IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

IN RE ENDOCHOICE HOLDINGS, INC. SECURITIES LITIGATION	Civil Action File No. 2016 CV 277772 (Consolidated with Civil Action No. 2016 CV 281193) CLASS ACTION

PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR (A) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND (B) ATTORNEYS' FEES AND LITIGATION EXPENSES AND MEMORANDUM IN SUPPORT

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Dated: May 11, 2020

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Pursuant to O.C.G.A. §9-11-23(e), the two Court-appointed Class Representatives Jesse Bauer and Kenneth T. Raczewski ("Plaintiffs")[1] on behalf of themselves and the certified Class[2], respectfully submit their motion for final approval of the proposed $8.5 million Settlement and proposed Plan of Allocation (the "Final Approval Motion"). Class Counsel also submit this brief in support of their request for an award of attorneys' fees equal to 33⅓ % of the Settlement ($2,833,333.33) and reimbursement of $121,361.41 in expenses, and an award of $15,000 to each of the two Class Representatives for their service to the Class (the "Fee Motion").

PRELIMINARY STATEMENT

After over three years of hard-fought litigation, Plaintiffs and their Counsel have reached an $8.5 million all cash settlement for the benefit of the Class in this securities class action. The claims at issue arise under the Securities Act of 1933 ("Securities Act"), and allege that Defendants made materially false, misleading or incomplete statements in the Offering Materials for its July IPO concerning the purported quality of EndoChoice's flagship "FUSE" endoscopy system and the Company's salesforce -- and that investors suffered large damages when it was later disclosed that FUSE product suffered from certain defects and its product sales had suffered.

Plaintiffs respectfully submit that, as detailed below, the Settlement represents an excellent result for the Class, and a decidedly above-average recovery of investor losses for a case of this type based on objective data. Moreover, as this Court noted in its February 11, 2020 Order preliminarily approving the Settlement (the "Preliminary Approval Order"), the Settlement was only reached after arm's length negotiations held under the aegis of a highly experienced mediator,

[1] Unless otherwise noted, capitalized terms have the same meanings as in the Parties' Stipulation of Settlement (previously submitted as Exhibit 1 to the Affidavit of William Fredericks in support of Plaintiffs' Motion for Preliminary Approval, dated January 30, 2020 (the "1/30/20 Fredericks Aff.").

[2] "Plaintiffs' Counsel" refers collectively to the two Class Counsel firms (Scott+Scott Attorneys at Law, LLP and Levi & Korsinsky, LLP) and to the Class Liaison Counsel (Law Offices of David A. Bain, LLC.)

Robert Meyer, Esq. of JAMS, and is fully consistent with the "Mediator's proposal" made by Mr. Meyer after a full-day mediation failed to result in an agreement. In sum, the Settlement readily meets the standards for final approval under O.C.G.A. §9-11-23(e).

Counsel also respectfully submit that they have earned an attorneys' fee award of 33⅓ % of the Settlement. As detailed in §§I and III below, Counsel diligently pursued this Action throughout, beginning with their comprehensive fact investigation, and thereafter proceeding through, *inter alia*: their preparation of the detailed Consolidated Complaint; their success (in substantial part) in defeating Defendants' motions to dismiss; their success (in both this Court and the Court of Appeals) in certifying the Class over Defendants' vigorous attacks; their conduct of adversarial discovery practice (and prevailing on a disputed discovery issue that required resolution by the Court); and, ultimately, Class Counsel's highly successful navigation of an adversarial mediation process that involved (on Plaintiffs' part alone) preparing ***three*** separate mediation briefs, a full-day mediation session, eventual agreement on the "Mediator's proposal," and the negotiation of lengthy and detailed "long-form" settlement papers. In total, Counsel have spent over 3,907.45 hours over nearly four years, all on a ***fully contingent*** fee basis with no assurance of ever being paid, to achieve the $8.5 million Settlement for the Class.

The requested 33⅓ % fee is also well within the range of percentage-based fees awarded in complex securities class actions, and fully merited by a review of all other relevant *Johnson/Friedrich* factors. Significantly, the requested one-third fee (equal to roughly $2.833 million), even if granted in full, is also ***less*** than the combined value of Plaintiffs' Counsel's "lodestar" time (equal to roughly $3.084 million) – and results in a "negative multiplier" of only 0.92 ($2.833 million divided by $3.084 million). Given that a "positive" multiple of two times (or more) on the lodestar value of Plaintiffs' Counsel's time would be unexceptional for a case

involving such a strong recovery for the Class, *a fortiori* a percentage-based fee that results in a "negative" multiplier (*i.e.*, a multiple of less than 1.0) is fair and reasonable. As further set forth below, the request for reimbursement of litigation expenses in the amount of $121,361.41, and the request for $15,000 each in service awards to the Class Representatives, are also fair and reasonable, and should be granted.

Accordingly, both Motions should be granted.

