UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARVIN GONG, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. NEPTUNE WELLNESS SOLUTIONS INC., MICHAEL CAMMARATA, TONI RINOW and MARTIN LANDRY Defendants.	**Case No. 2:21-cv-01386-ENV-ARL** **CLASS ACTION** Hon. Eric N. Vitaliano Hon. Arlene R. Lindsay

PLAINTIFF'S NOTICE AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

For the reasons set forth in the accompanying Plaintiff's Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement, Plaintiff respectfully requests that the Court enter an Order:

1. Granting preliminary approval of the proposed Settlement;
2. Approving the Plan of Allocation;
3. Approving the proposed form and manner of notice;
4. Certifying the proposed Class for purposes of the Settlement; and
5. Scheduling a Settlement Hearing.

Plaintiff has submitted a Proposed Order, attached to the Stipulation as Exhibit A, for the Court's convenience.

Dated: December 6, 2022

Respectfully submitted,

POMERANTZ LLP

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CERTIFICATE OF SERVICE

On December 6, 2022, the foregoing document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Christopher P.T. Tourek
Christopher P.T. Tourek

UNITED STATES DISTRICT COURT
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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Lead Plaintiff Kenneth Rickert ("Plaintiff") respectfully submits this memorandum in support of his unopposed motion seeking: (i) preliminary approval of the proposed Settlement set forth in the Parties' Stipulation and Agreement of Settlement dated December 6, 2022 (the "Stipulation")[1]; (ii) approval of the form and manner of giving notice to Class Members of the proposed Settlement; and (iii) the setting of a Settlement fairness hearing (the "Settlement Hearing") and deadlines for dissemination of Notice, for Class Member objections and exclusion, for the filing of Plaintiff's motion for Final Approval of the Settlement, and for the filing of Lead Counsel's application for an award of attorneys' fees and reimbursement of expenses and compensatory awards to Plaintiff.

I. PRELIMINARY STATEMENT

After litigating this Action for more than a year and a half, Plaintiff has negotiated a Settlement that provides a strong and immediate recovery to Class Members that is highly favorable in light of the risks of continued litigation. If approved by the Court, the proposed Settlement will resolve all claims against Defendants in exchange for cash payments totaling $4,000,000 or, if Neptune elects during the Election Period,[2] a combination of $1,500,000 in cash payments and $2,750,000 worth of Neptune stock (the "Settlement Amount") for the benefit of the Class. Plaintiff believes that the Settlement Amount represents a large proportion of what could actually be collected on any award achieved at trial, given the precarious financial situation of the

[1] The "Parties" collectively refers to Plaintiff, as defined above, together with Defendants Neptune Wellness Solutions, Inc. ("Neptune"), Michael Cammarata ("Cammarata"), Toni Rinow ("Rinow"), and Martin Landry ("Landry"). All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation.

[2] The "Election Period" is defined in the Stipulation to mean the time period between January 25, 2023 and February 1, 2023. During that time, Neptune will have sole discretion to decide whether to propose issuing Neptune securities in lieu of the $2,500,000 cash payment. If Neptune elects to propose issuing Neptune stock instead of cash during the Election Period, the Parties will thereafter jointly request that the Court issue findings necessary to ensure the availability of the exemption from registration under the Securities Act provided by Section 3(a)(10) thereof for the issuance of the shares.

corporate defendant, nonexistent insurance policies, and the limited resources of the individual defendants.

The Settlement provides a substantial, immediate, and guaranteed recovery for Class Members. Plaintiff and Lead Counsel believe that the proposed Settlement is fair, reasonable, adequate, and in the Class Members' best interest. Moreover, the proposed content and manner of providing notice satisfies requirements imposed by Fed. R. Civ. P. 23, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and due process. For these reasons, the Court should preliminarily approve the Settlement.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT

A. Procedural History

This action is currently pending before the Honorable Eric N. Vitaliano in the United States District Court for the Eastern District of New York (the "Court"), under the caption *Gong v. Neptune Wellness Solutions Inc., et al.*, Case No. 2:21-cv-01386-ENV-ARL (the "Action"). The initial complaint in this Action was filed on March 16, 2021 (ECF No. 1). Following the filing of the initial complaint, multiple parties filed motions to be appointed lead counsel and lead plaintiff (ECF Nos. 9-16, 18-23), including Lead Plaintiff Kenneth Rickert. On January 4, 2022, the Court appointed Kenneth Rickert to be Lead Plaintiff, and appointed its counsel, Pomerantz LLP as Lead Counsel (ECF No. 38).

The Parties then negotiated and filed a joint stipulation setting the deadline for Plaintiff to file his amended complaint and for Defendants to file their anticipated motion to dismiss (ECF No. 40). On February 16, 2022, after a thorough investigation that included multiple interviews with former Neptune and SugarLeaf employees and the engagement of a damages expert, Plaintiff filed an amended complaint (ECF No. 41) (the "Amended Complaint") against Neptune,

Cammarata, Rinow, and Landry. As a result of Plaintiff's extensive investigation, the Amended Complaint contained much stronger and more detailed claims than the initial complaint, and supported an extended class period. *Id.* On March 16, 2022, Defendants filed an unopposed motion for an extension of time to answer or otherwise respond to the Amended Complaint, which the Court subsequently granted (ECF No. 43). Additionally, on March 16, 2022, after negotiations between Lead Counsel and Landry, Plaintiff filed a waiver of service for Landry (ECF No. 44).

On April 1, 2022, Defendants filed a letter requesting a pre-motion conference, pursuant to Section III(A) of the Court's Individual Motion Practice and Rules (ECF No. 45). On April 8, 2022, Plaintiff filed his response in opposition (ECF No. 47). On April 12, 2022, the Court denied as moot Defendants' motion for a pre-motion conference and allowed the filing of their motion to dismiss.

