N.Y. 2002)....................9

Michels v. Phoenix Home Life Mut. Ins. Co.,
1997 N.Y. Misc. LEXIS 171 (Sup. Ct. Albany Cnty. Jan. 3, 1997)....................8

Missouri v. Jenkins,
491 U.S. 274 (1989)....................14

N.Y.C. Coal. to End Lead Poisoning v. Giuliani,
245 A.D.2d 49 (1st Dep't 1997) 12

Ousmane v. City of New York,
2009 N.Y. Misc. LEXIS 574 (Sup. Ct. N.Y. Cnty. Mar. 17, 2009)....................19

Page

Pressner v. Mortgage IT Holdings, Inc.,
2007 N.Y. Misc. LEXIS 4420 (Sup. Ct. N.Y. Cnty. May 29, 2007) 7

Pruitt v. Rockefeller Ctr. Props., Inc.,
167 A.D.2d 14 (1st Dep't 1991) 10, 11

Rosenfeld v. Bear Stearns & Co.,
237 A.D.2d 199 (1st Dep't 1997) 7

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005)..4

STATUTES, RULES AND REGULATIONS

CPLR
§901.. 10-13
§902.. 12-13
§908..5
§909..13

4894-7944-1989.v2

Pursuant to Civil Practice Law and Rules ("CPLR") Article 9, Plaintiffs,[1] on behalf of themselves and the Class, respectfully submit this memorandum of law in support of: (1) final approval of the proposed settlement of up to $48,000,000 (the "Settlement") of the above-captioned actions;[2] (2) approval of the Plan of Allocation (the "POA"); and (3) approval of Plaintiffs' Counsel's motion for an award of attorneys' fees and expenses and an award to Plaintiffs in connection with their representation of the Class.

The terms and parties of the Settlement are set forth in the Amended Stipulation of Settlement (the "Stipulation"), dated September 7, 2022, filed as NYSCEF No. 177.

I. PRELIMINARY STATEMENT

The $48 million Settlement, which includes $45 million in guaranteed cash payments to Class Members with an additional potential $3 million payout, is an outstanding result. It is the product of Plaintiffs' and Plaintiffs' Counsel's vigorous prosecution of the Actions, together with months of arm's-length settlement negotiations, including multiple formal mediation sessions overseen by a nationally-recognized mediator. This result was achieved in the face of considerable legal, practice, and procedural obstacles, such as the ongoing liquidation of the Diversified Fund and the Volatility Fund. It is particularly beneficial to the Class given the many risks of continued

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

[2] The Settlement resolves the claims raised in *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021 and *Dominus Multimanager Fund, Ltd. v. Infinity Q Capital Management LLC, et al.*, Index No. 652906/2022 (together, the "State Action"), as well as in *In re Infinity Q Diversified Alpha Fund and Infinity Q Volatility Alpha Fund Securities Litigation* (formerly known as *Yang v. Trust for Advised Portfolios, et al.*), Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y) (the "Federal Action"). The State Action and the Federal Action are collectively referred to as the "Actions."

litigation, including Defendants' motions to dismiss, Plaintiffs' forthcoming motion for class certification, Defendants' anticipated summary judgment motions following fact and expert discovery, trial, appeals, and potential requests for indemnification. Furthermore, it was imperative to reach an expedited resolution of the Actions in order to allow for the distribution of over $1 billion being maintained by the Funds as reserves, and to avoid further erosion of those reserves and available insurance coverage due to ongoing administration and litigation costs. Kim Aff., ¶¶6-7, 113.

The response from the Class further confirms the fairness of the Settlement. Pursuant to the Order Preliminarily Approving Settlement and Providing Notice ("Preliminary Approval Order"), dated October 17, 2022 (NYSCEF No. 181), over 46,700 copies of the Notice were sent to potential Class Members and nominees beginning on November 7, 2022, and the Summary Notice was published in *The Wall Street Journal* and over *Business Wire* on November 17, 2022. *See* Murray Aff., ¶¶5-12.[3] Although Plaintiffs expect that intervenor Charles Sherck will object and that at least some requests for exclusion have been mailed to the Claims Administrator, to date no objections or requests for exclusion have been received.[4]

Plaintiffs' Counsel also respectfully move this Court for an award of attorneys' fees of one-third of the Settlement's non-contingent cash payment of $45,000,000 (*i.e.*, $15,000,000) and $130,686.39 in litigation expenses that were reasonably and necessarily incurred in prosecuting and resolving the Actions, plus interest. Plaintiffs' Counsel's fee and expense request reflects the

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[3] "Murray Aff." refers to the Affidavit of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date, dated December 22, 2022, submitted herewith.