HISTORY OF THE ACTION AND SUMMARY OF WORK PERFORMED

Plaintiffs incorporate herein by reference the sections of the accompanying Fredericks Suppl. Aff. which summarize the Claims Asserted, the History of the Action, and the Negotiation of the Settlement. In brief, however, the history of this Action can be summarized as follows:

- In July and October 2016, Plaintiffs Bauer and Raczewski, respectively, filed separate actions alleging that Defendants had conducted EndoChoice's initial public offering (the "IPO") pursuant to defective Offering Materials that contained materially inaccurate misleading or incomplete statements and omissions concerning EndoChoice's FUSE endoscopy system. Fredericks Suppl. Aff. at ¶11;

- After the Court consolidated the cases, Plaintiffs filed a detailed, 64-page Consolidated Amended Complaint (the "Complaint") on December 2, 2016. *Id.* at ¶¶12-13;

- On January 17, 2017, the EndoChoice and Underwriter Defendants filed their respective motions to dismiss and comprehensive briefs in support. Plaintiffs thereafter filed equally comprehensive briefs in opposition, and the Court heard oral argument on the motion on April 18, 2017. *Id.* at ¶¶14-16;

- On May 2, 2017, the Court issued its decision denying in substantial part Defendants' motions to dismiss. *Id.* at ¶17;

- Plaintiffs filed their motion for class certification on May 30, 2017, and following the commencement of discovery (including the taking of both Plaintiffs' depositions) Defendants filed their papers in opposition on November 2, 2017. *Id.* at ¶¶18-20;

- Following oral argument on January 24, 2018, by order dated February 14, 2018, the Court granted Plaintiffs' motion for class certification (subject to one modest temporal modification). *Id.* at ¶¶20-21;

- On March 12 and March 15, 2018, the EndoChoice Defendants and the Underwriter Defendants each filed appeals of the Court's class certification order to the Georgia Court of Appeals. *Id.* at ¶22;

- Following full briefing and oral argument before the Court of Appeals, by published decision dated June 28, 2019, that court denied Defendants' appeals in their entirety. *Id.* at ¶23.

- Upon remand from the Court of Appeals, the parties engaged in further, and often contested, discovery proceedings, including Plaintiffs' service of detailed document requests and interrogatories and the holding of meet & confers over the scope of Plaintiffs' discovery requests, the specific contents of Plaintiffs' proposed electronic search terms (to be used in searching Defendants emails and other electronically stored information), and nature and number of custodians (located both in the United States and overseas) whose files needed to be searched for responsive documents. *Id.* at ¶¶26-29;

- As an indication of the extent to which even relatively ministerial discovery matters were hotly contested, the Parties were unable to agree on the terms of a Confidentiality Stipulation and Protective Order, with the result that, after letter briefing, on November 4, 2019, the Court was required to decide which Party's proposed order to enter (with the Court again deciding in Plaintiffs' favor). *Id.* at ¶28;

- While discovery matters continued to proceed, in the late summer of 2019 the Parties' counsel discussed the possibility of trying to mediate a resolution of the Action, with the Parties ultimately agreeing in October 2019 to retain Robert Meyer, Esq., of JAMS – a highly experienced mediator of complex securities class actions – to conduct a full day mediation session in New York on December 6, 2019. *Id.* at ¶¶30-39;

- Following the exchange of multiple sets of mediation briefs and related materials on issues of liability and damages, and a full day of negotiations under the Mediator's auspices in New York, the Parties were unable to reach an agreement. *Id.* at ¶¶33-35;

- At the conclusion of the mediation, however, the Mediator made a "mediator's proposal" to both sides to settle all claims at issue for the payment by Defendants of $8.5 million. Following further discussions, the Parties thereafter negotiated and signed a Memorandum of Understanding to settle this Action for $8.5 million, consistent with the "mediator's proposal." *Id.* at ¶¶35-37; and

- After the negotiation and preparation of the customary "long form" Stipulation of Settlement and related exhibits, Plaintiffs' Counsel moved for, and obtained, this Court's entry of its Preliminary Approval Order, dated February 11, 2020. *Id.* at ¶¶40-41.

SUMMARY OF THE SETTLEMENT

As noted at footnote 1 above, a complete copy of the Stipulation of Settlement was filed with the Court on February 4, 2020. In sum, the Settlement's main terms are as follows:

- **Monetary Consideration**: In exchange for the Class's release of all claims at issue against all Defendants, EndoChoice agreed to pay (and has since caused to be paid) $8.5 million in cash into an interest bearing escrow account. *Id.* at ¶41; Stip., ¶¶2-3.

- **Distribution to Class Members**: The $8.5 million, after deductions for Court-approved awards of fees, expenses and claims administration costs, will be distributed to Class Members who timely file valid Proofs of Claim, in accord with the Plan of Allocation that provides for a *pro rata* distribution based on the size of each Class Member's "Recognized Claim" Amount (which in turn takes into account the varying amounts of per share losses suffered depending on when a given Class Member purchased and sold their EndoChoice shares). Stip., ¶¶28-34.

