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

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

I, PHILLIP KIM, an attorney duly admitted to practice before the courts of the State of New York, affirm the following to be true under penalty of perjury:

1. I am a member of the Bar of the State of New York and a partner of The Rosen Law Firm, P.A., Co-Lead Counsel in the consolidated action, *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021. I am familiar with the proceedings in the Litigation[1] and have personal knowledge of the matters set forth herein based upon my firm's and my own participation in the Actions. If called as a witness, I could and would testify competently thereto.

2. I submit this affirmation pursuant to CPLR Article 9 in support of the accompanying 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. The purpose of this affirmation is to set forth the reasons Plaintiffs and Plaintiffs' Counsel believe: (i) the Settlement is fair, reasonable, and adequate and should be approved by this Court; (ii) the proposed Plan of Allocation is fair and reasonable and should be approved; and (iii) the requested attorneys' fees and expenses and service award to Plaintiffs should be granted.

I. INTRODUCTION

3. After nearly two years of hard-fought litigation and mediation, Plaintiffs and Plaintiffs' Counsel have succeeded in obtaining a substantial recovery for the Class of up to

[1] All capitalized terms not otherwise defined shall have the meanings ascribed to them in Section 1 of the Amended Stipulation of Settlement, dated September 7, 2022, filed as NYSCEF Doc. No. 177. As explained below, the Settlement resolves the claims raised in this consolidated action, *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021, and the related action, *Dominus Multimanager Fund, Ltd. v. Infinity Q Capital Management LLC, et al.*, Index No. 652906/2022 (together, the "State Action"), as well as the claims raised 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," and, together with the State Action, the "Actions").

$48,000,000 in cash, which consists of $45,000,000 in guaranteed cash and an additional right to receive some or all of $3,000,000 in insurance proceeds from certain Defendants.[2] A $48,000,000 cash recovery is outstanding on its own, but the top-line amount does not tell the whole story.

4. As explained herein and in the accompanying memorandum of law, this case follows the collapse of the Infinity Q Diversified Alpha Fund ("Diversified Fund"), a mutual fund, and the related Volatility Fund, a hedge fund (the "Volatility Fund" and, together with the Diversified Fund, the "Funds"). The Funds halted trading in February 2021, after it was publicly revealed that the Chief Investment Officer (Defendant Velissaris) for the investment advisor to the Funds had been secretly mismarking the Funds' investments in a third-party valuation tool that the Funds used to calculate the values of certain investments. This brazen and complex fraud significantly, but artificially, inflated asset valuations.

5. On February 18, 2021, the last day on which the Diversified Fund calculated a net asset value ("NAV"), the Diversified Fund's stated NAV was $1.727 billion. The Diversified Fund's assets were thereafter liquidated, and, it was revealed that the Fund held a total of approximately $1.249 billion in cash or cash equivalents as of March 25, 2021, which was about ***$500 million*** less than the NAV calculated just a few weeks before. The liquidation of the Volatility Fund similarly concluded that the hedge fund's assets as of October 31, 2021, were over $500 million less than previously reported. Thus, in total, Velissaris' surreptitious over-valuations

[2] As detailed in paragraph 2.2 of the September 7, 2022, Stipulation of Settlement and explained on page 7 of the Notice, EisnerAmper has already paid $16,750,000 to fund the Settlement and will pay an additional $5,250,000 into the settlement unless that money is paid to resolve claims asserted against EisnerAmper by the Diversified Fund, the Diversified Fund's Special Litigation Committee, and/or the Volatility Fund. Consequently, this $5,250,000 is expected to go to the Class, either as part of this Settlement or as distributions directly from the Funds.

of the Funds' assets artificially inflated the total value of the two funds by over $1 billion, which effectively disappeared virtually overnight when the fraud was uncovered.

6. After the fraud was revealed, the Funds liquidated. The remaining assets are available (i) to cover the Funds' liabilities (including legal claims from investors related to the fraud); and (ii) returning to investors what money remained after those liabilities were satisfied. Importantly, the Funds have interlocking and overlapping indemnification agreements with the Defendants in the Actions. Consequently, the Funds must retain their reserves until such time that significant claims against the indemnified Defendants are substantially resolved. This global settlement accomplishes that resolution as to shareholder claims and, therefore, should pave the way for the Funds to return a significant amount of their remaining assets to investors. The Diversified Fund initially set aside a reserve of about $750 million, the vast majority of which, ***according to the Diversified Fund itself***, is to cover the securities claims brought in this Litigation. While the Diversified Fund has made two, interim distributions to investors over the past two years, as of November 30, 2022, there is still over $560 million sitting in reserve pending the resolution of this case. A similar reserve has been taken by the Volatility Fund resulting in hundreds of millions of dollars remaining in the Volatility Fund following liquidation that had not been distributed to investors, which as of October 31, 2021, totaled over $650 million.

7. This holdback in both Funds, in addition to the ongoing erosion of remaining insurance proceeds from ongoing litigation and the depletion of assets through the continued administration of the Funds, made an expeditious resolution of investor claims imperative. The settlement achieved in these actions will pave the way for the release of nearly $1 billion of remaining investor funds held in reserve by the Funds. The cash Settlement Fund of up to $48 million that Plaintiffs are asking the Court to finally approve is ***in addition*** to these funds.

Resolving the Actions quickly, was of paramount importance to Plaintiffs and Plaintiffs' Counsel because prolonged litigation would both tie up investors' remaining money in the Funds, potentially for years, and legal fees and litigation costs would deplete the Fund's remaining assets and reduce Defendants' insurance proceeds, which are now being devoted to this Settlement instead. The Settlement is a resounding success because Plaintiffs and their Counsel were able to dramatically and efficiently increase the amount of money the Class will be able to recover while at the same time preserving the Funds' assets and Defendants' insurance for payment to investors, rather than on litigation and legal fees.

8. Even standing on its own, a settlement amount of up to $48 million is well-above the average settlement amount across all securities actions during the period 2017 to 2021. *See* J. McIntosh & S. Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review*, NERA ECON. CONSULTING, at 18 (Jan. 25, 2022), https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf.[3] Further, assuming that the total $1 billion decline in net asset value of the Funds would be recoverable as damages (which is not guaranteed, for example, because investors may not be able to recover the appreciation in fund assets), the Settlement represents around a 4.6% recovery for investors, which is a recovery percentage over three-and-a-half times more than the 1.3% average for cases where investor losses suffered similar losses. *Id*. at 23.

9. Moreover, the Settlement Fund of up to $48 million is an excellent recovery, in light of the reality that the Funds are currently in liquidation. For example, on November 23, 2022,

[3] NERA's calculation of the average settlement amount excludes so-called "outlier" or "mega" settlements of over $1 billion, which are atypical of securities litigation. *Id.* Even when these outliers are included in the data, the maximum settlement amount here is still above average for four out of the last five years analyzed by NERA. *Id.* at 17.

the U.S. Securities and Exchange Commission ("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 winddown the Diversified Fund and distribute its remaining assets.

10. Importantly, at the time the Settlement was reached, Plaintiffs and their Counsel had a clear understanding of the strengths and weaknesses of their claims, as well as the defenses thereto.

11. After seven motions to dismiss had been fully briefed, the Settlement was accomplished through hard-fought and extensive arm's-length settlement discussions facilitated by a highly skilled and experienced mediator, Robert A. Meyer, Esq., of JAMS. After exchanging mediation statements, the parties to the Actions participated in four days of mediation. The Parties did not reach agreement at these mediation sessions, but continued to work with the mediator for several months thereafter and exchanged several more mediation communications. Finally, their efforts bore fruit and the Parties were able to reach first a partial, and then a global, proposed Settlement.

12. The Federal Government's civil and criminal enforcement proceedings, coupled with Plaintiffs' extensive confirmatory discovery, have further clarified the facts of this case.

13. The Settlement has the full support of Plaintiffs. Hunter Aff., ¶7; Rosenstein Aff., ¶7; O'Connor Aff., ¶7; Dattani Aff., ¶8; Castiglia Aff., ¶8.[4]

[4] The "Hunter Aff." refers to the Affirmation of Andrea Hunter in Support of Motions for: (1) Final Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award. The "Rosenstein Aff." refers to the Affirmation of David Rosenstein in Support of Motions for: (1) Final Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award. The "O'Connor Aff." refers to the Affirmation of Neil O'Connor in Support of Motions for: (1) Final Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award. The "Dattani Aff." refers to the Affidavit of Ravi P. Dattani in Support of Motions for: (1) Final

14. Pursuant to the Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), dated October 17, 2022 (NYSCEF No. 182), the Notice and the Proof of Claim form (the "Notice Packet") were mailed to potential Class Members who could be identified with reasonable effort; the Notice Packet was posted on the Internet at http://www.infinityqsecuritiessettlement.com; and the Summary Notice was published over a national newswire service. *See* Affidavit of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Aff."), submitted herewith. In addition, the Diversified Fund included on its website for investors (at https://www.infinityqfundliquidation.com/) that the proposed Settlement was before the Court and provided a link to the Plaintiffs' site at http://www.infinityqsecuritiessettlement.com, where shareholders could access the Notice Packet and additional information.