The Parties subsequently negotiated and filed a consent motion for the entry of a briefing schedule (ECF No. 48), which the Court adopted. The Parties then briefed Defendants' Motion to Dismiss (ECF No. 50), Plaintiff's Response in Opposition (ECF No. 51), Plaintiff's Notice of Supplemental Authority (ECF No. 52), and Defendants' Reply in Support of their Motion to Dismiss (ECF No. 53), all of which were filed with the Court on August 5, 2022 pursuant to the Court's "bundling rule." On October 4, 2022, Plaintiff filed an additional Notice of Supplemental Authority with the Court (ECF No. 54).

On October 11, 2022, while waiting on a ruling from the Court on Defendants' Motion to Dismiss, Plaintiff and Defendants participated in a full-day mediation before an experienced mediator, Jed Melnick. While a settlement was not finalized at that mediation, the Parties continued to hold multiple follow-up rounds of discussions and negotiations over the ensuing week. Ultimately, the Parties reached an agreement to settle this Action for cash payments totaling

$4,000,000 or, at Neptune's election, a combination of $1,500,000 in cash payments and $2,750,000 worth of Neptune stock, as documented in their agreement in a Memorandum of Understanding executed on October 20, 2022. The Parties informed the Court of the Settlement in a joint letter filed with the Court on October 20, 2022 and asked the Court to stay all proceedings in the Action pending the outcome of the Parties' motion to approve the Settlement (ECF No. 55).

B. The Terms of the Settlement

The Settlement provides that Neptune will pay $1,500,000 in cash and either (1) an additional cash payment of $2,500,000 (totaling $4,000,000 in cash); or (2) securities valued at $2,750,000 (totaling $4,250,000 in cash and securities) into an Escrow Account, which amount plus accrued interest comprises the Settlement Fund. Stipulation, Section II(A). Notice to the Class and the cost of settlement administration ("Notice and Administration Expenses") will be funded by the Settlement Fund. Stipulation, Section IV. After a competitive bidding process, Plaintiff has retained a nationally recognized class action settlement administrator, AB Data Ltd., and asks the Court to approve its selection of settlement administrator.

The Notice provides that Lead Counsel will submit an application, in support of final approval of the Settlement, for an award of attorneys' fees in an amount not to exceed one-third of the Settlement Amount and litigation expenses in an amount not to exceed $60,000, plus interest accrued on both amounts at the same rate as earned by the Settlement Fund. The Notice also states that Plaintiff may also seek a compensatory award under the PSLRA not to exceed $7,000. The Notice further explains that such fees, award and expenses shall be paid from the Settlement Fund.

Having litigated this Action since early 2021, Plaintiff and his counsel were well-positioned to evaluate the Settlement, as well as the potential risks and benefits of continuing to trial, including the risks of being able to collect any successful judgment due to Neptune's

precarious financial condition and its lack of applicable insurance. Based on this evaluation, Plaintiff and his counsel agree that the Settlement represents a fair, adequate, and reasonable result for the Class.

While Plaintiff believes that the merits of their case are strong, Defendants contend that they did not violate the U.S. securities laws, did not act with scienter, and did not cause damages to the Class. Although Plaintiff believes his claims are well-supported and would ultimately prevail, he recognizes that there are numerous hurdles to success, including an unfavorable decision on Defendants' motion to dismiss or on a subsequent motion for summary judgment, the possibility that a jury may not return a verdict in their favor or may award damages less than the Settlement Amount, or an unfavorable appellate decision. Indeed, in two PSLRA cases that were tried to a verdict, plaintiffs in both cases did not file a motion for preliminary approval until approximately seven years after their respective juries rendered verdicts in their favor as a result of post-trial proceedings. *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02-cv-5571 SAS (S.D.N.Y. Apr. 21, 2017), ECF No. 1313 (motion for preliminary approval filed after appeal and approximately 7.5 years after the jury verdict); *see also* Mem. of P. & A. in Supp. of Pls' Unopposed Mot. for Prelim. Approval of Class Action Settlement, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.,* No. 02 C 5893 (N.D. Ill. Jun. 20, 2016), ECF No. 2212 (motion for preliminary approval filed approximately 7 years after the jury verdict and after appeal, which reversed the verdict in part and ordered a limited new trial). Plaintiff has also considered the additional costs and likelihood that further litigation would erode any cash reserves that Neptune has, thereby substantially delaying and diminishing any recovery. Given these significant risks, Plaintiff and his counsel believe that the prompt recovery of the Settlement provides an excellent result and is in the best interest of the Class.

III. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

The Second Circuit recognizes the "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *see also In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012). Courts should approve a class action settlement if it is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2); *see also In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 154 (S.D.N.Y. 2013); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013).[3]

"Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a subsequent 'fairness hearing.'" *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007), *adhered to on reconsideration*, No. 01 CIV. 3020 (SAS), 2007 WL 844710 (S.D.N.Y. Mar. 20, 2007). "In considering preliminary approval, courts make a preliminary evaluation of the fairness of the settlement, prior to notice" and "[o]nce preliminary approval is bestowed, the second step of the process ensues: notice is given to the class members of a hearing, at which time class members and the settling parties may be heard with respect to final court approval." *In re Nasdaq Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). "Preliminary approval is not tantamount to a finding that [a proposed] settlement is fair and reasonable. . . . Instead, at this stage, we need only decide whether the terms of the Proposed Settlement are at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 CIV. 2613 NRB, 2014 WL 6851096, at *2 (S.D.N.Y. Dec. 2, 2014). Additionally, "courts should give proper deference to the private consensual decision of the parties," and should bear in mind "the

[3] Unless otherwise noted, all emphasis is added, and internal quotations and citations are omitted throughout.

unique ability of class and defense counsel to assess the potential risks and rewards of litigation." *Waterford Twp. Police & Fire Ret. Sys. v. Smithtown Bancorp, Inc.*, No. 10-CV-864 (SLT) (RER), 2015 U.S. Dist. LEXIS 73276, at *18 (E.D.N.Y. Apr. 17, 2015).