[4] If any timely objections are subsequently received, Plaintiffs' Counsel will address them in Plaintiffs' reply brief due January 24, 2023.

many significant risks in prosecuting the Actions, as well as the tremendous result achieved in a complex action under time sensitive circumstances. Additionally, each representative Plaintiff seeks an award of $5,000 for the time they spent representing the Class. This request is consistent with plaintiff awards in similar securities class actions. The Notice informed potential Class Members that Plaintiffs' Counsel intended to apply to the Court for an award of attorneys' fees not to exceed one-third of the full Settlement Amount, plus expenses, and awards to each Plaintiff for their efforts in representing the Class. *See* Murray Aff., Ex. A, Notice at 11. To date, there have been no objections to Plaintiffs' Counsel's fee and expense request and requested Plaintiff award, and Plaintiffs' Counsel are actually seeking less than the noticed amount. Plaintiffs' Counsel's request for fees also has the full support of Plaintiffs. *See* Dattani Aff., ¶9, Castiglia Aff., ¶9, Hunter Aff., ¶¶8-9, O'Connor Aff., ¶¶8-9, Rosenstein Aff., ¶¶8-9.[5]

Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement and POA, and grant Plaintiffs' Counsel's requested award of attorneys' fees and expenses and award to Plaintiffs.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Plaintiffs respectfully refer the Court to the accompanying Kim Affirmation for a detailed discussion of the facts and history of the Actions, including the extensive efforts undertaken by Plaintiffs and Plaintiffs' Counsel, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement. Kim Aff., ¶¶20-114.

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[5] "Dattani Aff." refers to the Affidavit of Ravi P. Dattani, dated December 27, 2022; "Castiglia Aff." refers to the Affidavit of Rafael Z. Castiglia, dated December 26, 2022; "Hunter Aff." refers to the Affirmation of Andrea Hunter, dated December 20, 2022; "O'Connor Aff." refers to the Affirmation of Neil O'Connor, dated December 21, 2022; "Rosenstein Aff." refers to the Affirmation of David Rosenstein, dated December 20, 2022, submitted herewith.

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

New York courts strongly favor settlements as a matter of public policy. *See* *IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 213 (2009) ("[s]tipulations of settlement are judicially favored and may not be lightly set aside").[6] The Court of Appeals in *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993), held that "[s]trong policy considerations" favor settlements because "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit." *See also* *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (holding that courts should be "mindful of the strong judicial policy in favor of settlements").

Under New York law, class action settlement approval involves three steps. First, a scheduling order is entered setting forth the procedure for approving the settlement. Second, notice of the proposed settlement and its terms are disseminated to class members. Finally, the Court holds a hearing in which the fairness, adequacy, and reasonableness of the settlement is presented and class members can be heard. *See* *In re Colt Indus. S'holder Litig.*, 77 N.Y.2d 185, 189 (1991).

Plaintiffs have satisfied the first two steps. On October 17, 2022, the Court entered the Preliminary Approval Order. NYSCEF No. 181. Then, pursuant to that Order, Notice was mailed to potential Class Members who could be reasonably located beginning on November 7, 2022. Murray Aff., ¶¶5-11. The third step will be met because a fairness hearing is presently scheduled for January 31, 2023, at 2:00 p.m. before the Court.

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[6] Unless otherwise noted, all emphasis in quotations is added and all internal citations and quotation marks are omitted.

CPLR §908 states that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the [C]ourt." While §908 does not prescribe specific guidelines for evaluating proposed settlements, New York courts focus their inquiry on "the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members." *Hosue v. Calypso St. Barth, Inc.*, 2017 WL 4011213, at *4 (Sup. Ct. N.Y. Cnty. Sept. 12, 2017). Courts have determined fairness, adequacy and reasonableness based on the following factors: (i) the likelihood that plaintiffs will succeed on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of good faith bargaining; and (v) the complexity and nature of the issues of law and fact. *See Fernandez v. Hosp.*, 2015 N.Y. Misc. LEXIS 2193, at *3 (Sup. Ct. N.Y. Cnty. June 20, 2015).

These factors overwhelmingly favor approving the Settlement. Plaintiffs and Plaintiffs' Counsel thoroughly examined the facts and the law applicable to the claims and defenses asserted in the Actions, and weighed the benefits of the immediate Settlement against the risk, delay and cost of further litigation, including the possibility of appeals and indemnification sought by certain defendants. Kim Aff., ¶¶106-114. Plaintiffs respectfully submit that the Settlement is fair, reasonable and adequate, and merits this Court's approval.

A. The Likelihood of Success

The probability of a plaintiff's success on the merits is an important factor in assessing a settlement. *See In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990) ("[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement"), *aff'd*, 77 N.Y.2d 185 (1991); *see also Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *3-*4 (courts must "balance the value of [a proposed] settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation").