15. The Court-ordered deadline for filing objections to the Settlement or requesting exclusion from the Class is January 10, 2023. While, to date, no objections to any aspect of the Settlement have been filed by Class Members, Plaintiffs' Counsel believes that intervenor, Charles Sherck, is likely to object to the settlement in a self-interested effort to maintain the viability of his separately filed putative class action, *Sherck v. U.S. Bancorp Fund Services, LLC*, Case No. 2022cv000846 (Wis. Cir. Ct.).[5] As of December 22, 2022, the Claims Administrator had not

Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award. The "Castiglia Aff." Refers to the Affirmation of Rafael Z. Castiglia in Support of Motions for: (1) Final Settlement Approval; (2) Attorneys' Fees and Payment of Litigation Expenses; and (3) Plaintiff's Service Award.

[5] Plaintiffs' Counsel is also concerned that counsel for Mr. Sherck has been attempting to induce objections to the Settlement by conveying false and misleading information about the Settlement and the litigation to Class Members. Plaintiffs will address any objection(s) and/or request(s) for exclusion in their Reply Brief in Support of Final Approval of the Settlement to be filed by January 24, 2023.

received any request for exclusion from the Settlement, but Plaintiffs' Counsel believes at least some such requests have been mailed to the Claims Administrator.

16. For all of the reasons set forth herein, and in light of the excellent result obtained, notwithstanding the significant risks of the litigation detailed below, Plaintiffs and Plaintiffs' Counsel respectfully submit that the proposed Settlement is fair, reasonable, and adequate in all respects and that the Court should grant final approval.

17. In addition to seeking final approval of the Settlement, Plaintiffs also seek approval of the proposed Plan of Allocation, which is consistent with allocation plans that courts have approved in similar cases. The Plan of Allocation provides for the fair and equitable distribution of the Net Settlement Fund to Class Members who submit valid Claim Forms and, therefore, is fair and reasonable.

18. Plaintiffs' Counsel seeks an award of attorneys' fees. As detailed in the Settlement and Notice, the Settlement Amount consists of up to $45,000,000 in guaranteed cash and a further right for the Class to receive up to an additional $3,000,000 from the IQCM Parties in proceeds from an insurance policy that is currently the subject of ongoing litigation. Plaintiffs' Counsel seeks an award of 33 and 1/3% of the $45,000,000, and payment of their litigation expenses for costs necessary to prosecute the Actions totaling $130,686.39, with interest on both amounts earned at the same rate earned on the Settlement Fund. Plaintiffs' Counsel is not seeking any award of fees from the additional $3,000,000 the Class may ultimately recover from the IQCM Parties' currently disputed insurance, even though this amount may materially benefit Class Members. *See* accompanying Affirmation of Daryl F. Scott Filed on Behalf of Scott+Scott Attorneys at Law LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Scott+Scott Aff."), ¶¶5-6; 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."), ¶¶5-6; 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."), ¶¶5-7; 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."), ¶¶5-6. As discussed below, Plaintiffs' Counsel's requested fees amount to a modest 2.42x multiple of Plaintiffs' Counsel's "lodestar" (*i.e.*, Plaintiffs' Counsel's hourly rates multiplied by the hours spent on prosecuting and settling the Actions). *See* Scott+Scott Aff., ¶4; Rosen Aff., ¶4; RGRD Aff., ¶4; Criden & Love Aff., ¶4. Plaintiffs' Counsel respectfully submit that the requested fee is fair and reasonable given the excellent result obtained here and the extensive work performed by Plaintiffs' Counsel. As set forth in the accompanying Memorandum, it is also consistent with awards in similar securities class action cases under both the percentage and lodestar methodologies. Memorandum of Law in Support of Motion for Final Approval of Settlement and Plan of Allocation, and Award of Attorneys' Fees and Expenses to Plaintiff's Counsel and Service Award to Plaintiffs ("Memo."), §§VI.A-VI.C. Again, Plaintiffs support this request. Hunter Aff., ¶8-9; Rosenstein Aff., ¶8-9; O'Connor Aff., ¶8-9; Dattani Aff., ¶9-10; Castiglia Aff., ¶9-10.

19. In addition, Plaintiffs' Counsel request an award of $5,000 for each Plaintiff for their time representing and serving the best interests of the Class, an amount within the range typically granted to plaintiffs in securities and other similar class actions. Memo., §VI.E.

II. BACKGROUND

20. The Litigation consists of State and Federal actions that follow from the collapse of the Diversified Fund and the related Volatility Fund.

A. The Launch and Growth of the Funds

21. The Diversified Fund launched in 2014, and held itself out as a hedge fund for the masses. Its website proclaimed: "Innovative Hedge Fund Strategies – Providing innovative hedge fund strategies to institutional and retail investors." ¶4.[6]

22. The Diversified Fund, like all mutual funds, is registered as an investment company under the Investment Company Act of 1940. It offers securities to the public, which are registered under the Securities Act. ¶49.

23. The Investment Company Act of 1940 requires mutual fund advisors to file periodic reports with the SEC, provide certain disclosures to mutual fund investors, act in the best interest of their clients, and implement strict risk management and other internal controls. ¶50.

24. The SEC also requires that all mutual funds price their shares daily at NAV, which is calculated by dividing the total value of the cash and securities in a fund, less any liabilities, by the number of shares outstanding. The daily calculation of NAV is critical to market confidence and necessary for the market to value the shares of any mutual fund. ¶51.

25. Absent an order from the SEC halting trading in a mutual fund, mutual fund investors must be able to freely redeem their shares. ¶52.

26. In order to ensure that mutual funds remain liquid and able to satisfy redemption requests from shareholders, the SEC imposes various restrictions on the investments, liquidity, risk, and leverage that are available to mutual funds. ¶53. The reason for the SEC's extensive

[6] All citations to "¶_" are to paragraphs of the Consolidated Amended Complaint for Violations of the Securities Act of 1933, NYSCEF Doc. No. 139, as well as to the proposed amendment thereto, filed as NYSCEF Doc. No. 156, which is identical but for the addition of the lead plaintiff in the Federal Action. *See* NYSCEF Doc. No. 157 (redline). Citations to "Fed. Compl., ¶_" are to paragraphs of the Consolidated Complaint for Violations of the Federal Securities Laws, filed in the Federal Action on June 6, 2022. *See* Case No. 1:21-cv-01047 (E.D.N.Y. June 6, 2022), Doc. No. 67.

regulation of mutual funds under the Investment Company Act of 1940 is that funds are marketed to retail investors. ¶54.

27. Starting in February 2017, Infinity Q also offered the Volatility Fund as a private hedge fund that employed the same trading strategies and techniques. ¶¶31, 70, 94. Through exposure to these strategies, the Volatility Fund attempted to generate positive absolute returns over time in both positive and negative environments for equities, fixed income, and credit markets. Fed. Compl., ¶54.

28. The allure of both the Diversified Fund and the Volatility Fund came from the close connections between their shared investment advisor, Infinity Q Capital Management, LLC (Infinity Q), the veteran private equity billionaire, David Bonderman, and Mr. Bonderman's "family office," Wildcat Capital Management, LLC ("Wildcat"). ¶¶5, 31

29. Bloomberg, for example, published an article in 2015 entitled: "Private Equity Billionaire Is Now Selling a Hedge Fund for the Masses." The article stated:

> ***David Bonderman amassed a $3 billion fortune in private equity for sophisticated investors. He's now selling hedge fund strategies to the masses.***
>
> Bonderman, whose TPG Capital has owned companies such as Continental Airlines and retailer J Crew Group Inc., is using a family office that manages a portion of his money – Wildcat Capital Management – to back a startup investment business. ***Infinity Q Capital Management is offering retail and other investors a version of the hedge fund programs it uses for the billionaire, said James Velissaris, chief investment officer for the new firm.***
>
> ***Run by Wildcat employees, Infinity Q can sell products such as liquid alternative mutual funds to outside investors.*** It means Bonderman, 72, can profit from the expertise of his personal money managers, who in turn can earn more money. ¶6 (first emphasis added).

30. The Diversified Fund touted its "alternative strategies" and what it called its "quantamental" approach that purported to combine quantitative investing with private equity investing. ¶¶7, 8. Similarly, the investment objective of the Volatility Fund was to gain exposure

to volatility-based strategies that provide long and short exposure to a diversified portfolio of derivatives across equities, currencies, bonds, interest rates, and commodities markets. Fed. Compl., ¶54.