Rule 23(e)(1) provides that preliminary approval should be granted where "the parties show[] that the Court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1). As set forth below, this Settlement satisfies both prongs. It meets the criteria for final approval expressly enumerated in Rule 23(e)(2), as well as those articulated in *Detroit v. Grinnell Corp*., 495 F.2d 448 (2d Cir. 1974).

A. The Settlement Satisfies the Factors for Approval under Rule 23(e)(2) and *Grinnell*

The Settlement is highly beneficial to the Class and satisfies the factors articulated in the recent amendments to Rule 23(e)(2) and *Grinnell*. Under the recent amendments to Rule 23(e)(2), courts assessing approval are to consider whether:

> (A) The class representatives and class counsel have adequately represented the class;
> (B) The proposal was negotiated at arm's length;
> (C) The relief provided for the class is adequate, taking into account:
> (i) The costs, risks, and delay of trial and appeal;
> (ii) The effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) The terms of any proposed award of attorneys' fees, including timing of payment; and
> (iv) Any agreement required to be identified under Rule 23(e)(3); and
> (D) The proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). These factors "add to, rather than displace, the *Grinnell* factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). Courts in the Second Circuit have long considered the following factors, set forth in *Grinnell*, to evaluate "whether a class action settlement is fair, reasonable, and adequate under

Rule 23":

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Christine Asia Co. v. Yun Ma, No. 115MD02631CMSDA, 2019 WL 5257534, at *8-9 (S.D.N.Y. Oct. 16, 2019) (citing *Grinnell*, 495 F.2d at 463). While the Second Circuit has not prescribed any set order of consideration, at least one district court has suggested that courts first "consider[] the Rule 23(e)(2) factors, and then consider[] additional Grinnell factors not otherwise addressed by the Rule 23(e)(2) factors." *See Payment Card*, 330 F.R.D. at 29. However, the court should not "engage in a complete analysis at the preliminary approval stage . . . as other courts in this Circuit have held, 'it is not necessary to exhaustively consider the factors applicable to final approval'" when considering preliminary approval. *Id.* at 30 n.24 (quoting *In re Platinum & Palladium Commodities Litig.*, No. 10-CV-3617, 2014 WL 3500655, at *12 (S.D.N.Y. July 15, 2014)). Indeed, certain factors—such as the reaction of the class to the settlement—will not have sufficient data to thoroughly consider until the final approval stage. *Id.*

1. The Class Was Well-Represented by Plaintiff and his Counsel

Plaintiff and Lead Counsel more than satisfy Rule 23(e)(2)(A)'s "adequate representation" requirement. That requirement focuses mainly on the "alignment of interests between class members." *See Wal-Mart Stores, Inc.*, 396 F.3d at 106-07. Here, Plaintiff's interests (and those of counsel) were fully aligned at all times with the interests of absent Class Members. All bring the same claims asserting the same legal theory over the same Class Period. And, because Plaintiff and Lead Counsel all "share the common goal of maximizing recovery, there is no conflict of

interest[.]" *See In re Polaroid ERISA Litig*., 240 F.R.D. 65, 77 (S.D.N.Y. 2006).

Plaintiff has vigorously litigated this case from the beginning. Plaintiff has significantly contributed to the Action by overseeing the litigation, including helping with the initial investigation of this Action, the drafting of the Amended Complaint, the drafting of the opposition to Defendants' motion to dismiss, and the mediation and subsequent negotiations that ultimately resulted in the Settlement.

Lead Counsel substantially advanced this Action and benefitted the Class. At the pleadings stage, they thoroughly investigated the legal and factual bases for claims against Defendants, including conducting a private investigation prior to drafting and filing the initial complaint (ECF No. 1). Lead Counsel then negotiated with counsel for Defendants to accept service of the initial complaint and filed a joint scheduling agreement that extended Defendants' time to answer or otherwise respond to the initial complaint until after the Court's appointment of lead plaintiff (ECF No. 6). Lead Counsel subsequently filed a motion for appointment as lead counsel and for Plaintiff to be appointed lead plaintiff (ECF Nos. 15-16), which the Court ultimately granted against other competing motions (ECF No. 38). After the Court's lead plaintiff appointment order, Lead Counsel negotiated and filed a joint stipulation regarding the filing of Plaintiff's amended complaint and Defendants' anticipated motion to dismiss (ECF No. 40).

While waiting for the Court to rule on the appointment of lead plaintiff, Lead Counsel continued to investigate Plaintiff's claims, including reviewing (i) Neptune's public SEC filings; (ii) presentations, press releases, media, and analyst reports made by or about the Company; (iii) transcripts of Neptune's conference calls with analysts and investors; (iv) publicly available data relating to Neptune stock; and (v) other materials and data concerning the Company. Lead Counsel and its investigator also conducted more than a dozen interviews with former Neptune and

SugarLeaf employees and, in some cases, their attorneys. Further, Lead Counsel consulted with a damages and loss causation expert and conducted two separate damages analyses – one for the initial complaint on one for the Amended Complaint. Moreover, Lead Counsel researched the potential claims and defenses thereto that Plaintiff could bring, analyzing the controlling case law in the Second Circuit. This thorough investigation led Lead Counsel to expand the Class Period and expand the scope of claims in the Amended Complaint, adding a number of additional alleged misrepresentations made by Defendants concerning SugarLeaf and Neptune's other areas of business and adding an additional Defendant (ECF No. 41). Lead Counsel then initiated efforts to serve the newly added Defendant, Martin Landry, which service Mr. Landry ultimately waived (ECF No. 44).

Lead Counsel also opposed Defendants' letter for a pre-motion conference (ECF Nos. 45, 47) and subsequently negotiated a briefing schedule for Defendants' motion to dismiss once allowed (ECF No. 48). Lead Counsel then researched and opposed Defendants' 44-page motion to dismiss (ECF No. 50-1), drafting a 50-page response in opposition after researching and analyzing the controlling case law (ECF No. 51). Thereafter, Lead Counsel continued to monitor the controlling case law throughout the briefing period, and twice filed a notice of supplemental authority with the Court detailing newly-decided opinions that related to issues before the Court (ECF Nos. 52, 54).