- **No Reversion**: Once the Settlement becomes "final" and is no longer subject to appeal, no Defendant will be able to get back any of the $8.5 million consideration. *Id.* at ¶8.

- **Release of Claims**: Plaintiffs and the Class Members will release all of their "Released Claims" against all Defendants and their related Parties. Stip., ¶¶21-23.

- **Rights to Object or Opt Out:** Any Class Member, by following the instructions in the Notice, may either object to any aspect of the Settlement or request to be excluded ("opt out"). Stip. at Exh. A-1 (the Notice) at Responses to Questions 14, 19.

COMPLIANCE WITH THE COURT-ORDERED NOTICE PLAN

KCC, the claims administrator, has fully implemented the Notice Plan as directed by the Court's prior Preliminary Approval Order. *See* accompanying Affidavit of Justin Hughes of KCC, dated May 8, 2020 ("Hughes Aff."). In particular, KCC has mailed the "Notice Packets" (consisting of the Notice and Proof of Claim form) to 9,600 potential Class Members or "broker nominees" who hold shares in their name, using purchaser and shareholder lists provided by the Defendants. Hughes Aff. at ¶¶2-7. KCC also duly caused the Summary Notice to be published in *Investors Business Daily* and transmitted over *PR Newswire*, a widely-circulated newswire service, activated the dedicated Settlement website (www.endochoicesecuritieslitigation.com, where the

full text of the Stipulation and other relevant documents can be accessed), and established the dedicated toll-free settlement "hotline." *Id.* at ¶¶8-10. To date, no Class Member has requested exclusion from the Class or objected to the Settlement or any fee or expense request.[3]

The Court has already held in its Preliminary Approval Order (at 3) that the Notice Plan met all applicable Georgia rules and due process standards, including provision of individual notice to reasonably identifiable Class Members. Notice having been duly issued, and the Fairness Hearing having been set for June 15, 2020, it is now appropriate to address final approval.

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE GIVEN FINAL APPROVAL

O.C.G.A. §9-11-23(e) requires judicial approval for any compromise or settlement of class action claims. A class action settlement should be approved if the court finds it to be fair, reasonable, and adequate. *Ellison v. Southstar Energy Services LLC*, 2008-CV-147195, 2012 WL 2050514 at *5 (Fulton Super. Ct., Apr. 6, 2012) (Shoob, J.); *see also* Newberg on Class Actions ("Newberg") §13:48 (5th ed. 2011, December 2019 update). In evaluating whether a settlement is fair, a court should first inquire whether it was the result of arms-length negotiations, *Carpenters Health & Welfare Fund v. Coca-Cola Co*., No. 1:00-CV-2838-WBH, 2008 WL 11336122, at *7-8 (N.D. Ga. Oct. 20, 2008)[4], and whether the Class had experienced and informed counsel who had adequately litigated the case before settling. *Ellison*, 2012 WL 2050514 at *6.[5]

[3] The deadline for Class Members to submit opt-out requests or objections is May 25, 2020. Should any subsequently be submitted, Plaintiffs and/or Class Counsel will address them in reply papers.

[4] "Georgia courts may rely on federal class action cases as persuasive authority." *Liberty Lending Servs. v. Canada*, 293 Ga. App. 731, 738, n. 9 (2008); *see also EndoChoice Holdings, Inc. v. Raczewski*, 351 Ga. App. 212, 214-15 (2019) ("Because OCGA § 9-11-23 is based on Rule 23 of the Federal Rules of Civil Procedure, it is appropriate that we look to federal cases interpreting that rule for guidance"); *Brenntag Mid S., Inc. v. Smart*, 308 Ga. App. 899, 903 (2011) (same).

[5] All internal citations and internal quotations in quoted materials are omitted, and all emphases are added.

A. The Settlement Here Was The Result Of Arm's-Length Negotiations By Experienced Counsel Under The Aegis Of A Respected Mediator, And Thus Merits A Strong Initial Presumption Of Fairness

There is a strong initial presumption that a settlement is fair and reasonable where, as here, it was negotiated at arm's length under the auspices of an experienced mediator. The mediator here, Robert Meyer of JAMS, has a national reputation for settling complex cases. *See, e.g. Flynn v. Sientra, Inc*., 15-CV-07548, 2017 WL 11139918, at *3 (C.D. Cal. Jan. 23, 2017) (describing him as "skilled and experienced"). And the $8.5 million Settlement is based on this highly experienced mediator's "mediator's proposal." Fredericks Suppl. Aff at ¶35; *see also* Newberg §13:50 ("there appears to be no better evidence of [an arm's length process] than the presence of a neutral third party mediator"); *In re Equifax Inc. Cust. Data Sec. Breach Litig*., No 1:17-MD-2800-TWT, 2020 WL 256132, at *6 (N.D. Ga. Mar. 17, 2020) ("readily conclud[ing]" that settlement was negotiated at arm's length where it was reached under aegis of experienced mediator); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (role of "highly experienced mediator" supported approval).