31. The Funds' strategies referred, in large part, to investments in total return and other swaps, including variance, dispersion, and correlation swaps ("swap contacts" or "swaps"). Swaps are contracts in which two counterparties agree to exchange or "swap" payments with each other as a result of such things as changes in a stock price, interest rate, commodity price, or even the volatility or variance of a financial instrument. ¶9.

32. Likely attracted by the connection to Mr. Bonderman and ostensibly market-beating returns, investors flocked to the Funds. According to an SEC filing, $787 million poured into the Diversified Fund in the 12 months ending in August 2020. ¶10. Private marketing materials to prospective investors similarly showed that the Volatility Fund experienced significant growth during this time by purportedly employing similarly effective investment strategies. Fed. Compl. ¶9.

33. According to a report filed with the SEC, the Diversified Fund held swap contracts with a purportedly fair value of $449 million at the end of November 2020, representing about 26% of its $1.71 billion in net assets held at that time. That figure includes so-called variance swap contracts, especially complex swaps that derive their value from such multifaceted factors as market volatility or the way in which global markets, foreign currencies, or other assets move in relation to one another. ¶56. The Volatility Fund also held a large concentration of variance swap contract in its portfolio but was not required to report this number because the fund not registered under the Securities Act, nor was it registered as an investment company under the ICA. Fed. Compl., ¶53.

34. Because the Funds were dealing in so many complex and opaque swap contracts, each Fund claimed to use statistical models provided by third-party pricing services to comply with its legal duty to calculate its NAV on a daily basis. ¶57.

B. The Mismarking of the Funds' Investments and Overinflation of the Diversified Fund's NAV

35. The Funds' swaps investments were valued on a daily basis through a process known as "marking." The process of marking involves inputting the economic details of a transaction, in this case, a swap, along with information observable in the marketplace (*e.g.*, the value of an equity index or other benchmark) into a pricing tool to generate the present value of the investment. In turn, these valuations were combined with the Funds' other assets to calculate the NAV. ¶58.

36. Defendants repeatedly represented in the Prospectuses (¶¶98-100, 102-03, 105, 114) and offering and marketing materials (Fed. Compl., ¶¶58-67) that the marking and valuation of the Funds' complex investments was done using objective criteria, independent third parties, and/or a "valuation committee." None of this was true. In reality, Velissaris, Infinity Q, and others were intentionally mismarking certain of the Funds' swaps positions and manipulating the third-party pricing tools in order to inflate the valuations of those investments and the NAV. ¶58.

37. On February 17, 2022, Defendant Velissaris was arrested and charged by the U.S. Department of Justice with securities fraud and related crimes, and also civilly charged with defrauding Fund investors for years by the SEC and CFTC (these three actions are collectively referred to as the "Enforcement Actions"). ¶59.

38. The SEC's Complaint alleges the misconduct occurred "[f]rom at least February 2017 through February 2021," while both the Department of Justice and the CFTC allege the misconduct started in at least 2018. The Enforcement Actions allege that the Funds' NAV was

artificially inflated throughout the period of Velissaris's misconduct. Consistent with these regulatory findings, on or around March 8, 2022, the Diversified Fund's website reported that an outside consultant the Diversified Fund hired to re-value the Funds' assets "concluded that the Fund's Bilateral OTC Positions were overstated at each month-end date from February 2017 through January 31, 2021." That consultant further concluded that "the Fund's reported month-end NAV was overstated by less than 10% prior to October 31, 2019, more than 10% from October 31, 2019 through January 31, 2021, and for most months in 2020 it was more than 30% overstated." ¶60.

39. The Enforcement Actions charge precisely the misconduct alleged by Plaintiffs, with the SEC alleging that: "[i]n ***offering documents, prospectuses***, valuation policies, and other documents, Velissaris and Infinity Q represented to the Funds' current and prospective investors how they would value the Funds' assets" and those representations "were false or misleading," as "Velissaris and Infinity Q did not follow [the Fund's] valuation process." ¶61.

40. The Enforcement Actions shed light on exactly how the third-party pricing tool used by Velissaris and Infinity Q to value the Funds' swap positions – now identified as the Bloomberg Valuation Service, or "BVAL" – was systematically and secretly manipulated to inflate the value of those swaps and the Funds' NAV. ¶63.

41. During the Class Period, Velissaris repeatedly and surreptitiously made modifications to the underlying valuation code in BVAL's Custom Scripts, which had the effect of artificially increasing the value of certain of the Funds' swap positions and NAV. ¶67.

42. In addition, as reflected in the BVAL audit trail obtained by the SEC, Velissaris regularly altered the terms of positions that he had previously loaded into BVAL. Velissaris's updates included making changes to positions' notional values, effective dates, and expiration

dates that did not match the real terms of the transactions. The effect of this misconduct was to artificially inflate the Funds' investments and the Funds' NAV. ¶68.

43. Accordingly, contrary to what was claimed in the Prospectuses and offering documents, the process the Funds used to value its swap positions was not independent (because Velissaris and Infinity Q controlled it) or accurate, because of the wide-ranging mismarking and manipulations of BVAL pricing models that occurred throughout the entire Class Period, as described in detail by the Department of Justice, SEC, and CFTC. ¶71. As a result of Velissaris' manipulations of BVAL, the entity that published the Funds' NAVs was actively misled in to believing and representing that those NAVs were higher than they should have been. Plaintiffs (and apparently the SEC, Commodity Futures Commission, the U.S. Department of Justice, or any other state or federal agency, commission, or regulator (collectively, the "Regulators")) have uncovered no compelling evidence that the entity responsible for publishing the Funds' NAVs to investors knew Velissaris was manipulating BVAL until it was too late.

44. The Enforcement Actions also make clear that certain Defendants utterly failed to maintain appropriate oversight of the valuations of the Funds' investments. For example, although Infinity Q claimed to have a valuation committee to oversee valuations of the Funds' assets that were not independently priced by third parties, the SEC uncovered that "there were no formal valuation committee meetings since at least approximately 2018," and "Velissaris was the sole decision-maker at Infinity Q for the valuation" of the Funds' swaps. ¶72.

45. The Enforcement Actions further demonstrate that awareness of the mismarking of the Funds' swaps and overinflation of the NAV extended to some extent beyond Velissaris. ¶73.

46. For example, Velissaris and others at Infinity Q were aware that Infinity Q was massively overvaluing the Funds' positions, as Velissaris' manipulation of BVAL increased in

conjunction with the Funds' reporting deadlines (and offering circulars). As Defendant Velissaris explained to Defendant Lindell in an August 2018 communication, which coincided with the Diversified Fund's fiscal year-end: "I have to tighten all of [BVAL] this week . . . So there will be some larger than normal moves." ¶74.

47. As the SEC noted, "if the Auditor properly tested these positions, [Velissaris's] scheme may have been uncovered." That did not happen. ¶92.

48. In addition, the "positions reported by the [] Fund" in its SEC filings "***at mathematically impossible valuations***" should have been easily caught by a reasonably diligent auditor. ¶93 (emphasis and brackets in original).

49. In May 2020, the SEC opened an inquiry into the valuation practices at Infinity Q, which quickly turned into a formal investigation. Fearing that the scheme was close to being discovered, Velissaris and Lindell tried to obstruct the SEC's investigation, and provided false and misleading information to the SEC. ¶95. Lindell subsequently entered into a settlement with the SEC for his role in the fraud.

C. The Truth Begins to Emerge

50. On December 30, 2020, without providing a reason, the Diversified Fund filed a supplemental Prospectus and notice with the SEC, announcing that it was closing to new investment:

> Effective as of the close of business on December 31, 2020, the Infinity Q Diversified Alpha Fund (the "Infinity Q Fund") is closed to all new investment, including through dividend reinvestment, and the Infinity Q Fund's transfer agent will not accept orders for purchases of shares of the Infinity Q Fund from either current Infinity Q Fund shareholders or new investors. Current shareholders, however, may continue to redeem Infinity Q Fund shares. If all shares of the Infinity Q Fund held in an existing account are redeemed, the shareholder's account will be closed. ¶124.

51. Approximately two months later, on February 22, 2021, the Diversified Fund and Infinity Q filed a request with the SEC for an order pursuant to Section 22(e)(3) of the Investment Company Act of 1940 suspending the right of redemption with respect to shares of the Diversified Fund, effective February 19, 2021. The basis of this joint request was Infinity Q's inability to determine the Diversified Fund's NAV. The joint filing admitted that Velissaris had been "adjusting certain parameters within the third-party pricing model that affected the valuation" of the Fund's swap contracts for an unknown period of time. The Diversified Fund and Infinity Q also admitted that Velissaris' conduct had resulted in "historical valuation errors" but that the "extent and impact" of those errors was still being investigated. The request also stated that the Diversified Fund was liquidating its portfolio and distributing its net assets to shareholders. ¶125.