Simultaneously, Lead Counsel vigorously pursued settlement discussions. After the Parties agreed on a mediator, Lead Counsel drafted a mediation statement, prepared for and attended a full-day mediation session, participated in further negotiations in the following week, and monitored the financial viability of Neptune, so as to determine the best overall result for both Plaintiff and the Class. Lead Counsel additionally researched and analyzed the benefits of a cash-

based settlement compared to a cash-and-stock-based settlement, and the legality and proper method for stock issuance as part of a settlement under the controlling securities laws. After agreeing to the Settlement in principle, Lead Counsel consulted with a number of potential Class Members about the Settlement and their options moving forward. Thus, the Settlement is demonstrably the product of the assiduous work and vigorous advocacy of both Lead Counsel and Plaintiff on behalf of Neptune shareholders. Accordingly, this factor weighs in favor of approval.

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

"A settlement is procedurally fair when it is "achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class's interests." *Rodriguez v. CPI Aerostructures, Inc.*, No. 20CV0982ENVCLP, 2021 WL 9032223, at *4 (E.D.N.Y. Nov. 10, 2021); *see also* Fed. R. Civ. P. 23(e)(2)(B). In such circumstances, "'great weight' is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation." *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.), *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997). Indeed, there is a "presumption of fairness when a class settlement has been reached after arm's-length negotiations between experienced, capable counsel." *Rodriguez*, 2021 WL 9032223, at *4. Additionally, "the [P]arties' involvement in mediation in this case helps to ensure that the proceedings were free of collusion and undue pressure." *Id*. (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). Here, the Settlement was the result of extensive arm's length negotiations, culminating in an agreement after a full-day mediation session and subsequent negotiations before a highly regarded and experienced mediator.

3. The Settlement Is an Excellent Result for the Class

The Settlement provides an excellent result and immediate recovery for the Class, and is

fair, reasonable, and adequate considering "the costs, risks, and delay of trial and appeal" and other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). The Settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd sub nom. In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145 (2d Cir. 1987).

Here, the Settlement provides cash payments of $1,500,000 and, at Neptune's election, either an additional cash payment of $2,500,000 or securities valued at $2,750,000 for the benefit of the Class. This is an excellent result, especially given the significant risks of continued litigation and the low possibility that a substantially higher verdict, even if awarded at trial and sustained on appeal, could actually be collected. After consulting with an econometric expert, Plaintiff and Lead Counsel estimate that the maximum likely aggregated damages that would be awarded upon a successful verdict on all claims is $70.0 million. However, only a small fraction of that amount could actually be collected should Plaintiff prevail at trial, post-trial appeals, and any coverage litigation, due to the Neptune's current precarious financial position, the absence of any applicable insurance policy, and the limited wealth of individual defendants. Trial could also limit actual damages. Even if Plaintiff prevailed, a jury might not accept that the entirety of the decline in stock price on each disclosure date was caused by the alleged fraud.

Even without discounting the unique risks to collectability, the Settlement in this Action is favorable compared to other securities fraud class actions with similar damages. Plaintiff estimates that this recovery represents at least 5.71% of the approximately $70.0 million in aggregated damages. This recovery is in line with the average settlement amount in securities class actions. *See In re China Sunergy Sec. Litig.*, No. 07 CIV. 7895 DAB, 2011 WL 1899715, at *5 (S.D.N.Y.

May 13, 2011) ("the average settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses"); *In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (a recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations").

a. The costs, risks and delay of trial and appeal support approval

The recovery is a strong result for the Class when considered on its own, and highly favorable when weighed against the risks of continued litigation. In assessing a settlement, courts consider "not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case." *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at *9 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). A court need only determine whether the Settlement falls within a range of reasonableness that "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Pantelyat v. Bank of America, N.A.*, No. 16-cv-8964 (AJN), 2019 WL 402854, at *7 (S.D.N.Y. Jan. 31, 2019).

Here, although Plaintiff and Lead Counsel believe their case against Defendants is strong, they acknowledge that Defendants have put forth substantial arguments concerning liability. Specifically, Plaintiff still needs to succeed in his opposition to Defendants' motion to dismiss, Defendants' inevitable motion for summary judgment, and at trial. Undoubtedly, successfully prosecuting this Action through trial, like any securities action, would be both complex and risky. *See*, *e.g.*, *Christine Asia Co.*, 2019 WL 5257534, at *10 ("In evaluating the settlement of a

securities class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain."); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 CM PED, 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (recognizing that complex securities class actions are "notably difficult and notoriously uncertain"). Indeed, even were Plaintiff able to prosecute this Action to trial, there can be no assurance that the jury would find that Defendants made misrepresentations, acted with scienter, or that those misrepresentations were the cause of investor losses. *See, e.g.*, *Kalnit v. Eichler*, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim."), *aff'd*, 264 F.3d 131 (2d Cir. 2001).

Moreover, prevailing at trial would not necessarily result in a larger recovery. The jury could award a smaller number of damages, or the verdict could be appealed. *See, e.g.*, *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997) (reversing jury verdict of $81 million for plaintiffs against an accounting firm and entering judgment for defendant); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning securities fraud class action jury verdict for plaintiffs in a case tried in 1988 on the basis of a Supreme Court opinion handed down in 1994).