4894-7944-1989.v2

The Actions presented several factual and legal obstacles to prevailing on the merits against all Defendants. The claims asserted in the Actions were extensively briefed in connection with Defendants' motions to dismiss in the State Action and related pre-motion letter brief for leave to file a motion to dismiss in the Federal Action. While Plaintiffs were prepared to continue litigating the Actions, surviving Defendants' motions to dismiss was not assured, nor was obtaining class certification or overcoming the very likely future motions for summary judgment by Defendants following the close of fact and expert discovery. Defendants have continuously denied any wrongdoing and are represented by a highly respected defense team. Although Plaintiffs believe they adequately alleged Securities Act, Exchange Act, and common law claims, there would be no recovery if Defendants' continued litigation efforts, including appellate efforts, were successful.

The briefing on the motions to dismiss in *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021, highlight the numerous challenges raised by Defendants, such as, *inter alia*, regarding statement actionability, plaintiff standing, solicitor-seller liability, the scope of Section 11 liability, and control person liability. *See* Kim Aff., ¶¶71, 73, 109. Similarly, Defendants in the Federal Action argued that scienter had not been adequately alleged under the Exchange Act. *See* Moving Defs.' Pre-Mot. Ltr., Case No. 1:21-cv-01047-FB-MMH, ECF 72 (E.D.N.Y Aug. 5, 2022). Furthermore, the issues of causation and damages featured prominently by Defendants at the mediation and would have been central to any motions for summary judgment. For example, Defendants argued that Plaintiffs have not pled actual reliance or an entitlement to a presumption of reliance. *See id.* If accepted, Plaintiffs' damages could effectively be zero for all fraud-based claims.

When balanced with the risks Plaintiffs faced in litigating the Actions, the Settlement presents a very good result for the Class and warrants approval.

B. The Extent of Support from the Parties and the Judgment of Counsel

The support of the parties and the judgment of counsel support granting final approval. *See* *Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199, 199 (1st Dep't 1997).

Plaintiffs and the Class support approval of the Settlement. Dattani Aff., ¶8, Castiglia Aff., ¶8, Hunter Aff., ¶7, O'Connor Aff., ¶7, Rosenstein Aff., ¶7. Although the January 10, 2023 deadline for objections has not yet passed, to date, there have been no objections to any aspect of the Settlement. While intervenor Charles Sherck has stated that he intends to object to the Settlement, we believe his forthcoming objection lacks merit and appears to be a self-interested ploy to maintain his duplicative class proceeding, *Sherck v. U.S. Bancorp Fund Services, LLC*, Case No. 2022cv000846 (Wis. Cir. Ct.). A lack of objections is generally indicative of the class's approval of a proposed settlement. *See* *Pressner v. Mortgage IT Holdings, Inc.*, 2007 N.Y. Misc. LEXIS 4420, at *6 (Sup. Ct. N.Y. Cnty. May 29, 2007) (approving settlement "since there has been no objection to the propose[d] settlement"). Plaintiffs will address the objection of Mr. Sherck and any other objections received in their reply papers.

In addition, based on their extensive investigation, analyses of applicable legal principles, and discovery efforts, Plaintiffs' Counsel had a firm understanding of the strengths and weaknesses of their case. *See, e.g.*, Kim Aff., ¶¶21-60, 97-99, 106-17. Plaintiffs' Counsel reviewed Infinity Q's press releases, SEC filings, analyst reports, media reports, regulatory filings, related proceedings, and other publicly disclosed information regarding Defendants. *Id.*, ¶144. Additionally, Plaintiffs' Counsel drafted and filed detailed complaints, opposed Defendants' numerous motions to dismiss, reviewed over 329,000 documents made available by Defendants, spoke with witnesses, and drafted and negotiated the Settlement papers. *Id.*, ¶¶97-99. Given their thorough prosecution of the case and the benefits provided by the Settlement, Plaintiffs' Counsel have concluded that the Settlement is fair, reasonable and adequate, particularly when contrasted

against the significant risks, costs, and uncertainties of continued litigation. This conclusion supports settlement approval. *See, e.g.*, *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *85 (Sup. Ct. Albany Cnty. Jan. 3, 1997).

C. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations

As discussed in the Kim Affirmation (¶¶74-79, 88, 97-99, 123-125), the Settlement resulted from informed, extensive, arm's-length negotiations, including the submission of lengthy mediation statements and formal mediation sessions on December 17, 2021, December 28, 2021, January 17, 2022, and March 17, 2022, under the direction of an experienced mediator, Robert A. Meyer, Esq. Though a global resolution was not reached on March 17, the parties continued to negotiate and were able to reach an agreement during the following months of discussions. In addition, counsel on both sides are highly experienced and knowledgeable with respect to securities class action litigation. *Id.*, ¶138. There is absolutely no hint of collusion in the resolution of the Actions.