52. The very same day, the SEC granted the Diversified Fund's request and took the extraordinary step of suspending redemptions indefinitely. ¶127. Infinity Q also halted redemptions and liquidated the assets of the Volatility Fund, after admitting substantially the same misconduct occurred with respect to the valuing of that fund's assets. Fed. Compl., ¶18.

53. Shortly thereafter, the Funds' website was taken offline, with only a brief statement remaining on the homepage. ¶128. The statement explained that the Funds were unable to calculate NAV in order to redeem shares, as the Funds are required to do under federal securities law, and had received an order from the SEC suspending redemptions indefinitely while the Funds' assets were being liquidated. The website provided a link to the SEC's Order. The website added: "The Chief Investment Officer of Infinity Q has been relieved of his duties, effective February 21, 2021." ¶129.

54. As reported, beginning on March 1, 2021, the Board of the Diversified Fund began working to liquidate all assets held by the Diversified Fund that were not already in cash or cash equivalents as of February 22, 2021.

55. An update posted to the Diversified Fund's website on March 11, 2021, stated:

> Although the Fund is still calculating the proceeds from the liquidations to date, it anticipates that the proceeds from liquidating the swaps and other portfolio positions liquidated to date will be less than the aggregate value ascribed to those instruments by Infinity Q and the Fund on February 18, 2021, the last day an NAV was calculated for the Fund. As a result, the amount of Fund assets available for possible distribution to shareholders, before taking into account the reserve described below, will be less than the net assets of the Fund as valued on February 18, 2021. ¶¶20, 130.

56. The update went on to state that, as of March 9, 2021, the Diversified Fund held a total of approximately $1.2 billion in cash or cash equivalents, ***over $500 million*** less than the NAV that the Diversified Fund had calculated just a few weeks before. ¶21.

57. On August 23, 2021, the Diversified Fund's new website — which is now dedicated to issues related to the Diversified Fund's liquidation — explained in an "FAQ" that the Diversified Fund had reserved around $750 million from the Diversified Fund's remaining $1.24 billion in assets, largely to cover the claims in the Actions. That "FAQ" stated in pertinent part:

> ***The vast majority of the reserved amount is to provide for the possible damages the Fund might owe to current and former shareholders in connection with the shareholder litigation that has been filed or may be filed.*** It is important for every shareholder to understand that those cases assert, on behalf of substantially all shareholders, that each current shareholder (and some former shareholders) has a claim against the Fund. Those claims must be paid, or adequately reserved for, before the Fund is legally permitted to distribute money to shareholders for their equity interests in the Fund. ¶132.

58. The Diversified Fund has made two, interim distributions over the past year and a half, however, it continues to hold back approximately $560 million pending the resolution of the Diversified Fund's liabilities, principally the claims asserted in the Actions. *See*

https://www.infinityqfundliquidation.com/updates. Final approval of this Settlement will pave the way for additional distributions to investors from the Diversified Fund.

59. Similarly, by October 31, 2021, the Volatility Fund completed the liquidation of its assets, other than a small investment in a product run by the wife of Defendant Velissaris that she has reportedly refused to liquidate. Although the Volatility Fund claimed an NAV of $1.22 billion as of February 2021, the Volatility Fund only held $653 million following liquidation, confirming that the NAV had been overstated by $567 million. Fed. Compl., ¶122.

60. Pursuant to the settlement agreements with Defendants, Plaintiffs' Counsel were given access on a confidential, attorneys' eyes-only basis to the documents Defendants produced in response to certain subpoenas from various regulators for documents related to the misconduct at issue here. In total, Plaintiffs' Counsel received access to 329,886 documents from Defendants, consisting of e-mails, chats, and other documents, which were expeditiously reviewed and analyzed. Plaintiffs' Counsel's review of this evidence confirmed Plaintiffs' core allegations, as outlined above, as well as the allegations in the Regulators' civil and criminal enforcement proceedings.

D. Procedural History

1. Plaintiffs File Suit in State and Federal Court

61. On February 24, 2021, just two days after the Diversified Fund and Infinity Q requested that the SEC suspend the right of redemptions, Plaintiff Andrea Hunter commenced an action by filing the Complaint for Violations of the Securities Act of 1933. *Hunter v. Infinity Q Diversified Alpha Fund, et al.*, Index No. 651295/2021 (N.Y. Sup. Ct.) ("*Hunter*").

62. The following day, on February 24, 2021, Plaintiff David Rosenstein filed a factually-related action, *Rosenstein v. Trust for Advised Portfolios, et al.*, Index No. 651302/2021 (N.Y. Sup. Ct.) ("*Rosenstein*").

63. By order dated April 15, 2021, the *Hunter* action was consolidated with the *Rosenstein* action, and proceeded under the caption *In re Infinity Q Diversified Alpha Fund Securities Litigation*, Index No. 651295/2021 (N.Y. Sup. Ct.). Also by that order, the law firms of Scott+Scott Attorneys at Law LLP ("Scott+Scott") and The Rosen Law Firm, P.A. ("Rosen"), were appointed co-lead counsel for plaintiffs in that consolidated action. NYSCEF No. 12.

64. On April 16, 2021, co-lead counsel for plaintiffs in *In re Infinity Q Diversified Alpha Fund Securities Litigation* filed a Consolidated Complaint. NYSCEF No. 13.

65. Plaintiff Liang Yang commenced the Federal Action by filing the Class Action Complaint for Violation of the Federal Securities Laws on February 26, 2021. *Yang v. Trust for Advised Portfolios, et al.*, Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y) ("*Yang*").

66. On February 17, 2022, plaintiffs Schiavi and Dattani and Dominus filed a putative class action complaint on behalf of purchasers in the Diversified Fund and the Volatility Fund and specifically adding Defendant U.S. Bancorp, the allegations of which are factually related to the complaints in *Hunter*, *Yang*, and *In re Infinity Q Diversified Alpha Fund Securities Litigation*. *Schiavi + Company LLC DBA Schiavi + Dattani, et al. v. Trust for Advised Portfolios, et al.*, Case No. 1:22-cv-00896 (E.D.N.Y.) ("*Schiavi*") and incorporated newly discovered allegations from the DOJ, SEC, and CFTC pleadings.

67. On March 31, 2022, Schiavi and Dattani was appointed lead plaintiff in the Federal Action and Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Boies Schiller Flexner LLP were appointed co-lead counsel.

68. On April 8, 2022, the *Yang* action was consolidated with the factually-related *Schiavi* action. The Federal Action is currently stayed by consent of the parties pending the

outcome of the Settlement. If the Settlement received final approval, the Federal Action will be voluntarily dismissed.

69. On August 12, 2022, Plaintiff Dominus filed a complaint in the Supreme Court of the State of New York asserting common law claims on behalf of investors in the Volatility Fund, which was subsequently designated as related to the State Action. *Dominus Multimanager Fund Ltd. v. Infinity Q Capital Management LLC, et al.*, Index No. 652906/2022.

2. The Parties Brief Multiple Motions to Dismiss

70. Between June 1, 2021, and June 30, 2021, pursuant to the agreed-upon schedule, defendants filed seven motions to dismiss the Consolidated Complaint in *In re Infinity Q Diversified Alpha Fund Securities Litigation*. Plaintiffs opposed those motions on July 30, 2021. NYSCEF Nos. 40-105. Defendants filed reply motions in support of the motions to dismiss on September 14, 2021. NYSCEF Nos. 115-127.

71. The briefing on the motions to dismiss highlighted the factual and legal issues in dispute, and the arguments varied substantially among the different Defendants. The Trust and Trust Officers' Motion to Dismiss, for instance, argued primarily that the Complaint failed to allege a false or misleading statement, but also urged that the Section 12(a)(2) claims should be dismissed for failure to allege that the Trust and Trust Officers were statutory sellers. *See* NYSCEF No. 51. The motion to dismiss filed by Infinity Q Capital Management, the Bonderman Family Limited Partnership, and a related individual argued primarily that they were improper defendants under Section 11 of the Securities Act of 1933, and also urged that they did not constitute control persons under Section 15. *See* NYSCEF No. 59. The auditor, EisnerAmper LLP, filed a motion to dismiss arguing that its audit reports were opinions, and that it did not believe any information in its audit opinions was false. *See* NYSCEF No. 53. The underwriter, Quasar Distributors, LLC, argued that the Complaint failed to allege a false or misleading

statement, that it was not involved in the valuations at issue, and that it did not constitute a statutory seller under Section 12. *See* NYSCEF No. 68. Other motions putting forth related arguments were made as well.