Further, continued litigation involves unique risks. Due to Neptune's precarious financial situation and lack of insurance, Plaintiff and Class Members might recover nothing at all, even with a successful verdict. As Neptune has disclosed, coverage was denied by their insurers, making any insurer contribution unlikely. Neptune provided Plaintiff's counsel a copy of the insurance denial letter and the applicable policy. Exacerbating the situation, Neptune has little cash on hand and a declining revenue stream. According to Neptune's August 15, 2022 Form 10-Q, the Company only had only $6,231,968 cash on hand, and continues to lose money. Any further litigation would only serve to consume the limited resources that Neptune has left, rather than

going to Class Members. *See Burns v. FalconStor Software, Inc.*, No. 10 CV 4572 (ERK), 2013 WL 12432583, at *8 (E.D.N.Y. Oct. 9, 2013) (granting preliminary approval while defendants' motion to dismiss was still pending because further litigation "would likely consume tremendous time and resources").

b. Other Rule 23(e)(2)(C) factors support approval

Rule 23(e)(2)(C) also states that adequacy should be assessed in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims[,]" "the terms of any proposed award of attorney's fees, including timing of payment[,]" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors supports approval.

First, the Settlement calls for an experienced Settlement Administrator to process claims and distribute the Net Settlement Fund pro-rata to the Class Members according to the defined Plan of Allocation using procedures that are well-established and have been proven effective in securities fraud litigation. AB Data Ltd., the Settlement Administrator selected by Lead Counsel after a competitive bidding process (subject to Court approval), will process claims under the guidance of Lead Counsel, and provide the Class Members with a reasonable opportunity to cure deficiencies in their claims. Thereafter, AB Data Ltd. will audit the claims received and evaluate the proposed distribution according to the Plan of Allocation, and Lead Counsel will then move the Court for an order of distribution permitting checks to be mailed to eligible claimants.[4]

Second, as disclosed in the Notice, Lead Counsel, who have not been paid to date, will apply for a fee award not to exceed one-third of the Settlement Fund. Such a fee would be

[4] This is not a claims-made settlement. If the Settlement is approved, Defendants will not have any right to the return of a portion of the Settlement Fund based on the number or value of the claims submitted.

reasonable for the work performed and the results obtained and consistent with awards in similar complex class action cases. *See, e.g.*, *In re PPDAI Grp. Inc. Sec. Litig.*, No. 18-CV-6716 (TAM), 2022 WL 198491, at *17 (E.D.N.Y. Jan. 21, 2022) (approving a one-third of a $9 million settlement); *Enriquez v. Nabriva Therapeutics plc et al*, 1:19-cv-04183, ECF No. 78 (S.D.N.Y. May 14, 2021) (approving fee award that was one-third of a $3 million settlement); *Pearlman v. Cablevision Sys. Corp.*, No. CV104992JSAKT, 2019 WL 3974358, at *3 (E.D.N.Y. Aug. 20, 2019) ("[I]t is very common to see 33% contingency fees in cases with funds of less than $10 million, and 30% contingency fees in cases with funds between $10 million and $50 million."); *In re BioScrip, Inc. Sec. Litig.*, 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017), *aff'd sub nom. Fresno Cty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.*, 925 F.3d 63 (2d Cir. 2019) (approving 33 1/3% settlement and stating "courts routinely award a percentage amounting to approximately 1/3"); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) ("it is very common to see 33% contingency fees in cases with funds of less than $10 million"); *Hayes v. Harmony Gold Min. Co.*, No. 08 CIV. 03653 BSJ, 2011 WL 6019219, at *1 (S.D.N.Y. Dec. 2, 2011), *aff'd*, 509 F. App'x 21 (2d Cir. 2013) (noting that attorneys' fee of one-third of the $9 million settlement amount was fair, reasonable and adequate).

Third, to protect the Settlement and the Class, the Parties have placed the terms under which Defendants may terminate the Settlement if a certain threshold of Class Members submit valid and timely requests for exclusion into a separate confidential agreement. Such an agreement "is standard in securities class action settlements and has no negative impact on the fairness of the Settlement." *See, e.g., Christine Asia Co.*, 2019 WL 5257534, at *15.

4. The Settlement Treats All Class Members Equitably

The Settlement easily satisfies the Rule 23(e)(2)(D) criteria that the Settlement treat class

members equitably relative to one another. Under the proposed Plan of Allocation, each Authorized Claimant will receive a pro-rata share of the Net Settlement Fund, which shall be the Authorized Claimant's Recognized Loss divided by the total of Recognized Losses of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund. Courts have repeatedly approved similar plans. *See, e.g., In re Citigroup, Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 386-87 (S.D.N.Y. 2013); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145-46 (S.D.N.Y. 2010).

B. The Remaining *Grinnell* Factors Support Approval

The additional factors articulated in *Grinnell* include: the stage of the proceedings and the amount of discovery completed; the ability of the defendants to withstand a greater judgment; and the range of reasonableness of the settlement fund in light of the best possible recovery and the risks of litigation. Here, each supports approval.[5] However, "a court need not find that every factor militates in favor of a finding of fairness; rather, a court consider[s] the totality of these factors in light of the particular circumstances." *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 134 (S.D.N.Y. 2008).

First, the stage of the proceedings favors approval. This factor assesses "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-CV-05669 BMC, 2012 WL 5874655, at *4 (E.D.N.Y. Nov. 20, 2012). Here, Plaintiff and Lead Counsel researched this action for almost a full year before filing the Amended Complaint, with the assistance of experienced private investigators interviewed more than a dozen former Neptune and SugarLeaf employees, researched and drafted a 50-page opposition to Defendants' motion to dismiss, drafted two separate notices of supplemental

[5] One remaining *Grinnell* factor, the reaction of the Class, cannot meaningfully be assessed until Notice is disseminated and will be addressed at a later stage.