Where, as here, the settlement was negotiated at arm's length between knowledgeable and experienced counsel and overseen by a well-respected mediator, approval is warranted. *See, e.g.*, *Michels*, 1997 N.Y. Misc. LEXIS 171, at *86.

D. The Complexity and Nature of the Issues of Law and Fact Support Final Approval of the Settlement

Securities class actions involve complex issues of law and fact that present considerable risk to plaintiffs. Here, the complexity and risks faced by Plaintiffs were greater than most such cases. *See* §III.A; Kim Aff., ¶¶35-49, 106-114, 127; *Hosue*, 2017 WL 4011213, at *5 (approving settlement because "Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendant"). For example, the Actions involved complex factual issues (*e.g.*, valuation of swaps

when calculating fund NAVs) and complex issues of loss causation and damages (*e.g.*, whether certain declines in value were recoverable) that would require the use of expert testimony and the risks inherent in a "battle of the experts." Plaintiffs also needed to navigate potential Defendant cross-claims and indemnifications, the impact of multiple regulatory proceedings and a special litigation committee, dwindling insurance, retained Fund assets, and ongoing liquidation efforts. There was simply no assurance that even if Plaintiffs survived Defendants' motions to dismiss, Plaintiffs could certify a class, survive summary judgment, or prevail at trial and on appeal. Even then, serious concerns would remain regarding Defendants' ability to pay and the impact of various indemnification agreements amongst Defendants. The Settlement eliminates these substantial risks.

In sum, the Settlement meets all the factors weighed by New York courts in determining whether a settlement is fair, reasonable, and adequate, and should be approved.

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

Under federal precedent, the standard for approval of the POA is the same as the standard for approving settlements, *i.e.*, the POA "'must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)). "When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014). While CPLR Article 9 does not specifically mention plans of allocation, New York courts acknowledge their importance in common fund settlements. *See 212 Inv. Corp. v. Kaplan*, 2008 N.Y. Misc. LEXIS 3348, at *10-*13 (Sup. Ct. N.Y. Cnty. May 27, 2008).

The POA, which is set forth in the Notice, provides a *pro rata* allocation based on the "recognized loss amount" on investments in the Volatility Fund and Diversified Fund, calculated

4894-7944-1989.v2

using a formula that takes into account the different amounts of artificial inflation in the Funds' NAV at different times. For Class Members that purchased or otherwise acquired shares of the Diversified Fund, their claims are subject to a 2.21x multiplier, which reflects the more favorable standards of pleading and proof available to claimants who can assert claims under the Securities Act. This same multiplier as between fraud-based claims and Securities Act claims was approved by a Special Master and a United States District Court after extensive analysis and the review of empirical evidence supporting the relative value of Securities Act claims in *The Police Ret. Sys. of St. Louis v. Granite Constr. Inc., et al.*, Case No. 3:190-cv-04744-WHA (N.D. Cal.). It is a fair method to divide the Net Settlement Fund for distribution based on the claims alleged by Plaintiffs. *See* Kim Aff., ¶¶129-131.

The POA is fair and reasonable and should be approved.

V. THE CLASS SHOULD BE CERTIFIED

This Court preliminarily certified the Class in the Preliminary Approval Order. NYSCEF No. 181. Because the elements of CPLR §§901 and 902 are satisfied, and nothing has changed since the Court entered its Preliminary Approval Order, the Court should grant final certification of the Class.

A. The Class Satisfies the Requirements of CPLR §901

"Appellate courts in this State have repeatedly held that the class action statute should be liberally construed." *Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 21 (1st Dep't 1991). In reversing the trial court's denial of class certification, the court in *Pruitt* held that class certification was "particularly appropriate" in Securities Act cases because "class members have allegedly sustained damages in amounts insufficient to justify individual actions" and "it would be impractical and inefficient for individual class members to prosecute separate actions" given that

millions of shares were issued in the offering. *Id*. *Pruitt* also held that "the class action remedy is frequently utilized" in securities cases. *Id*.

Under CPLR §901, the Court may certify a class if: (1) "the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable"; (2) "there are questions of law or fact common to the class which predominate over any questions affecting only individual members"; (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; (4) "the representative parties will fairly and adequately protect the interests of the class"; and (5) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR §901.