Nor can there be any dispute that the Settlement was negotiated by experienced Counsel who had a firm understanding of the strengths and weaknesses of the relevant claims and defenses. Indeed, settlement negotiations did not even ***begin*** until more than 3 years after the Action was commenced. And although fact discovery had yet to be completed, there can be no question that Class Counsel had conducted an extensive investigation into the facts at issue, and that the Parties – in this Court, the Court of Appeals, and in multiple mediation submissions – had exhaustively briefed issues of liability, class certification, and competing expert positions on damages and loss causation. As noted in § III.A.5 below, it is also respectfully submitted that (as the Court has previously found in approving them as Class Counsel) Plaintiffs' Counsel are highly experienced in complex securities class action litigation. In such circumstances, Class Counsel's

recommendation to approve a settlement is another factor that strongly favors approval. *Ellison*, 2012 WL 2050514 at *5 (views of experienced counsel probative of fairness of settlement); *Espinosa v. Cal. Coll. of San Diego, Inc*., No. 17cv744-MMA (BLM), 2018 WL 1705955, at *7 (S.D. Cal. Apr. 9, 2018) ("great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation.").

B. The *Bennett* Factors Also Strongly Favor Final Settlement

Courts in Georgia and the Eleventh Circuit also consider the so-called *Bennett* factors, namely (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement; (6) and the stage of proceedings at which the settlement was achieved. *Carpenters Health & Welfare Fund*, 2008 WL 11336122, at *7 (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)); *see also Ellison*, 2012 WL 2050514 at *5-6 (listing nearly identical factors); *accord Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2012). However, these factors should not be decided in a "formalistic" fashion and a "court should not decide the merits of a case or resolve unsettled legal questions." *Carpenters Health & Welfare Fund*, 2008 WL 11336122, at *7; *see also Equifax,* 2020 WL 256132, at *44 ("Final approval is not a trial on the merits"). Moreover, courts should bear in mind that "settlement agreements…are highly favored under the law and will be upheld whenever possible" *See Triple Eagle Assocs. v. PBK, Inc.,* 307 Ga. App. 17, 20, 704 S.E.2d 189, 193 (2010); *accord* Newberg §13:44 ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding length trials and appeals.").

As discussed below, the Settlement represents an excellent recovery despite substantial litigation risk, and one that will avoid the significant additional time and costs of litigation through

trial and inevitable appeals in a case that has ***already*** had one trip to the Court of Appeals. Such considerations, as well as review of all of the other *Bennett* factors, all strongly support approving the $8.5 million "bird in the hand" represented by the Settlement here.

1. Likelihood of Success at Trial

Plaintiffs believe the Class's claims have merit. Defendants, however, took a very different view throughout. Had a jury agreed with Defendants on either liability or damages, the Class would have walked away with little or nothing. *See In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330, 1349 (S.D. Fla. 2011). Indeed, although the $8.5 million Settlement represents an above-average recovery compared to comparably sized securities cases (*see* §I.B.2 below), the Settlement is particularly strong when considered against the specific risks of continued litigation here—risks that make this sizable immediate cash payout even more desirable.

Liability Risks: To establish liability under the Securities Act, a plaintiff must prove she acquired a security pursuant to offering materials that (1) contained a materially untrue statement of fact, or (2) omitted a material fact necessary to make a statement not misleading, or that was otherwise required to be included. *In re Friedman's, Inc. Sec. Litig*., 385 F. Supp. 2d 1345, 1356-57 (N.D. Ga. 2005). Plaintiffs' Complaint put forward four main theories of liability: (1) "whether disclosures in the Offering Materials detailing [the FUSE] Gen[eration] 2's [alleged and then-existing] defects" were material; (2) whether Defendants misrepresented the quality of their salesforce; (3) "whether the [alleged] lack of functional Gen2 demonstration units for use by the sales force" was material; and (4) whether, as result of the foregoing misrepresentations and/or omissions, the Company's statements about its expected revenue were rendered false and misleading. *See generally* this Court's Order on Motions to Dismiss ("MTD Order") at 10-15.

Although the Court sustained all of Plaintiffs' "omissions" theories at the motion to dismiss stage, the Court's order found that all but one of the alleged affirmative misstatements contained

in the Offering Documents concerning the alleged quality of the Company's FUSE product and its salesforce were immaterial "puffery," and hence not actionable as a matter of law. In addition, the one surviving affirmative misstatement (regarding expected revenue growth) was a statement of opinion, as to which Plaintiffs would have had to meet a higher standard of proof at trial. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186 (2015) (for opinions to be actionable, plaintiff must show that the speaker subjectively disbelieved them, or that they were objectively false or misleading based on their *omission* of undisclosed facts that stripped the opinion of any reasonable basis). Accordingly, although Plaintiffs' "omissions" theories survived, Defendants would still be able to argue to a jury that they made no affirmatively false statements – a potentially powerful argument.