authority – demonstrating Plaintiff's continued vigilance over the controlling law at issue – drafted a mediation statement, engaged in a full-day mediation and multiple subsequent negotiations before an experienced mediator where Plaintiff and Lead Counsel were able to adequately assess both Defendants' arguments for dismissal and Neptune's financial situation and potential inability to fund a larger settlement later, consulted with econometric experts concerning the total potential damages and compared that to the Settlement amount, and researched the legality of a stock issuance by Neptune pursuant to the Settlement. *Supra* at Section II(A); Section III(A)(1). All of this experience place Plaintiff and Lead Counsel in an expert position to effectively evaluate the merits of the Settlement and appreciate the strengths and weaknesses they will face if the litigation were to proceed. *See Rodriguez*, 2021 WL 9032223, at *5 (finding this factor satisfied where plaintiff settled his action while the motion to dismiss decision was pending because "[w]hile formal discovery has not occurred in this case . . . Plaintiffs filed an exhaustive Amended Complaint in this case and defendants responded with a motion to dismiss, apprising plaintiffs of the defendants' position. Moreover, Lead Plaintiff and his counsel engaged in extensive negotiations with the defendants with the aid of a mediator."); *Burns*, 2013 WL 12432583, at *8 (finding that information gained through the mediation and settlement process found to be sufficient in a case without any discovery); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 CPS SMG, 2007 WL 2743675, at *10 (E.D.N.Y. Sept. 18, 2007) ("Although little formal discovery has been completed, Lead Counsel has interviewed several former employees of [Defendant] and obtained a number of internal documents, and all parties have conducted extensive research[.]").[6]

[6] *See also In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 177 (S.D.N.Y. 2014) (finding that even where "no merits discovery occurred in this case to date," lead counsel was

Second, while no class has yet been certified, even assuming class certification is achieved, the Court could revisit certification at any time. Thus, absent settlement, there would always be a meaningful risk that this case or parts thereof might not be maintained on a class-wide basis through trial. *Rodriguez*, 2021 WL 9032223, at *6 (quoting *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005)) ("the risk that the case might not be certified is not illusory").

Third, the low probability that Plaintiff could collect on a judgment substantially larger than the Settlement Amount "weighs heavily in favor of approving the settlement." *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. at 179. That is especially true where, as here, the corporate defendant has precariously low cash on-hand and the lack of any applicable insurance coverage limits the ability for Plaintiff to actually recover a large judgment from Defendants. *Id; see also supra* at Section III(A)(3)(a). Therefore, "risk of collection weighs in favor of final approval, because the settlement decreases the risk of collection." *Massiah*, 2012 WL 5874655, at *5.

Finally, the Settlement is within the range typically found reasonable relative to the maximum prospective recovery. Reasonableness must be judged "in light of the strengths and weaknesses of plaintiffs' case" not "the best of all possible worlds." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. at 762. Here, the Settlement's recovery is reasonable even before considering potential impediments to continued litigation of this Action and is an excellent recovery after considering such risks.

"knowledgeable with respect to possible outcomes and risks in this matter and, thus, able to recommend the Settlement"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("Formal discovery is not a prerequisite; the question is whether the parties had adequate information about their claims.").

IV. THE PROPOSED PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

The proposed Plan of Allocation, which is detailed in the Notice to be provided to the Class Members, will govern how the Settlement proceeds will be distributed among Class Members who timely file a valid Proof of Claim. A plan of allocation, "particularly if recommended by experienced and competent class counsel," should be approved so long as it is "fair and adequate" and "ha[s] a reasonable, rational basis." *Christine Asia Co.*, 2019 WL 5257534, at *15. The proposed Plan of Allocation was prepared by Lead Counsel after consulting with experts, and rationally reflects the allegations and causes of action asserted in this case as well as the Court's rulings. It will result in a fair and equitable distribution of the proceeds among Class Members who submit valid claims and does not preference Plaintiff. Each will receive no more, or less, than his or her *pro rata* share of the Net Settlement Fund based on recognized losses assessed by the formula described in the Notice.

V. THE COURT SHOULD APPROVE THE PROPOSED PLAN OF NOTICE

Rule 23(c)(2) directs that the notice be "the best notice that is practicable under the circumstances" (Fed. R. Civ. P. 23(c)(2)(B)) and Rule 23(e) directs "notice in a reasonable manner" (Fed. R. Civ. P. 23(e)(1)(B)). Pursuant to the PSLRA, the notice must also include an explanation of the plaintiff's recovery. *In re Take Two Interactive Sec. Litig.*, No. 06 CIV. 1131 (RJS), 2010 WL 11613684, at *12–13 (S.D.N.Y. June 29, 2010) (quoting 15 U.S.C. §78u-4(a)(7)). The notice must also "fairly apprise[] the prospective members of the class of the terms of the proposed settlement and of the options that [are] open to them in connection with the proceedings." *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 95 (2d Cir. 2019).

Plaintiff's proposed plan of notice satisfies these standards. As specified by Rule 23(c)(3) and 15 U.S.C. §78u4(a)(7), the Notice describes the proposed Settlement and sets forth, among

other things: (1) the nature, history, and status of the litigation; (2) the definition of the certified Class and who is excluded; (3) the reasons for settling; (4) the amount of the Settlement Fund; (5) the Class's claims and issues raised in this Action; (6) the Parties' disagreement over damages and liability; (7) the maximum amount of attorneys' fees and expenses that Lead Counsel may seek; (8) the maximum amount that may be requested as a reimbursement award to Class Representatives; and (9) the plan for allocating the Settlement proceeds to the Class. *See* Ex. A-1. The Notice also describes the process for seeking exclusion from the Class, or for objecting to the Settlement, Plan of Allocation, or requests for awards of fees and expenses. *Id.*

To provide notice of the Settlement, the proposed Preliminary Approval Order directs that within 16 calendar days after entry of the Preliminary Approval Order, the Settlement Administrator shall cause the Notice to be provided on the Settlement website, a link to which shall be e-mailed to all potential Class Members whose e-mail information can be identified with reasonable effort, and cause the Postcard Notice to be mailed to all potential Class Members whose e-mail information is unknown but otherwise can be identified with reasonable effort. Plaintiff will also cause the Summary Notice to be published on a national business newswire within 10 calendar days after the mailing of the Postcard Notice begins. Ex. A at ¶15. All key Settlement documents will also be posted on the settlement website and made available by email or toll-free telephone number. Ex. A at ¶14. Accordingly, the proposed plan of notice meets all the requirements of due process, the PSLRA, and the Federal Rules of Civil Procedure.