All five prerequisites of CPLR §901 are easily met here and, therefore, the preliminary certification of the Class should be made final. Specifically:

> (1) **Numerosity** is established because Defendants issued thousands of shares in the Funds and the last reported NAVs for each of the Funds exceeded a billion dollars, representing a large investor base. Kim Aff., ¶5. *See Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014) (recognizing that "the legislature contemplated classes involving as few as 18 members").
>
> (2) **Commonality** is demonstrated because all potential Class Members, including Plaintiffs, must prove the same facts to establish Defendants' liability, *i.e.*, that Defendants misstated or omitted material facts in violation of the securities laws. *See Pruitt*, 167 A.D.2d at 21 (finding "common questions of law and fact" where Securities Act claims turned on "the truth or falsity of the prospectus' statements").
>
> (3) **Typicality** is met because Plaintiffs' claims are exactly the same as potential Class Members and require the Court to address the same legal and factual questions. *See id.* at 22 (finding typicality met because "plaintiff's claims are identical to those of the other members of the class since he alleges, as would they, that he purchased the stock on the basis of a false and misleading prospectus").
>
> (4) **Adequacy** is satisfied because each representative Plaintiff: (i) is a member of the Class it seeks to represent and has the same interests and injuries as other Class Members; (ii) maintained an interest in prosecuting the Actions; and (iii) retained experienced counsel with a track record in class actions and has zealously advocated for the Class's interests. *See id.* at 24.

(5) **Superiority** is shown because a class action is a more efficient and fair mechanism for litigating the claims at issue compared to individual litigations. *See* *N.Y.C. Coal. to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 52 (1st Dep't 1997) ("the possibility of multiple lawsuits and inconsistent rulings also weighs in favor of granting class certification").

B. The Discretionary CPLR §902 Factors Also Support Certification

Discretionary CPLR §902 factors include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action.

CPLR §902 consists of "[d]iscretionary factors" that are mostly "implicit in CPLR §901." 1 Weinstein, Korn & Miller, *CPLR Manual*, §7.07(c)(8) (2021); *see also* *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 948 (Sup. Ct. N.Y. Cnty. 1978) (same).

CPLR §902 Factors 1, 2, 4, and 5 relate to commonality, typicality, and superiority, all of which, as described above, are readily satisfied. *See supra* at 11-12. Factor 3 is no longer applicable here because Mr. Sherck, who has brought the only other putative class action raising securities law claims, has now been permitted to intervene in the Actions and participate as an absent class member. *See* NYSCEF No. 199. The Settlement also permits Mr. Sherck and other Class Members to opt-out if they wish to pursue their own claims.

With respect to Factor 4, this Court is a particularly desirable forum for resolving this controversy because of the Commercial Division's expertise in adjudicating business disputes – especially actions involving traded securities. Moreover, the alleged wrongdoing at the core of the Actions occurred in New York County, where the Funds' investment advisor, IQCM, was located. Thus, there is a high desirability to concentrating the claims at issue in this Court.

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For the foregoing reasons, each CPLR §§901 and 902 factor supports granting final certification of the Class.

VI. PLAINTIFFS' COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFFS IS FAIR AND REASONABLE

Plaintiffs' Counsel respectfully request an award of attorneys' fees of one-third of the Settlement's non-contingent cash payment, or $15 million. The Notice apprised potential Class Members that Plaintiffs' Counsel would seek up to one-third of the full Settlement Amount (or $16 million), which is more than Plaintiffs' Counsel is now requesting. Murray Aff., Ex. A, Notice at 11. To date, there have been no objections to this fee request. Additionally, the requested fees have the full support of Plaintiffs. Dattani Aff., ¶9, Castiglia Aff., ¶9, Hunter Aff., ¶¶8-9, O'Connor Aff., ¶¶8-9, Rosenstein Aff., ¶¶8-9. Courts "give serious consideration to negotiated fees" because such arrangements "offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008). For these reasons, and those detailed below, Plaintiffs' Counsel respectfully request that the full amount of the fee request be granted.

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

Pursuant to CPLR §909, Plaintiffs' Counsel respectfully request that the Court award attorneys' fees based on a percentage of the common fund achieved in the Settlement. *See Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *11-*12 (finding that the preferable method for awarding attorneys' fees in a common fund class action settlement is the percentage method); *Lopez v. Dinex Grp., LLC*, 2015 N.Y. Misc. LEXIS 3657, at *14-*15 (Sup. Ct. N.Y. Cnty. Oct. 6, 2015) (same); *Charles v. Avis Budget Car Rental, LLC*, 2017 N.Y. Misc. LEXIS 5082, at *10-*11 (Sup. Ct. N.Y. Cnty. Dec. 14, 2017) (same).

The Supreme Court recognizes that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-class action, the customary fee arrangement would be contingent and in the range of one-third of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 n.* (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers.").

The requested fee is reasonable and squarely within the range of percentage fees awarded within the Manhattan Supreme Court and New York federal courts in comparable class action cases. *See, e.g.*, *In re DouYu Int'l Holdings Ltd. Sec. Litig.*, No. 651703/2020, NYSCEF No. 217 (Sup. Ct. N.Y. Cnty. Dec. 1, 2022) (awarding one-third fee, plus expenses); *In re Altice USA, Inc. Sec. Litig.*, Index No. 711788/2018, NYSCEF No. 161 (Sup. Ct. Queens Cnty. Feb. 28, 2022) (same); *In re SciPlay Corp. Sec. Litig.*, Index No. 655984/2019, NYSCEF No. 152 (Sup. Ct. N.Y. Cnty. Nov. 17, 2021) (same); *In re EverQuote, Inc. Sec. Litig.*, Index No. 651177/2019, NYSCEF No. 132 (Sup. Ct. N.Y. Cnty. June 11, 2020) (same); *Charles*, 2017 N.Y. Misc. LEXIS 5082, at *12-*13 (same).