72. The Court scheduled a hearing on the pending motions to dismiss for April 4, 2022. *See* NYSCEF No. 128.

73. In addition, certain Defendants filed a pre-motion to dismiss letter brief in the Federal Action and argued that scienter had not been adequately alleged under the Private Securities Litigation Reform Act of 1995. *See* Moving Defs.' Pre-Mot. Ltr., Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y Aug. 5, 2022), Dkt. No. 72. Plaintiffs' Counsel argued to the contrary that Plaintiffs have more than adequately alleged each Defendants' scienter for purposes of the Exchange Act claims against them, but nonetheless the risk remained that the Court on a motion to dismiss, on summary judgment, or a jury at trial, would agree with Defendants' assertions. *See* Pls.' Pre-Mot. Ltr. Resp., Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y Aug. 12, 2022), Dkt. No. 73. Furthermore, Defendants raised issues of causation and damages throughout this litigation and such issues would have been central to any motion for summary judgment. Specifically, Defendants argued that Plaintiffs have not pled actual reliance or an entitlement to a presumption of reliance. *See* Moving Defs.' Pre-Mot. Ltr., Case No. 1:21-cv-01047-FB-MMH (E.D.N.Y Aug. 5, 2022), Dkt. No. 72. If a jury accepted this argument, Plaintiffs' damages could effectively be zero for all Exchange Act claims.

3. Plaintiffs Participate in Arm's-Length Mediation

74. With the motions to dismiss pending in the State Action, the parties in both the State Action and the Federal Action agreed to participate in mediation. *See* NYSCEF No. 128.

75. The parties exchanged mediation statements in advance of the mediation, highlighting the factual and legal issues in dispute.

76. On December 17, 2021, the parties attended a virtual mediation session with the highly experienced mediator, Robert A. Meyer, Esq., of JAMS. At the end of the full-day session, the parties did not reach a settlement, however, substantial progress was made.

77. The parties attended additional mediation sessions with Mr. Meyer on December 28, 2021, January 17, 2022, and March 17, 2022.

78. All parties understood that it was imperative to reach a settlement in the Actions, as the Funds were winding down, consuming the Defendants' insurance proceeds, and holding hundreds of millions of dollars from the Funds' remaining assets as reserves until the Actions could be resolved. At the same time, though, several major issues stood in the way of a global settlement: Different parties had very different defenses to Plaintiffs' allegations, as discussed above, overlapping insurance coverage among Defendants limited certain Defendants' ability to preserve their insurance for defense costs and settlement, and the complicated indemnification agreements among the Defendants made anything but a global resolution of this matter all but untenable because it would require the Funds to retain a significant portion, if not all, of their remaining respective reserves, rather than returning that money to investors.

79. The parties made further progress at these mediation sessions, but did not reach settlement.

4. Plaintiffs Adjourn the Hearing on the Motion to Dismiss as a Way to Continue Settlement Negotiations and Amend Their Consolidated Complaints

80. On March 25, 2022, the Parties wrote to the Court to provide an update on the settlement negotiations. In addition to discussing the ongoing mediation, the parties informed the Court that Plaintiffs intended to file a Consolidated Amended Complaint, which would moot the then-pending motions to dismiss. Accordingly, the parties requested that the Court adjourn the April 4, 2022 hearing to conserve judicial resources. *See* NYSCEF No. 137.

81. The Court adjourned the hearing, and State Plaintiffs filed their Consolidated Amended Complaint on May 2, 2022. NYSCEF Nos. 138, 139.

82. Plaintiffs' Consolidated Amended Complaint made three major additions to the Consolidated Complaint, which reflected key factual developments since the original Consolidated Complaint was filed, as well as facts Plaintiffs developed through their own, ongoing investigation.

83. First, the amendment added allegations related to the Enforcement Actions, which were only filed against Defendant Velissaris after Plaintiffs had filed their Consolidated Complaint. Not only did the Enforcement Actions corroborate Plaintiffs' allegations and strengthen their theory of the case, but the Enforcement Actions contained a wide range of additional facts that Plaintiffs could not previously have known, as Plaintiffs did not have access to the documents and witnesses that the SEC, DOJ, and CFTC had used to build their cases. *See* ¶¶59-96.

84. Second, Plaintiffs' Consolidated Amended Complaint added a section entitled "Additional Allegations of Control and Scienter," which focused on a key document known as the Investment Advisory Agreement (or "IAA") that had been entered into between the Trust and Infinity Q on behalf of the Fund. *See* ¶¶136-38. By the terms of the IAA, Infinity Q agreed to assume liability for statements in the Fund's Prospectuses, which Plaintiffs view as bolstering the allegation that Infinity Q is a proper defendant under Section 11. *See id.*

85. Third, Plaintiffs' Consolidated Amended Complaint added factual allegations directed at establishing that the auditor, EisnerAmper, ignored numerous red flags and failed to audit the Diversified Fund's financial statements with the appropriate professional care due under the Public Company Accounting Oversight Board Standards. *See* ¶¶91, 157-166.

86. On June 6, 2022, the Federal Plaintiffs filed the Consolidated Complaint, which included U.S. Bancorp as a defendant and the claims of Volatility Fund investors, as well as the new allegations from the earlier complaint filed by plaintiffs Schiavi and Dattani and Dominus and Plaintiffs' Counsel's ongoing investigation.

87. On August 15, 2022, the State Plaintiffs filed a motion for leave to file a second Consolidated Amended Complaint, for the purpose of including Federal Lead Plaintiff Schiavi and Dattani as a class representative for investors in the Diversified Fund. *See* NYSCEF Nos. 155, 156, 157.

88. As the same time Plaintiffs were working diligently to build their case, the Parties continued mediation, including several more bilateral mediation sessions, all while Mr. Meyer was engaged in extensive "shuttle diplomacy" between Plaintiffs and various Defendants.

5. The Mediation Process Bears Fruit and Leads to a Proposed Partial Settlement, and Then the Global Settlement that is Now Before the Court

89. On August 17, 2022, Plaintiffs filed an Order to Show Cause in connection with the proposed preliminary approval of a settlement that had been reached with certain defendants. *See* NYSCEF Nos. 158, 159, 160. The parties had negotiated formal settlement documentation, including the Stipulation, Class and Summary Notices, Proof of Claim Form, and proposed Orders, which were filed in connection with Plaintiffs' Order to Show Cause. *See id.*

90. After further work involving the mediator, Plaintiffs were able to reach a settlement with the remaining holdout defendants. *See* NYSCEF No. 161.

91. On September 7, 2022, Plaintiffs filed an Order to Show Cause in connection with the preliminary approval of the proposed global settlement. *See* NYSCEF Nos. 175, 176, 177. The parties filed formal settlement documentation, including the Amended Stipulation, Class and

Summary Notices, Proof of Claim Form, and proposed Orders, which were filed in connection with Plaintiffs' Order to Show Cause.

92. The Court scheduled a preliminary fairness hearing for October 17, 2022. NYSCEF No. 180.

6. Plaintiffs Secure Preliminary Approval and Provide Notice of the Settlement

93. On October 17, 2022, following the fairness hearing, the Court preliminarily approved the Settlement and ordered Notice be disseminated to potential Class Members ahead of the final approval hearing. *See* NYSCEF No. 182.

94. In accordance with the Preliminary Approval Order, on October 7, 2022, Plaintiffs' Counsel, through the Claims Administrator, implemented a comprehensive Court-approved notice program whereby notice was given to the members of the Class by mail and by publication. Murray Aff., ¶¶4-12. The Summary Notice was published on October 17, 2022, and the Notice has been, and continues to be, posted on the settlement website, http://www.infinityqsecuritiessettlement.com, along with other Settlement-related documents. Murray Aff., ¶¶12-14. The Notice contained the information necessary for Class Members to evaluate the benefits of the Settlement and included directions for those Class Members wishing to: (a) exclude themselves from the Class; (b) object to the Settlement, the Plan of Allocation, the award of attorneys' fees and expenses to Plaintiffs' Counsel, or the requested service award to Plaintiff; (c) file a Proof of Claim; and/or (d) attend the Settlement Hearing.

95. While the January 10, 2023, deadline for objections or exclusions has not yet passed, to date, there have been no objections filed to any aspect of the Settlement, Plan of Allocation, requested award of attorneys' fees and expenses to Plaintiffs' Counsel, or requested service award to Plaintiff, and no requests for exclusion from the Class have been received.

Murray Aff., ¶16. Plaintiffs do, however, anticipate that intervenor Sherck may object to the Settlement on grounds that lack merit and his counsel may have attempted to induce other objections. Plaintiffs' Counsel also believes that at least some requests for exclusion have been mailed to the Claims Administrator but were still in transit as of December 22, 2022.

96. Plaintiffs' Counsel continue to manage the settlement process for the Actions, including preparing the papers filed today and will present the Settlement to the Court at the final fairness hearing scheduled for January 31, 2023.