Moreover, Defendants also vigorously argued throughout that any problems that the FUSE had were unexceptional, and that investors understand that any new "cutting edge" technologies will experience at least some "bugs." Defendants also pointed to various "risk disclosures" in the Offering Documents that, they argued, showed they had adequately warned investors that there might be product problems, and that there could be no assurance that the Company's salesforce could deliver long term growth. In sum, though Plaintiffs survived dismissal, there could be no assurance that evidence obtained during fact discovery would ultimately enable Plaintiffs to prove that the nature, size and scope of any alleged problems with the FUSE or EndoChoice's salesforce were ***so*** large that the Offering Materials' lack of further disclosure violated the Securities Act. *Cf. Equifax,* 2020 WL 256132, at *7 (granting final approval where "discovery [might] not support the[] claims, a jury might find for [defendants], and an appellate court might reverse a plaintiffs' judgment"); *see also* Fredericks Suppl. Aff. ¶¶49-55.[6]

[6] Defendants also asserted that they could show that the Offering Materials' specific statements concerning future "growth" in the short term were, in fact***, literally true*** (because the Company did generate anemic

Moreover, because the claims at issue involved technical questions concerning alleged defects in EndoChoice's "cutting edge" FUSE system, Plaintiffs would have ultimately had to win a "battle of experts" on liability. *See* Fredericks Suppl. Aff. ¶52. EndoChoice (which is now owned by one of the biggest medical equipment makers in the world, Boston Scientific Corp.) would have predictably presented top-flight liability experts on their side – and, in the best of circumstances, "battles of the experts" are inherently unpredictable and high risk. *See Asghari v. Volkswagen Grp. of Am., Inc.*, No. CV 13-02529 MMM (VBKx), 2015 WL 12732462, at *19 (C.D. Cal. May 29, 2015) (presence of disputed and complex technical issues supports approval); *Alin v. Honda Motor Co*., C.A. No. 08-4825, 2012 WL 8751045, at *12 (D.N.J. Apr. 13, 2012) (risk of having to win technical "battle of experts" supports approval).

Damages Risks: Plaintiffs also faced additional challenges in establishing damages, and in refuting Defendants' affirmative "negative causation" defenses. (under §11(e) of the Securities Act, 15 U.S.C. §77(e), a defendant may escape liability to the extent it can show that the Class's alleged losses were caused by matters unrelated to the matters that were allegedly misrepresented in or omitted from the Othering Documents). Such disputed issues would have also come down to a "battle of experts," thus further supporting approval of the Settlement. *See Carpenters Health & Welfare Fund*, 2008 WL 11336122, at *8 ("In the battle of the experts, it is virtually impossible to predict with certainty which testimony will be credited."); *In re NetBank, Inc. Sec. Litig.*, No. 1:07-CV-2298-TCB, 2011 WL 13176646, at *4 (N.D. Ga. Nov. 9, 2011) (citing substantial costs and risks of disputing complex damages and loss causation issues at trial).

growth in its first year after the IPO) – and that any more optimistic language in the Offering Materials suggesting greater-than-anemic growth after the first year was too vague to be actionable and effectively immunized by the Offering Materials risk disclosures that future success could not be assured.

Other Litigation Risks. Of course, assuming that Plaintiffs prevailed at trial, they would have almost certainly had to defeat efforts by Defendants to overturn any plaintiffs' verdict through post-trial motions and appeals. Indeed, Plaintiffs note that Defendants have ***already*** taken this case to the Court of Appeals to challenge (albeit unsuccessfully) this Court's prior order certifying the Class. The risk of post-trial appeals is thus plainly here absent a settlement.[7]

In sum, the complexities and significant litigation risks inherent in this Action *strongly* favor final approval of the Settlement.

2. Size of Settlement As A Percent of Reasonably Recoverable Damages

The second and third *Bennett* factors are "usually combined," *see Thorpe v. Walter Inv. Mgmt. Corp.*, No. 1:14-cv-20880-UU, 2016 WL 10518902, at *3 (S.D. Fla. Oct. 17, 2016), and focus on the extent to which the settlement represents a meaningful recovery compared to what might have been reasonably recovered at trial, and compared to recoveries obtained in comparable actions. Here, assuming that Plaintiffs "ran the table" on all liability issues at trial and appeal, Plaintiffs' expert estimated the maximum theoretically recoverable damages here were roughly $75 million, but that reasonably recoverable damages were closer to $40 million – while Defendants argued that damages were actually no more than $21 million (and likely less). Fredericks Suppl. Aff. ¶56. Accordingly, the $8.5 million Settlement represents the recovery, in a complex and high-risk case, of roughly 25% of Plaintiffs' best estimate of reasonably recoverable