B. The Relevant Factors Confirm that the Requested Fee Is Reasonable

In determining the award of attorneys' fees, New York courts consider the following factors: (i) the risks of the litigation; (ii) whether counsel had the benefit of a prior judgment; (iii) the standing at bar of counsel for the plaintiffs and defendants; (iv) the magnitude and complexity of the litigation and responsibility undertaken; (v) the amount recovered; (vi) the knowledge the Court has of the case's history and the work done by counsel prior to trial; and (vii) what would be reasonable for counsel to charge a victorious plaintiff. *See, e.g.*, *Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *14-*15. Each of these factors support fee approval.

1. The Risks of Prosecuting the Actions

It is widely recognized that "shareholder actions are notoriously complex and difficult to prove." *See In re Bayer AG Sec. Litig.*, 2008 U.S. Dist. LEXIS 101350, at *11 (S.D.N.Y. Dec. 15, 2008). As detailed above, the Actions were no exception because they involved complex issues of law and fact that presented considerable risk to Plaintiffs' case, which was being litigated on a fully contingent basis by Plaintiffs' Counsel. *See supra* at §III.A. and Kim Aff., ¶¶106-113, 134-136. In the face of these risks, which include the ongoing liquidation of the Funds, Plaintiffs' Counsel secured an exceptional and expeditious result for the Class without any assurance of being compensated for their time and expenses.[7] Accordingly, the significant risks of litigation weigh in favor of fee approval.

2. Plaintiffs' Counsel Did Not Have the Benefit of a Prior Judgment

While Plaintiffs' Counsel recognize that certain regulatory enforcement and criminal proceedings have been brought in relation to the facts of the Actions, those cases were all filed after the Actions commenced and, to the extent resolutions have been reached, those resolutions happened after the Settlement was achieved. Thus, this factor supports the requested fees.

3. Plaintiffs' Counsel and Defense Counsel Are Preeminent Firms in the Securities Class Action Realm

Lead Plaintiffs' Counsel, which includes Robbins Geller, Scott+Scott and The Rosen Law Firm among others, are all deemed to be highly skilled law firms in the securities class action bar. *See* accompanying Affirmation of Daryl F. Scott Filed on Behalf of Scott+Scott Attorneys at Law

[7] Indeed, success in complex contingent litigation like the Actions is not assured. *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, 2009 U.S. Dist. LEXIS 50995 (N.D. Cal. June 16, 2009) (court granted summary judgment for defendants after eight years of litigation, after plaintiffs' counsel incurred over $7 million in expenses, and worked over 100,000 hours, representing a lodestar of $40 million), *aff'd*, 627 F.3d 376 (9th Cir. 2010).

LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Scott+Scott Aff."), ¶7; Affidavit of Eric I. Niehaus Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("RGRD Aff."), ¶8; Affirmation of Phillip Kim on Behalf of The Rosen Firm, P.A., in Support of Application for Award of Attorneys' Fees and Expenses ("Rosen Aff."), ¶7; Affirmation of Michael E. Criden on Behalf of Criden & Love, P.A., in Support of Application for Award of Attorneys' Fees and Expenses ("Criden & Love Aff."), ¶7. Nonetheless, Plaintiffs' Counsel submit that the quality of their representation is best evidenced by the result achieved. The Settlement is attributable to the diligence, determination, hard work, and reputation of counsel, who developed, litigated, and successfully resolved the Actions to obtain a substantial cash recovery.

Defendants are also represented by lawyers from well-regarded law firms in the securities bar, Morgan, Lewis & Bockius LLP, Faegre Drinker Biddle & Reath LLP, Vedder Price P.C., Duane Morris LLP, and Davis Wright Tremaine LLP, who presented a very skilled defense and spared no effort or expense in representing their clients. Notwithstanding this formidable opposition, Plaintiffs' Counsel's ability to present a strong case and their willingness to vigorously prosecute the Actions through trial and the inevitable appeals enabled them to achieve the very favorable result for the Class. Thus, this factor supports the requested fees.

4. The Magnitude and Complexity of the Actions

As explained above, the Actions raised a number of complex factual issues and questions concerning, *inter alia*, liability and damages. *See supra* at §III.A. and Kim Aff., ¶¶71, 73, 106-113, 140. The Actions involved an alleged sophisticated scheme to artificially inflate the NAVs of two investment funds, resulting in hundreds of millions of dollars in investor losses. The magnitude and complexity of the Actions support the fee request.