VI. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

Plaintiff respectfully proposes the schedule set forth below for Settlement-related events. The specific timing of events is determined by the date on which the Settlement Hearing is scheduled. To allow sufficient time for the Notice to be disseminated to the potential Class

Members, Plaintiff respectfully requests that the Court schedule the Settlement Hearing at the Court's convenience but for a date not earlier than 100 calendar days after entry of the Preliminary Approval Order.

EVENT	PROPOSED DUE DATE
Deadline for notice to Class Members by either: (a) emailing a link to the Notice to Class Members for whom the Claims Administrator is able to obtain email addresses; or (b) mailing the Postcard Notice, if an email address cannot be obtained, by first class mail, postage prepaid (Preliminary Approval Order, ¶11)	16 calendar days after entry of Preliminary Approval Order
Deadline for the publication of the Summary Notice in nationally distributed, business-focused newswires (Preliminary Approval Order, ¶15)	26 calendar days after entry of Preliminary Approval Order
Deadline for filing of papers in support of the Settlement, the Plan of Allocation, and Fee and Expense Application (Preliminary Approval Order, ¶26)	28 calendar days prior to the Settlement Hearing
Deadline for receipt of exclusion requests or objections (Preliminary Approval Order, ¶19)	21 calendar days prior to Settlement Hearing
Postmark deadline for submitting a Proof of Claim (Preliminary Approval Order, ¶17)	30 calendar days prior to Settlement Hearing
Deadline for filing responses to any objections or in further support of the Settlement, the Plan of Allocation, and the Fee and Expense Application (Preliminary Approval Order, ¶27)	7 calendar days prior to the Settlement Hearing
Settlement Hearing (Preliminary Approval Order, ¶6)	To be determined by the Court, approximately 100-105 days after entry of the Preliminary Approval Order

VII. CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES IS APPROPRIATE

In preliminarily approving the proposed Settlement, this Court must consider whether to conditionally certify the Settlement Class for settlement purposes. *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 620 (1997); Manual for Complex Litigation (Fourth) § 21.632. The Second Circuit has long acknowledged the propriety of certifying a class solely for settlement purposes. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). "The type of certification approval that courts provide with a preliminary settlement approval is accorded under a more relaxed standard" than in the typical certification process. 4 NEWBERG ON CLASS ACTIONS § 13:18 (5th ed. 2012). The Court need not conduct a rigorous analysis at this stage to determine whether to certify a settlement class, but should reserve this analysis for the final approval hearing. *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007). In certifying the Settlement Class the Court is not required to determine whether the action, if tried, would present intractable management problems, "for the proposal is that there be no trial." *Id*. at 620; *see also* Fed. R. Civ. P. 23(b)(3)(D).

Certification of a settlement class is appropriate where the proposed class and proposed class representative meet the four requirements of Rule 23(a): (1) "numerosity" – the class is so numerous that joinder of all members is impracticable, (2) "commonality" – there are questions of law or fact common to the class, (3) "typicality" – the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) "adequacy" – the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition, certification of a class action for damages requires a showing, under Rule 23(b)(3), that questions of law or fact common to the members of the class predominate over individual issues of law or fact ("predominance") and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy ("superiority"). Fed. R. Civ. P. 23(b)(3). Here, the Parties

have stipulated to the certification of the Settlement Class for settlement purposes only. Stipulation, Section V(A). For settlement purposes, Plaintiff requests that the Court certify the Settlement Class defined in the Stipulation, comprising: all persons and entities that purchased or otherwise acquired Neptune securities on the NASDAQ or another U.S. trading venue between July 24, 2019, and July 15, 2021, inclusive, and who were damaged thereby. *Id*. at Section I(G). Here, the proposed Settlement Class meets the requirements of and satisfies Rule 23(a) and 23(b)(3).

A. Numerosity

Rule 23(a)(1) requires that the proposed class be so numerous that joinder of all members is impracticable. In the Second Circuit, "[n]umerosity is presumed for classes larger than forty members." *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir.). "In securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Pearlstein v. BlackBerry Ltd.*, No. 13 CV 7060, 2021 WL 253453, at *7 (S.D.N.Y. Jan. 26, 2021); *see also Rodriguez*, 2021 WL 9032223, at *8. Here, an average monthly volume of 36.64 million Neptune shares was traded during the Class Period. ECF No. 41, ¶156. Thus, while Plaintiff "does not know the 'exact' number of class members, he estimates that there are "thousands" of investors residing in geographically disparate areas that would be included in the class, thus rendering joinder impracticable." *Rodriguez*, 2021 WL 9032223, at *8. Consequently, numerosity is satisfied. *Id*.

B. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "In securities fraud cases, where putative class members have been injured by

similar material misrepresentations and omissions, the commonality requirement is satisfied." *In re Pfizer Inc. Sec. Litig.*, 282 F.R.D. 38, 44 (S.D.N.Y. 2012); *see also Gordon v. Vanda Pharms. Inc.*, No. 19 CV 1108 (FB)(LB), 2022 WL 4296092, at *7 (E.D.N.Y. Sept. 15, 2022). Here, common issues include (1) whether Defendants made affirmative misrepresentations and/or omitted material information to investors regarding Neptune's acquisition of SugarLeaf Labs, LLC; (2) whether Defendants made affirmative misrepresentations and/or omitted material information to investors regarding Neptune's capability to fulfill, performance of, and communications with Costco regarding an agreement to provide hand sanitizer to Costco; (3) whether Defendants made material affirmative misrepresentations and/or omitted material information to investors regarding a purchase order to supply personal protective equipment in the wake of COVID-19; (4) whether Defendants' misrepresentations and omissions violated federal securities laws; (5) whether Defendants' misrepresentations and omissions were material; (6) whether Defendants acted with scienter; (7) whether the prices of Neptune securities during the Class Period were artificially inflated because of Defendants' conduct; and (8) whether members of the Class have sustained damages and, if so, what is the proper measure of damages. *See* Amended Complaint, ¶159. Other courts have found such issues establish commonality. *See*, *e.g.*, *Rodriguez*, 2021 WL 9032223, at *8.