7. Plaintiffs Receive and Review Discovery from Defendants, and Plaintiffs' Review Confirms Their View that the Settlement is Fair, Reasonable, Adequate, and Should Be Finally Approved

97. In connection with the proposed Settlement, Plaintiffs have received and reviewed voluminous discovery from the Defendants. In particular, Plaintiffs received access to the following:

a. 159,281 documents from TAP, consisting of all non-privileged documents and information TAP had produced in response to a subpoena from the Regulators related in any way to the Regulators' investigations of the facts and circumstances alleged in the Actions;

b. 149,495 documents from IQCM and BFLP, consisting of all non-privileged documents and information that IQCM and/or BFLP had produced in response to a subpoena from the Regulators related in any way to the Regulators' investigations of the facts and circumstances alleged in the Actions;

c. 19,700 documents from U.S. Bancorp, consisting of all non-privileged documents and information U.S. Bancorp had produced in response to a subpoena from the Regulators related in any way to the Regulators' investigations of the facts and circumstances alleged in the Actions; and

d. 1,410 documents from EisnerAmper, consisting of its non-privileged audit workpapers relating to EisnerAmper's audits of the financial statements of the Funds.

98. Plaintiffs have conducted a reasonable and proportional review of all these documents—in some cases using technology-assisted review techniques where available and appropriate—and are confident that the documents confirm the fairness, reasonableness, and adequacy of the Settlement.[7]

99. In sum, it is respectfully submitted that the procedural history of the Actions detailed above demonstrates that Plaintiffs and Plaintiffs' Counsel have aggressively and diligently prosecuted the Actions from their outset through the achievement of an outstanding Settlement for the Class.

E. The SEC Reaches a Settlement with the Diversified Fund, and Defendant Velissaris Pleads Guilty to Securities Fraud

100. On November 10, 2022, the SEC and the Diversified Fund announced the settlement of SEC claims against the Diversified Fund relating to the alleged mispricing of the Fund's assets in violation of Rule 22c-1 under the Investment Company Act of 1940. That settlement did not require payment to the SEC of any of the Diversified Fund's assets.

101. The Diversified Fund released a statement the same day, in which it emphasized that resolution of that matter – along with the proposed settlement of the securities class action pending before this Court – represented an important step forward in the Fund's effort to distribute its reserves to shareholders: "In addition to the recent proposed settlement of the pending securities

[7] The documents from TAP, U.S. Bancorp, and EisnerAmper were subject to a complete, linear review (*i.e.*, every single document was reviewed). The documents from IQCM and BFLP were reviewed using a continuous active learning model confirmed by elusion and other sample reviews.

class actions against the Fund, the Fund's settlement with the SEC is another important step in the Fund's ongoing efforts to resolve its remaining liabilities and get additional money paid to shareholders." *See* https://www.infinityqfundliquidation.com/.

102. On November 21, 2022, Defendant Velissaris pleaded guilty to securities fraud, admitting to making false and misleading statements concerning Infinity Q's process for valuing swap and derivative positions that made up a substantial portion of the holdings of the mutual and hedge funds. *See* https://www.justice.gov/usao-sdny/pr/founder-and-former-chief-investment-officer-infinity-q-pleads-guilty-securities-fraud. Velissaris also admitted to fraudulently mismarking those securities in ways that did not reflect their fair value. *Id*.

103. Velissaris admitted that, in order to avoid detection of the scheme, he provided both Infinity Q's auditor, EisnerAmper, and the SEC with falsified or altered documents, including providing the auditor with altered term sheets that served to provide fabricated support for the fraudulently inflated values. *Id*.

104. In particular, Velissaris admitted that, on multiple occasions, EisnerAmper selected certain Fund positions that it would independently value in order to confirm the reasonableness of Infinity Q's values from BVAL. In order to ensure that EisnerAmper would not arrive at materially different results when independently valuing positions that Velissaris had manipulated in BVAL, Velissaris altered the terms of certain deal documents and provided them to EisnerAmper. After receiving these falsified documents and relying on them in its independent evaluation, EisnerAmper confirmed the reasonableness of Velissaris' valuations in BVAL. *Id*.

III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND PROVIDES A RECOVERY FOR CLASS MEMBERS BEYOND WHAT SIMILAR CASES TYPICALLY ACHIEVE

105. New York Courts have long evaluated whether a proposed class action settlement is fair, reasonable, and adequate by applying the following five factors articulated by the First

Department in *In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (N.Y. App. Div. 1990): the likelihood of success, the extent of support from the parties, the judgment of counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact. *Id.* Plaintiffs and Plaintiffs' Counsel respectfully submit that each of these factors strongly favors final approval of the proposed Settlement.

A. Plaintiffs' Likelihood of Success

106. Plaintiffs believe their allegations strongly support their claims for violations of the securities laws against all Defendants. Moreover, Plaintiffs contend that the Enforcement Actions, filed by the SEC, DOJ, and CFTC long after this case was filed – as well as Defendant Velissaris pleading guilty to securities fraud – corroborate Plaintiffs' core theories of liability. Plaintiffs also understand, however, that success was not guaranteed. Simply put, there was no assurance that the Class would have recovered an amount equal to, let alone greater than, the proposed Settlement had the Litigation continued. This is especially true where, as here, there was a high likelihood that a judgment in excess of the Defendants' available insurance would have been satisfied in whole or in part from the Funds' litigation reserves, which in the absence of further litigation could have been (and now will be) returned to the Funds' investors in large part.

107. Throughout the litigation, Defendants consistently and vigorously denied that Plaintiffs could prove that any of the challenged statements were materially untrue and misleading and/or that such statements were made by any Defendants other than the Funds. While Plaintiffs had substantial responses to Defendants' arguments, the stages at which this Court would determine the existence of, and a jury would ultimately resolve, factual disputes in the Actions – summary judgment and later trial – presented serious risks that weighed in favor of settlement.

108. In addition, aside from whether the Funds' Prospectuses contained false and misleading statements, this case presented a host of other issues that could prove difficult for Plaintiffs.

109. As demonstrated in the briefing on the motions to dismiss, the issue of which Defendants constituted proper defendants under Section 11 of the Securities Act of 1933 was especially contentious, as certain parties fell into gray areas in the statute's enumerated categories. For example, Plaintiffs alleged that certain of the Bonderman-affiliated defendants were "person[s] performing similar functions" as a director of the issuer, *see* 15 U.S. Code §77k(a)(2), but these defendants disputed this point vigorously. Moreover, while Plaintiffs believe that the IAA in which Infinity Q agreed to assume liability for statements in the Diversified Fund's Prospectuses provides a basis to argue that the Infinity Q-affiliated defendants can be sued under Section 11, that theory is not a typical route to Section 11 liability.

110. Likewise, while Plaintiffs believe that they could successfully plead a Section 11 claim against U.S. Bancorp, doing so is far from certain and litigating that claim successfully through a motion to dismiss, summary judgment, trial, and the inevitable appeals present significant additional hurdles. Among the high hurdles that Plaintiffs' Counsel would need to overcome, U.S. Bancorp is not clearly one of statutorily enumerated defendants under Section 11, and Plaintiffs' Counsel are not aware of any case holding that a mutual fund's administrator and/or custodian can be held liable under Section 11.

111. While Plaintiffs believe they adequately alleged Section 12(a)(2) liability against all Section 12 defendants as statutory sellers, the primary caselaw on which Plaintiffs rely extends only to the motion to dismiss stage; the road beyond the pleadings is far more difficult.

112. Finally, while Defendant Velissaris' pleading guilty to securities fraud corroborates Plaintiffs' theories and strengthens their claims, it could be argued that Velissaris' admissions concerning misleading the Funds' auditor, EisnerAmper, and others could theoretically be used to strengthen those Defendants' due diligence defense, as well as the defenses of other parties that might claim to have relied on EisnerAmper's audits, including U.S. Bancorp and the individual defendants.

113. Further, even if Plaintiffs had prevailed on liability, causation, and damages issues on summary judgment and through trial, if the Parties' litigation experience in this hard-fought case is any guide, it is reasonably likely that Defendants would have then filed post-verdict motions and/or appeals. Thus, litigating the Actions to finality would have required the Class to wait ***years*** and incur significant additional expense before being able to collect an uncertain recovery. Any delay would be especially costly to the Class here, as the continued prosecution of this Litigation would: (i) consume the insurance proceeds available to Defendants; (ii) consume the Funds' assets used to defend the Funds and other Defendants in these Actions; (iii) prevent the Funds from releasing hundreds of millions of dollars held in reserves to investors; and (iv) further erode the assets of the Funds through administration costs. Moreover, any victory could prove illusory because the Defendants with the clearest liability, such as Defendant Velissaris, had significant doubts about their ability to pay any significant amount and both the Volatility Fund and the Diversified Fund were in liquidation. In addition, certain defendants such as U.S. Bancorp claimed to possess indemnification agreements that could result in investors essentially paying themselves, if for example the Funds used reserve assets to pay their indemnifications. In addition, the Funds risked being placed into receivership or otherwise subjected to forced regulatory oversight, which

could severely limit the ability of investors to negotiate a civil settlement or result in a stay of civil proceedings, as in fact has occurred with the Diversified Fund.