5. The Amount Recovered

Perhaps the most important factor in determining a reasonable fee amount is the result obtained. At the end of the day this is what Plaintiffs and the Class care most about. They would gladly pay more for a great result than less for a bad result.

The $48 million Settlement is a great result for the Class. The Settlement represents at least 4.6% of the maximum recoverable damages based on an aggressive loss causation and damages analysis including strict liability ***and*** securities fraud claims for both Funds, and approximately 10% of maximum recoverable damages based on the analysis of just the strict liability mutual fund claims. This range of recovery (roughly 5% to 10% or greater) is truly significant and multiples above the 1.8% median percentage recovery in securities class action settlements in 2021 according to NERA. Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* (NERA Economic Consulting Jan. 25, 2022), 24 at Figure 22. The substantial recovery further supports the fee request.

Moreover, the Settlement Fund of up to $48 million is an excellent recovery in light of the reality that both the Diversified Fund and the Volatility Fund are currently in liquidation, significantly limiting available assets that could be used to fund a settlement. For example, on November 23, 2022, the SEC with consent of the Diversified Fund, filed a motion in the District Court for the Southern District of New York to appoint an independent special master to wind down the Diversified Fund and distribute its remaining assets. Kim Aff., ¶9. It is also significantly more than the amount recovered in many other comparable cases involving investment fund collapses. *See, e.g.*, *Emerson, et al. v. Mutual Fund Series Trust, et al.*, No. 2:17-cv-02565-SJF-SIL (E.D.N.Y) ($3.325 million); *Sokolow v. LJM Funds Mgmt., Ltd., et al.*, No. 1:18-cv-01039 (N.D. Ill.) ($12.85 million); *In re Third Avenue Mgmt. LLC Sec. Litig.*, No. 1:16-cv-02758-PKC (S.D.N.Y.) ($14.25 million).

6. The Actions' History and Work Done by Plaintiffs' Counsel

A detailed description of the procedural history of the Actions and Plaintiffs' Counsel's prosecutorial efforts (including investigation, key pleadings, discovery, motions, mediation, and settlement negotiations) is set forth in the accompanying Kim Affirmation. For the sake of brevity, the Court is respectfully referred to that affirmation, which demonstrates that Plaintiffs' Counsel's time and effort invested in litigating the Actions was substantial. Kim Aff., ¶¶61-99. Thus, this factor supports the fee request.

7. The Fees Charged to a Victorious Plaintiff

As discussed above, courts recognize that the typical fee arrangement in non-class cases is one-third of any recovery. *See* *Blum*, 465 U.S. at 903 n.* (discussing standard one-third recovery in tort suits). In addition, several courts within the Manhattan Supreme Court and New York federal district court have awarded a one-third fee in similar securities class actions. *See* §VI.A. above. Because the requested fee comports with such arrangements, this factor supports the fee request.

C. The Fee Request Is Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, New York courts may cross-check the proposed award against counsel's lodestar. *See, e.g.*, *Clemons v. A.C.I. Found., Ltd.*, 2017 N.Y. Misc. LEXIS 1788, at *11 (Sup. Ct. N.Y. Cnty. May 11, 2017) ("[a]pplying the lodestar method as a comparison"). Under the lodestar method, "the court scrutinizes the hours billed in the case and multiplies that amount by a reasonable hourly rate. Upon determining the lodestar amount, the court may, in its discretion and under specific circumstances, increase the lodestar amount by applying a multiplier based on certain more subjective factors, such as the difficulty of the case, the risk of success and the quality of

representation." *Ousmane v. City of New York*, 2009 N.Y. Misc. LEXIS 574, at *24-*25 (Sup. Ct. N.Y. Cnty. Mar. 17, 2009).

Plaintiffs' Counsel's fee request is reasonable under the lodestar method. Plaintiffs' Counsel have spent, in the aggregate, 8,696.75 hours in prosecuting the Actions, producing a total lodestar amount of $6,189,188.75 when multiplied by Plaintiffs' Counsel's 2022 billing rates. *See* Scott+Scott Aff., ¶4; RGRD Aff., ¶4; Rosen Aff., ¶4; Criden & Love Aff., ¶4.[8] The amount of attorneys' fees requested by Plaintiffs' Counsel herein, $15 million, represents a modest multiplier of 2.42x to Plaintiffs' Counsel's aggregate lodestar.