[7] It should also be noted that even though Plaintiffs prevailed on appeal in sustaining this Court's class certification Order, class certification orders remain subject to review until entry of final judgment. In an apparent effort to try to gain some leverage at the December 6, 2019 mediation, on November 27, 2019 Defendants filed a Motion to Decertify the Class. Although Plaintiffs believe that the motion was baseless, courts have also noted that the pendency of decertification motion, because it raises the risk that class members will receive nothing if it is granted, is another factor that provides further support for granting final approval. *See, e.g., In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 284 (S.D.N.Y. 1999) (noting risk of class members receiving nothing if class was decertified); *Dynabursky v. Alliedbarton Sec. Servs., LP*, No. SACV 12-2210-JLS, 2016 WL 8921915, at *5 (C.D. Cal. Aug. 15, 2016) (where defendants had moved to decertify "[t]he risk of decertification should the action proceed *favors* final approval.").

damages (assuming success on *all* disputed merits issues). *Compare, e.g., Thorpe*, 2016 WL 10518902, at *10 (approving securities class action settlement representing "5.5% of maximum damages and 10% of the most likely damages," and referring to this as an "excellent" recovery); *In re Biolase*, *Inc. Sec. Litig.*, No. CV 13-1300, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (settlement recovery of 8% of estimated damages "equals or surpasses the recovery in many other securities class actions").[8]

Published data also confirms that the $8.5 million Settlement represents a decidedly superior result. For example, recent research shows that in securities class actions (as here) involving total investor losses of $50 to $99 million, settlements from 1996 to 2019 have recovered on average only 4.7% of estimated such losses. *See* J. McIntosh & S. Starykh, "Recent Trends in Securities Class Action Litigation: 2019 Full-Year Review" (NERA Economic Consulting, Feb. 12, 2020), at 18.[9] In other words, this objective research supports the conclusion that the recovery here represents roughly twice the expected recovery in a securities class action of comparable size.

3. Costs and Delay of Further Litigation

The substantial costs and delays required before any recovery could be obtained through litigation also strongly support approval of the Settlement. While this case settled after over three years of hard-fought litigation, including an appeal, completing discovery and achieving a litigated verdict would have required substantial additional time and expense. *See* Fredericks Aff. ¶58. The

[8] *See also, e.g., In re CP Ships Ltd., Sec. Litig.*, No. 8:05MD1656-T-27TBM, 2008 WL 4663363, at *4 (M.D. Fla. Oct. 21, 2008), *aff'd* 578 F.3d 1306 (11th Cir. 2009) (approving $1.3 million settlement that represented **only *1% to 1.5%*** of estimated damages of $130 to $180 million); *Erica P. John Fund, Inc. v. Halliburton Co.*, C.A. No. 3:02-cv-1152, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (granting final approval where recovery ranged from "11.8% to 42.9% of the maximum possible recovery" and noting that an 11.8% recovery is "fairly sizeable" compared to other securities class action settlements).

[9] Available at https://www.nera.com/content/dam/nera/publications/2020/PUB_Year_End_Trends_012120_ Final.pdf.

foregoing would pose substantial expense for the Class and delay the Class's ability to recover—even if Plaintiffs ultimately succeeded.

In contrast to costly, lengthy, and uncertain continued litigation, the Settlement provides an immediate, significant, and certain recovery of $8.5 million for members of the Class. *See In re NetBank, Inc. Sec. Litig.*, 2011 WL 13176646, at *4 (granting final approval where protracted litigation "would have resulted in substantial costs" but the proposed settlement obviates those costs and results in "a substantial and definite cash recovery."); *see also Ellison*, 2012 WL 2050514 at *5 ("[t]he future expense and likely duration of the litigation, and its uncertainty of outcome, support approval of the Settlement").

4. Reaction of Absent Class Members

Over 9,600 Notice Packets have been mailed to Class Members or their nominees. Although the May 25 deadline for Class Members to "opt out" from or object to the Settlement has not yet passed, to date ***none*** have done so. Should any later be received, Plaintiffs will address them in reply papers, but the lack of significant numbers of objections or opt-outs further supports approval. *Ellison*, 2012 WL 2050514 at *6; *Thorpe*, 2016 WL 10518902, at *4.

5. The Parties' Understanding of the Strengths and Weaknesses of the Case When the Settlement Was Reached

The stage of proceedings at which the Settlement was achieved also supports its approval. The Settlement was only reached after Class Counsel had, *inter alia*: (1) conducted an extensive fact investigation undertaken prior to filing the Complaint (which included identifying, locating and interviewing numerous former EndoChoice employees); (2) thoroughly briefed the merits of the claims asserted in opposing Defendants' Motions to Dismiss; (3) faced down Defendants' efforts to defeat class certification in both this Court and the Court of Appeals; (4) engaged in significant discovery proceedings, including lengthy negotiations over the scope of document

discovery, relevant document custodians, and use of electronic search terms; (5) consulted extensively with their damages expert; and (6) engaged in further comprehensive exchanges of the Parties' respective positions on all merits and damages (including matters raised by Defendant's November 2019 motion to decertify the Class) in connection with the exchange of numerous mediations submissions and a full-day mediation in New York. In sum, at the time the case was settled, Class Counsel had a strong understanding of the strengths and weakness of the Class's claims after more than three years of litigation.

In sum, all O.C.G.A. §9-11-23(e) factors support final approval of the Settlement.

II. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

The proposed Plan of Allocation ("POA") here was set forth in full in the Notice sent to Class Members. *See* Hughes Aff., at Exh. A, pp.9-12. The standard for approval of a POA is the same as that for a settlement: whether it is "fair, adequate and reasonable and is not the product of collusion between the parties." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982); *accord In re Rayonier Inc. Sec. Litig*., No. 3:14-CV-1395, 2017 WL 4535984, at *1 (M.D. Fla. Oct. 5, 2017). In applying this standard, trial courts enjoy "broad supervisory powers … to allocate the proceeds among the claiming class members ... equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken,* 669 F.2d 228, 238 (5th Cir. 1982), and if recommended by "experienced and competent" class counsel, a POA will typically be approved as long as it has a reasonable and rational basis. *See, e.g., White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 CM GWG, 2014 WL 4401280, at *9 (S.D.N.Y. Sept. 4, 2014).

Class Counsel developed the POA here in close consultation with their damages expert, using allocation methodologies routinely applied in securities cases of this type. Specifically, the POA is (a) based on the decline in value of EndoChoice shares that occurred following partial

disclosure events as the truth concerning the problems with EndoChoice and its technology were gradually disclosed (which in turn reduced the amount of artificial inflation in the stock price allegedly caused by the alleged misstatements and omissions at issue), while also (b) taking into account that Class Members who purchased earlier in the Class Period faced fewer "traceability" and causation issues. Fredericks Suppl. Aff. ¶60. The proposed POA will therefore result in a fair and equitable distribution of the Net Settlement Fund, and should be approved.

III. THE COURT SHOULD AWARD A PERCENTAGE-BASED ATTORNEYS' FEE EQUAL TO 33⅓ % OF THE RECOVERY

Courts have long recognized 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. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Barnes v. City of Atlanta*, 281 Ga. 256, 260, 637 S.E.2d 4, 7 (2006) ("With respect to attorney's fees, Georgia adheres to the common-fund doctrine"). When awarding attorneys' fees out of a common fund, in Georgia "the percentage of the fund approach [is] the most equitable, sensible, and fair," *Friedrich v. Fid. Nat'l Bank*, 247 Ga. App. 704, 707, 545 S.E.2d 107, 110 (2001). Applying *Friedrich*'s directive that (absent special circumstances) Georgia courts must award fees based on the percentage method, in class actions the courts of this state typically award fees in a range from "25 to 33 percent." *Teachers Ret. Sys. v. Plymel*, 296 Ga. App. 839, 846-47 (2009) (citing 25% to 33% range in affirming 30% fee); *Walther v. Multicraft Constr. Co*., 205 Ga. App. 815, 817 (1992) (fee between "33⅓ to 50 percent" is "usual and customary" in contingent fee cases, depending on risk and complexity of the case); *see also In re NetBank, Inc. Sec. Litig.*, No. 1:07-CV-2298-TCB, 2011 WL 13353222, at *3 (N.D. Ga. Nov. 9, 2011) (awarding 34% fee); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1300 (11th Cir. 1999) (citing 30% as the "benchmark" for percentage fee awards in the 11th Circuit, and approving modest upward adjustment to affirm 33⅓ % fee); *Columbus Drywall & Insulation v.*

Masco Corp., No. 1:04-cv-3066-JEC, 2012 WL 12540344, at *8 (N.D. Ga. Oct. 26, 2012) (awarding 33⅓ % fee).

Given the excellent results achieved in the face of substantial risk, and the fact that the requested fee represents a "negative multiplier" on the "lodestar" value of the time that Class Counsel devoted to this case over nearly four years, Class Counsel respectfully submit that their work fully merits a fee award at the top end of the customary 25%-to 33⅓ % range.

A. THE *JOHNSON* FACTORS SUPPORT A FINDING THAT THE REQUESTED FEE IS FAIR AND REASONABLE

To determine whether a requested percentage fee is reasonable, courts in Georgia must also "articulate specific reasons for selecting the percentage upon which the … award is based." *Friedrich,* 247 Ga. App. at 707. Although the relevant factors "may vary from cases to case," *Friedrich* noted that in evaluating a fee request it continues to be "appropriate" to use the 12 factors enumerated in *Johnson v. Ga. Hwy. Express*, 488 F.2d 714 (5th Cir. 1974), namely:

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson, 488 F.2d at 717-20. Additional factors may include (13) the time required to reach a settlement; (14) the reaction of the Class (including the extent of objections or opt-outs); (15) any non-monetary benefits provided; and (15) the economics involved in prosecuting a class action. *Friedrich*, 247 Ga. App. at 707.