114. By comparison, the Settlement represents an excellent recovery, as well as a certain and immediate one.

B. Plaintiffs' Counsel's Judgment Supports the Settlement

115. At the time the Settlement was reached, Plaintiffs and Plaintiffs' Counsel had a strong understanding of the strengths and weaknesses of the Class' claims.

116. The Settlement was only reached after: (i) an extensive factual investigation involving both a Consolidated Complaint and a Consolidated Amended Complaint, as described above; (ii) Plaintiffs briefed seven motion to dismiss; (iii) the parties engaged in a comprehensive and multi-month, arm's-length mediation process overseen by an experienced mediator. Plaintiffs have also been able to confirm the fairness, reasonableness, and adequacy of the Settlement through an extensive review of confirmatory discovery.

117. Based on all of the foregoing, Plaintiffs' Counsel have concluded that the Settlement is fair, reasonable, and adequate for the Class.

C. The Extent of Support from the Parties Supports the Settlement

118. As noted above and in the accompanying Affirmations, these Plaintiffs, which have been active participants in and carefully monitored the Litigation since its inception, strongly support the Settlement. Hunter Aff., ¶7; Rosenstein Aff., ¶7; O'Connor Aff., ¶7; Dattani Aff., ¶8; Castiglia Aff., ¶8.

119. In addition, the Court-ordered notice program informed Class Members of the Settlement's material terms, the Plan of Allocation, the potential amount of fees and expense reimbursement that Plaintiffs' Counsel would seek, the potential amount of the service award

Plaintiffs would seek, and of the time and manner by which they could object to any of those points or exclude themselves from the Class altogether.

120. As set forth in the accompanying Affirmation of Ross D. Murray, as of December 22, 2022, 46,708 copies of the Notice and Proof of Claim Form have been mailed to likely Class Members and nominees. Murray Aff., ¶11. In addition, copies of the Notice were posted on the settlement website, and the Summary Notice was published in *The Wall Street Journal* and transmitted over *Business Wire*. Murray Aff., ¶¶12, 14.

121. The deadline for submitting objections or requests for exclusion is January 10, 2023.

122. Although that deadline has not yet passed, as of the date of this Affirmation, the Claims Administrator has not received any objections or exclusion requests. Murray Aff., ¶16. This reaction of the Class indicates support for, and the reasonableness of, finally approving the Settlement and approving the fee and expense request and the service award to Plaintiffs.

D. The Settlement Was the Result of an Arm's-Length Negotiation by Experienced Counsel with a Nationally Respected Mediator

123. In evaluating whether the settlement is fair, courts consider whether the settlement was the product of arm's-length negotiation, including whether a neutral mediator was involved or whether, by contrast, the plaintiffs appear to have rushed into settlement negotiations prematurely.

124. As described above, the Settlement is the product of a hard fought and considered negotiation process under the supervision of an experienced mediator, which included extensive confirmatory discovery. *Supra*, ¶¶74-79, 88, 97-99. The Settlement came after four days of mediation, as well as further mediation negotiations that lasted several months.

125. Because the Actions were hard-fought at every stage by experienced counsel and the Settlement was overseen by a reputable, experienced mediator, this strongly weighs in favor of a finding that the Settlement is fair, reasonable, and should be approved.

E. The Complexity of the Actions Supports Final Approval of the Settlement

126. Given their nature, courts have recognized that, in general, securities class actions are highly complex. *See In re AOL Time Warner, Inc.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006).

127. This case was an outlier in terms of its great complexity, however, even among securities cases. Because the events at issue involve a mutual fund and a related hedge fund – not a publicly traded company's stock as does the typical securities class action – the Defendants did not fit neatly into the regulatory scheme. This is why so many Defendants put forth arguments that they were not proper defendants under the Securities Act.

128. The extraordinary complexity here made the outcome of the Actions highly uncertain, notwithstanding the perceived strength of Plaintiffs' claims, and supports final approval of the Settlement, which recovers an above-average percentage of reasonably recoverable damages.

IV. THE PLAN OF ALLOCATION IS CUSTOMARY, FAIR, AND REASONABLE

129. To receive a distribution from the Net Settlement Fund, Class Members are required to submit a Proof of Claim form. The Claim Form was mailed with the Notice and is also available on the settlement website. The Claims Administrator will review the claim forms and supporting documents submitted, provide an opportunity to cure any deficiencies, and mail or wire Class

Members their *pro rata* share of the Net Settlement Fund in accordance with the proposed Plan of Allocation.[8]

130. The proposed Plan of Allocation was formulated by Plaintiffs' Counsel and a retained expert with experience in such matters. The Plan of Allocation provides for a customary *pro rata* allocation based upon the "recognized loss amount" on subscriptions in the Volatility Fund and purchases/acquisitions of shares in the Diversified Fund, calculated 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 U.S. 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. 3:19-cv-04744-WHA (N.D. Cal.).

131. The Plan of Allocation will therefore result in a fair and equitable distribution of the Settlement proceeds. Moreover, the Plan of Allocation in its entirety was set forth in the Notice that was distributed to all Class members. Murray Aff., Ex. A, Notice at 5-9. To date, no objections to the Plan of Allocation have been filed. Plaintiffs' Counsel respectfully submit that the Plan of Allocation is fair and reasonable and should be approved by the Court.

[8] To receive a distribution, the Authorized Claimant's payment amount must be $10.00 or more. *See* Murray Aff., Ex. A, Notice at 7.

V. PLAINTIFFS' COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND PLAINTIFFS' REQUESTS FOR A SERVICE AWARD

A. The Requested Fee Is Reasonable Under the Factors Considered by New York Courts

132. As explained in the accompanying memorandum, New York courts have long recognized that attorneys who represent a class and achieve a benefit for class members are entitled to compensation for their services, and that attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund. Memo., §VI.A. Here, Plaintiffs' Counsel seek an attorneys' fee award of 33 and 1/3% of the Settlement's non-contingent cash payment of up to $45,000,000 (*i.e.*, $15,000,000), plus the interest accrued thereon, for the 8,696.75 hours of total time they devoted to the Actions. *See* Scott+Scott Aff., ¶4; Rosen Aff., ¶4; RGRD Aff., ¶4; Criden & Love Aff., ¶4. The request is consistent with the noticed amount, the excellent result achieved, the complex and extensive work performed, and is fully supported by Plaintiffs. *See* Murray Aff., Ex. A, Notice at 11; Hunter Aff., ¶¶8-9; Rosenstein Aff., ¶¶8-9; O'Connor Aff., ¶¶8-9; Dattani Aff., ¶¶9-10; Castiglia Aff., ¶¶9-10. Plaintiffs' Counsel believe such a fee is reasonable and appropriate in light of the result obtained and the resources expended in prosecuting the Litigation and the inherent risk of nonpayment from representing the Class on a contingent basis. Furthermore, Plaintiffs' Counsel are not requesting any fees on the $3,000,000 in the contingent consideration portion of the Settlement, despite the fact that this portion may provide significant additional value to Class Members, resulting in an overall fee request of 31.25% of the total Settlement value. As further detailed in the accompanying Memorandum, an award of 33 and 1/3% of the full settlement amount is commonly granted by New York courts, and other courts throughout the country, in similar securities cases and here Plaintiffs' Counsel are asking for less than that. Memo., §VI.A.

133. New York courts' analysis of requests for attorneys' fees considers a number of factors, including: (i) the risks of the action; (ii) the existence of a precedential decision in a similar, prior litigation; (iii) counsel's experience; (iv) the magnitude and complexity of the action; (v) the amount recovered for the class; and (vi) the work done by counsel. *See, e.g.*, *Fiala v. Metro. Life Ins. Co., Inc.*, 899 N.Y.S.2d 531, 540 (N.Y. Sup. Ct. 2010). Plaintiffs' Counsel respectfully submit that the fee request is justified based on all of these factors.

1. The Risks of the Actions

134. Plaintiffs faced substantial challenges in proving their claims, including subsequent rounds of motion to dismiss, summary judgment motions, trial, and the likelihood of additional appeals. The specific risks Plaintiffs faced in proving their claims, along with the risks of proceeding to trial, are detailed above at ¶¶106-113.

135. Moreover, Plaintiffs' Counsel, who worked on a contingent basis, bore the risk that no recovery would be achieved. Plaintiffs' Counsel understood that they were embarking on a complex, expensive, risky, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. That risk was particularly pronounced here given this was a case relating to the failure of a mutual fund and a related hedge fund – not the decline of a publicly-traded stock, as in the typical securities class action – and, furthermore, the Funds at issue were in the process of liquidation.

136. Plaintiffs' Counsel's persistent efforts in the face of substantial risks and uncertainties is what resulted in a favorable result for the Class and supports the requested fee.