The 2.42x multiplier is well within (if not below) the range of multipliers commonly awarded in class actions in New York state and federal courts. *See, e.g.*, *Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *14 (awarding fees representing a 2.5 multiplier);[9] *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *19 (awarding fees representing a 3.15 multiplier); *In re BHP Billiton Sec. Litig.*, 2019 U.S. Dist. LEXIS 63598, at *3-*5 (S.D.N.Y. Apr. 10, 2019) (awarding fees representing a 2.7 multiplier), *aff'd sub. nom. City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App'x 17 (2d Cir. 2020); *In re BISYS Sec. Litig.*, 2007 U.S. Dist. LEXIS 51087, at *9-*11 (S.D.N.Y. July 16, 2007) (awarding fees representing a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *In re Telik, Inc. Sec. Litig.*, 576

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[8] In determining whether counsel rates are reasonable, the Court should take into account the attorneys' professional reputation, experience, and status. Here, Plaintiffs' Counsel are experienced securities practitioners with track records of success. *See, e.g.*, Robbins Geller Aff. Therefore, Plaintiffs' Counsel's hourly rates are reasonable here. *See* Hr'g Tr. at 160:22-24, *In re Am. Realty Cap. Props., Inc. Litig.*, No. 15-MC-40(AKH) (S.D.N.Y. Jan. 23, 2019) ("I find your lodestar reasonable, the rates appropriate and, in relationship to the work that you did, reasonable.").

[9] As recognized in *Fernandez*, lead counsel's multiplier is slightly overstated because it does not account for "time that they will be required to spend administering the settlement going forward." *Id.* at *15.

F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[i]n contingent litigation, lodestar multiples of over 4 are routinely awarded").

Plaintiffs' Counsel invested substantial time and effort prosecuting the Actions to a successful completion. The requested fee, therefore, is reasonable whether calculated as a percentage-of-the-fund or under the lodestar method.

D. Plaintiffs' Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of the Actions

Plaintiffs' Counsel also respectfully request an award of $130,686.39 in expenses incurred while prosecuting the Actions. Plaintiffs' Counsel have submitted affirmations regarding these expenses, which include, among other things, the costs of hiring investigators and a damages consultant and mediating the Class's claims – all of which were critical to Plaintiffs' success in achieving the Settlement. *See* Scott+Scott Aff., ¶¶5-6; Robbins Geller Aff., ¶¶5-7; Rosen Aff., ¶¶5-6; Criden & Love Aff., ¶¶5-6. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *In re Flag Telecom Holdings*, 2010 U.S. Dist. LEXIS 119702, at *86 (S.D.N.Y. Nov. 8, 2010); *see also* *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *20 ("Courts typically allow counsel to recover their reasonable out-of-pocket expenses."). Accordingly, Plaintiffs' Counsel respectfully request $130,686.39 in expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund.

E. Service Award to Plaintiffs

Each representative Plaintiff also respectfully requests an award of $5,000 for the significant time it spent representing the Class. As set forth in the respective Plaintiffs' affidavits/affirmations, each Plaintiff took their fiduciary role as a plaintiff seriously by, *inter alia*, reviewing pleadings and briefs in the Actions, regularly communicating with Plaintiffs' Counsel,

searching for and providing to Plaintiffs' Counsel documents related to the Actions, monitoring the progress of settlement negotiations, and approving the Settlement. *See* Dattani Aff., ¶¶5-7; Castiglia Aff., ¶¶5-7, Hunter Aff., ¶¶4-6, O'Connor Aff., ¶¶4-6, Rosenstein Aff., ¶¶4-6. As a result of these efforts, Plaintiffs were able to file detailed pleadings in the Actions and perform the necessary investigation of claims to achieve a successful resolution.

The requested service award is within the range of such awards granted by New York courts. *See, e.g.*, *Charles*, 2017 N.Y. Misc. LEXIS 5082, at *5-*7 (awarding $10,000 service award); *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *6-*10 (awarding $20,000 service award); *Hosue*, 2017 WL 4011213, at *6-*8 (awarding $5,000 service award); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 U.S. Dist. LEXIS 181932, at *14 (S.D.N.Y. Oct. 15, 2015) (awarding $16,800 to several plaintiffs "to compensate them for their reasonable costs and expenses directly relating to their representation of the Class"). Thus, an award of $5,000 to each Plaintiff is appropriate.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the proposed Judgment and Order Granting Final Approval of Class Action Settlement, which will be submitted with Plaintiffs' Counsel's reply submission on January 24, 2023, thereby approving the Settlement and the POA, and awarding attorneys' fees of one-third of the non-contingent $45,000,000 recovery, plus expenses in the amount of $130,686.39, plus interest, and an award of $5,000 to each representative Plaintiff.

DATED: December 27, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

1. Pursuant to 22 N.Y.C.R.R. §202.70(g), Rule 17, the undersigned counsel certifies that the foregoing memorandum of law was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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2. The total number of words in the memorandum of law, inclusive of point headings and footnotes and exclusive of the caption, signature block, and this Certification, is 6,661 words.

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