C. Typicality

Rule 23(a)(3) requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The Second Circuit has established a two-pronged test. First, there must be a showing that class counsel is qualified, experienced and able to conduct the litigation. Second, the named plaintiffs' interests must not be antagonistic to the interest of other members of the class." *Rodriguez*, 2021 WL 9032223, at *9.

"This is satisfied, where, as here, the claims of the representative plaintiffs arise from the same course of conduct that gives rise to claims of the other class members, where the claims are based on the same legal theory, and where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representatives." *Gordon*, 2022 WL 4296092, at *7. Here, Plaintiff's claims and the claims of other Class Members arise from the same course of conduct and are based on the same legal theory. Thus, typicality is satisfied.

D. Adequacy

Besides having achieved a highly favorable settlement, the standard criteria of adequacy is also satisfied here. "Adequacy entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Flag Telecom Holdings, Ltd. Sec. Litig*., 574 F.3d 29, 35 (2d Cir. 2009). Plaintiff satisfies both prongs. Plaintiff's interests are the same as absent Class Members: to maximize recovery and to make sure that recovery is achieved as soon as possible. There are no antagonistic interests. Likewise, having retained a highly experienced securities litigation firm and regularly communicated with the attorneys of record, Plaintiff puts the Class in a strong position throughout this Action, both generally and in particular regarding negotiating the Settlement.

E. The Class Meets the Requirements of Rule 23(b)

Rule 23(b)(3) requires proof that common issues predominate, and that a class action is the superior method of adjudication. As the U.S. Supreme Court noted, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. "Moreover, common issues, such as liability, may be certified even where other issues, such as damages, do not lend themselves to classwide proof." *Rodriguez*,

2021 WL 9032223, at *11. Further, "the predominance inquiry will sometimes be easier to satisfy in the settlement context" because a settlement class inherently addresses some of the practical concerns motivating the predominance test, concerns that are primarily relevant when certifying a litigation class. *In re Am. Intern. Grp., Inc. Sec. Litig.*, 689 F.3d 229, 232 (2d Cir. 2012).

Here, "[r]esolution of plaintiff's allegations—including questions of liability, causation, and damages—are susceptible to generalized proof and, further, such generalized inquiries predominate over any issues specific to individual class members." *Gordon*, 2022 WL 4296092, at *8; *see also Micholle v. Ophthotech Corp.*, No. 17-CV-1758 (VSB), 2022 WL 1158684, at *3 (S.D.N.Y. Mar. 14, 2022) ("Predominance is met here because the members of the Settlement Class were subject to the same alleged misrepresentations and omissions of Defendants and the claim is susceptible to common evidence and proof"); *Mikhlin v. Oasmia Pharm. AB*, No. 19 cv 4349 (NGG)(RER), 2021 WL 1259559, at *11 (E.D.N.Y. Jan. 6, 2021) ("The putative class members purchased the same securities, the value of which was allegedly damaged by the same series of fraudulent acts and omissions. Accordingly, the court will likely find that common factual and legal questions predominate over individual issues.").

Superiority is likewise established. Courts consider four factors in assessing superiority: (1) the interests of members of the class in individually controlling the prosecution of separate actions; (2) whether other litigation has already commenced; (3) the desirability or undesirability of concentrating claims in one forum; and (4) the difficulties likely to be encountered in the management of a class action. *Amchem*, 521 U.S. at 616. Here, each factor favors certification. Because many investors suffered losses too small to justify individual litigation, class adjudication is the only realistic basis for recourse. Moreover, because "[t]here are likely thousands of class members nationwide . . . consolidating their claims is in the interests of efficiency and judicial

economy." *Gordon*, 2022 WL 4296092, at *9; *see also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 702 (S.D.N.Y. 2019) ("[C]oncentrating the case in one forum will help improve fairness and efficiency in adjudication of the claims of plaintiffs, who are widely dispersed."). "Additionally, a class action is superior where, as here, the economic loss incurred by many class members is not of a magnitude that would make individual 'litigation economical.'" *Gordon*, 2022 WL 4296092, at *9 (citing *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 702). There are no other parallel actions, and it is desirable to concentrate claims to avoid unnecessary duplication and waste of resources. Finally, Plaintiff foresees no difficulty in effecting settlement on a class basis, as is the typical course in securities fraud class actions.

F. Lead Counsel Satisfies Rule 23(g)

Rule 23(g) requires the appointment of a class counsel that can fairly and adequately represent the interests of the Class, and specifically instructs the Court to consider:

> (i) The work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A).

Here, Lead Counsel satisfies all of these considerations. Lead Counsel spent significant effort investigating the potential claims in this action before and after being appointed Lead Counsel, which led to a viable Amended Complaint. *Supra* at Section III(A)(1). Lead Counsel is also highly experienced in the area of securities litigation and securities fraud class actions on behalf of investors, as outlined in the firm's resume. *See* ECF No. 16-5. Moreover, Lead Counsel has extensive knowledge of the applicable law governing this Action, as demonstrated both by its experience, *id*., and its performance in this Action, where Lead Counsel opposed Defendants'

motion to dismiss. *See* ECF Nos. 50-51, 54. Finally, Lead Counsel has expended significant resources in representing the Class, including but not limited to the resources necessary to successfully engage in mediation. *Supra* at Section III(A)(1). Thus, Lead Counsel's extensive efforts and in-depth knowledge of the law governing this Action weigh strongly in favor of appointment under Rule 23(g).

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) grant preliminary approval of the proposed Settlement, (2) approve the Plan of Allocation, (3) approve the proposed form and manner of notice, (4) certify the proposed Class for purposes of the Settlement, and (5) schedule a Settlement Hearing.

Dated: December 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 6, 2022, the foregoing document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Christopher P.T. Tourek
Christopher P.T. Tourek