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

137. The Actions were the first cases filed and prosecuted arising from the allegedly false and misleading Prospectuses and the collapse of the Fund. Accordingly, Plaintiffs' Counsel were required to develop the facts and legal theories in an effort to obtain a recovery for the Class.

In the face of this adversity, Plaintiffs' Counsel secured an outstanding result, *i.e.*, the up-to $48,000,000 cash recovery. As described above, the Diversified Fund has now reached a settlement with the SEC and Velissaris has now pleaded guilty to securities fraud, *see supra* ¶¶100-04, but those regulatory resolutions both occurred ***after*** the Settlement was reached and preliminarily approved by this Court.[9]

3. Plaintiffs' Counsel Are Highly Experienced in Securities Class Action Cases

138. Lead Counsel, Scott+Scott, The Rosen Firm, and Robbins Geller, have a significant history of achieving successful results in securities class action cases. Moreover, Lead Counsel vigorously prosecuted the Actions against skillful and experienced counsel representing Defendants, and were able to use their substantial experience in securities class actions to obtain a favorable result for the Class in just under two years. Thus, this factor supports the requested fee.

4. The Magnitude and Complexity of the Actions

139. As noted above, given their nature, courts have recognized that, in general, securities class actions are highly complex. And the Actions were highly complex, even among securities actions.

140. In addition, the magnitude of the Actions was significant as the potential damages were in the range of up to $1 billion. Thus, Plaintiffs' Counsel's ability to resolve the Actions on such favorable terms further supports the requested fee.

5. The Amount Recovered

141. Perhaps the most important factor considered in making a fee award is the result obtained. Here, the Settlement Amount supports Plaintiffs' Counsel's requested fee. Here, the

[9] After the Settlement was filed on September 7, 2022, on September 30, the SEC commenced and settled a civil action against Defendant Lindell. *See SEC v. Lindell*, Case No. 1:22-cv-08368, Dkt. Nos. 1, 3 (S.D.N.Y. Sept. 30, 2022).

recalculated NAVs of the Funds show that they were over-valued by around $1 billion, in total, as a result of the misconduct. While it is possible that not all of this amount could have been recovered as damages (for example, because investors may not have been able to recover their "lost profits"), the Settlement Amount represents a recovery of around 4.6% of this total theoretical damages maximum. As noted above, the Settlement represents an above-average recovery, when compared against settlements achieved in similar cases and the average securities settlement in the last five years. *Supra*, ¶8. Both the Diversified Fund and the Volatility Fund were also in liquidation without any ongoing business, limiting the available resources to fund the Settlement. Moreover, the Settlement should facilitate the expeditious return to investors of hundreds of millions of dollars that the Funds are currently maintaining as litigation reserves. Importantly, ***none*** of the Settlement Amount is coming from these reserves. Instead, the Settlement Amount represents how Plaintiffs' significant efforts have successfully grown the pot for the class.

142. That the Settlement is an excellent outcome for the Class is also demonstrated by the significant obstacles Plaintiffs' Counsel overcame in order to achieve it, including Defendants' motion to dismiss and Defendants' hard-fought participation in a protracted mediation process.

143. Thus, this factor supports Plaintiffs' Counsel's requested fee.

6. The Work Done by Plaintiffs' Counsel

144. Since February 2021, Plaintiffs' Counsel have expended a substantial amount of time and effort in prosecuting the Actions and negotiating the Settlement. *See supra*, ¶132 and Scott+Scott Aff., ¶4; Rosen Aff., ¶4; RGRD Aff., ¶4; Criden & Love Aff., ¶4. Plaintiffs' Counsel's work included, among other things:

(a) Performing a factual investigation with respect to the collapse of the Fund;

(b) Preparing and filing multiple Consolidated Complaints, requiring extensive additional investigation;

(c) Briefing seven motions to dismiss in the State Action;

(d) Responding to pre-motion to dismiss letter brief in the Federal Action;

(e) Preparing for and participating in a mediation with Mr. Meyer, submitting detailed mediation statements, and participating in follow-up mediation negotiations with the Mediator culminating in the Settlement;

(f) Preparing the formal Settlement documentation, preliminary approval papers, and final approval papers; and

(g) Conducting extensive confirmatory discovery to ensure that the Settlement was fair, reasonable, and adequate.

145. Moreover, Plaintiffs' Counsel will continue to work through the final approval hearing. Thereafter, Plaintiffs' Counsel will prepare a motion to distribute the Net Settlement Fund to Authorized Claimants once the work of the Claims Administrator is completed. Plaintiffs' Counsel respectfully submit that this extensive and effective work supports the requested fee.

146. The Notice informed potential Class Members of Plaintiffs' intent to request a fee award of up to 33 and 1/3% of the Settlement Amount (which is more than Plaintiffs' Counsel's formal request, which comes to 31.25% of the Settlement Amount) and to date, there have been no objections to the requested award.

B. The Requested Expenses Are Fair and Reasonable

147. Plaintiffs' Counsel seek an award of $130,686.39 in expenses they incurred in the prosecution of the Actions. *See* Scott+Scott Aff., ¶¶5-6; Rosen Aff., ¶¶5-6; RGRD Aff., ¶¶5-7; Criden & Love Aff., ¶¶5-6.

148. The claimed expenses are reasonable and were necessary for the successful prosecution of the Actions. From the beginning of the Actions, Plaintiffs' Counsel were aware that they might not recover any of their expenses and, at the very least, would not recover anything

until the Actions were successfully resolved. Plaintiffs' Counsel closely managed their expenses throughout the Actions, while always ensuring they took all steps necessary to aggressively prosecute Plaintiffs' claims.

149. The requested expenses reflect typical expenditures incurred in the course of litigation, such as the costs of online legal and other research, electronic discovery and database fees, expert-consultant fees, mediation fees, and travel. Additional detail with respect to these expenses are contained in the accompanying Affirmations, Scott+Scott Aff., ¶¶5-6; Rosen Aff., ¶¶5-6; RGRD Aff., ¶¶5-7; Criden & Love Aff., ¶¶5-6.

150. Plaintiffs' Counsel believe that all these expenses are reasonable and were necessary for the successful prosecution of the Actions.

C. Plaintiffs' Requested Service Award Is Reasonable

151. Plaintiffs have requested a service award of $5,000 for each Plaintiff for their time and effort prosecuting the Actions on behalf of the Class.

152. As discussed in Plaintiffs' supporting Affirmations, Plaintiffs Andrea Hunter, David Rosenstein, Neil O'Connor, Schiavi and Dattani, and Dominus have diligently fulfilled their obligations to the Class since the Actions were initiated. *See* Hunter Aff., ¶¶4-6; Rosenstein Aff., ¶¶4-6; O'Connor Aff., ¶¶4-6; Dattani Aff., ¶¶5-7; Castiglia Aff., ¶¶5-7. Their efforts assisting and supervising Plaintiffs' Counsel required Plaintiffs to dedicate considerable time and resources to the Actions, and Plaintiffs were of substantial assistance to both Plaintiffs' Counsel and the Class. These efforts required each Plaintiff to dedicate time and resources to the Actions that would have otherwise been devoted to Plaintiffs' primary duties.

153. The Notice informed potential Class Members of Plaintiffs' intent to request a service award, and to date, there have been no objections to said award. The efforts expended by Plaintiffs during the course of the Actions are precisely the types of activities courts have found to

support the award of a service award, and the $5,000 sought is fair and reasonable. Such requests have been granted in similar cases and are supportive of the broad public policy that encourages investors to take an active role in commencing and supervising private securities litigation.

VI. CONCLUSION

154. In light of the significant recovery to the Class and the substantial risks of continued prosecution of the Litigation, as described above and in the accompanying memorandum of law, Plaintiffs' Counsel respectfully submit that the Settlement and Plan of Allocation should be approved as fair, reasonable, and adequate.

155. For the same reasons, and in light of the substantial work performed on a contingent basis, Plaintiffs' Counsel respectfully submit that the Court should award attorneys' fees in the amount of $15,000,000, plus $130,686.39 in expenses, plus the interest earned thereon at the same rate and for the same period as that earned on the Settlement Fund until paid; plus an award of $5,000 to each of Plaintiffs Andrea Hunter, David Rosenstein, Neil O'Connor, Schiavi and Dattani, and Dominus in connection with their representation of the Class.

I affirm under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Executed this 23th day of December, 2022.

Phillip Kim

PRINTING SPECIFICATIONS STATEMENT

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

Name of Typeface: Times New Roman
Point Size: 12
Line Spacing: Double

2. The total number of words in the affirmation, inclusive of point headings and footnotes and exclusive of the caption, signature block, Table of Contents, and this Certification, is 12,729 words.

DATED: December 23, 2022
New York, New York

Respectfully submitted,

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