For the Court's convenience, Class Counsel submit that these somewhat overlapping factors can be efficiently grouped here into seven categories: (1) quality of result achieved; (2) complexity, riskiness and "desirability" of the case; (3) the contingent nature of the retention and

the economics involved; (4) customary fees and awards in similar cases; (5) counsel's experience, ability, and reputation; (6) the reaction of the Class; and (7) the amount of time and labor expended (including a "lodestar crosscheck"). ***All*** of these factors strongly support the requested fee.[10]

1. The Results Achieved

In *Camden,* cited by *Friedrich,* the 11th Circuit identified the result obtained by class counsel as *the* pre-eminent consideration: "in this context, monetary results achieved predominate over all other criteria." *Camden I Condo. Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991); *see also Friedman's*, 2009 WL 1456698, at *3 (it is "the best determinant of the reasonableness and quality of the time expended"). For all of the reasons previously discussed at §I above, Class Counsel here achieved a decidedly above-average result in the face of above-average risk, which in turn readily justifies a fee at the high end of the customary 25% to 33⅓ % range (if not a fee above the customary range). *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (settlement for "approximately 9% of the possible damages," was substantially higher than average in securities class actions, which justified higher fee).

2. Complexity, Risk and Desirability of the Case

"[M]ulti-faceted and complex" issues are "endemic" to cases based on alleged violations of federal securities law. *Ressler v. Jacobson*, 149 F.R.D. 651, 654 (M.D. Fla. 1992). "Securities litigation on the whole is notoriously difficult and unpredictable" and plaintiffs "face tall hurdles in establishing the elements of their claims . . . and convincing the jury of liability and the amount of damages." *Billiteri v. Sec. Am., Inc.*, No. MDL 1500, 2011 WL 3586217, at *10 (N.D. Tex.

[10] Here, it is respectfully submitted that certain factors such as "time limitations imposed by the client," "the nature of the professional relationship with the client," and the "non-monetary benefits provided" are not relevant or material, and are therefore neutral in terms of any multi-factor analysis.

Aug. 4, 2011); *see also In re NetBank, Inc. Sec. Litig*., No. 1:07-CV-2298-TCB, 2011 WL 13353222, at *3 (N.D. Ga. Nov. 9, 2011) (similar). This Action was no exception.

For all of the same reasons that the "complexity" and "litigation risk" factors strongly support approval of the Settlement (*see* §I.B above), the same factors weigh equally in favor of supporting a fee at the high end of the "customary" 25% to 33⅓ % range.

Indeed, the prior discussion actually significantly ***understates*** the riskiness of this litigation viewed as of the time the case was first brought and the motions to dismiss were filed. Specifically, when Class Counsel filed the Complaint on behalf of their clients, there was a split in authority as to whether state courts (such as this Court) continued to have concurrent jurisdiction with federal courts) to hear Securities Act claims in the wake of certain 1998 amendments. Absent prior Georgia precedent, Plaintiffs had to (and did) prevail against Defendants' vehement threshold argument that this Court lacked jurisdiction over this case. *See* MTD Order at 2-4. However, this Court's ruling on the jurisdictional issue remained subject to reversal on appeal – ***thus exposing Class Counsel to still further risk that all their work on this case would be for naught.*** And in fact, soon after the Court issued its MTD Order, the Supreme Court granted certiorari in *Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 138 S. Ct. 1061 (2018) on the issue in another case. Although the Supreme Court ultimately affirmed the correctness of Plaintiff's position (and this Court's ruling) on the issue, that it granted review at all provides further strong evidence of just how complex and risky this case was. *See Eaves et al*., *v. Earthlink, Inc.,* No. 2005-cv-97274, 2010 WL 5883596, at *5 (Fulton Super. Ct., June 10, 2010) (grant of appellate court review on an issue confirms that case involved difficult and complex issues).[11]

[11] As noted at fn. 13 below, shortly after learning that the Supreme Court had granted *certiorari* in *Cyan*, Class Counsel retained specialist Supreme Court appellate counsel to submit an *amicus curiae* brief to defend the position that it had taken, on behalf of the Class and classes in other state court actions, in support

As for the desirability of the case, Class Counsel respectfully submit that it is not uncommon for many law firms to bring separate securities class action cases on behalf of their investor clients, with the most promising securities cases attracting a dozen or more prospective lead plaintiffs (and their respective firms). Fredericks Suppl. Aff. ¶67. Here, by contrast, the two lead counsel firms were the only ones that pursued the case.

In sum, the risk, complexity and desirability factors all strongly favor the requested fee.

3. The Contingent Nature of the Fee and the Economics Involved

"A contingency fee arrangement often justifies an increase in the award of attorneys' fees," *Behrens v. Wometco Enterprises, Inc*., 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990), "because if the case is lost a lawyer realizes no return for investing time and money in the case." *Equifax*, 2020 WL 256132, at *33. Even a victory at trial is not a guarantee of success. The contingent fee "economics" of the case thus required Counsel to undertake the representation knowing they would have to spend substantial time and money despite a substantial risk of never receiving any compensation. The undertaking "of such risk *alone* can support a fee award of over 30% of the settlement fund." *Cabot E. Broward 2 LLC*, No. 16-61218-CIV, 2018 WL 5905415, at *4 (S.D. Fla. Nov. 9, 2018) (emphasis in original). In short, the ***fully contingent*** nature of the representation here is another factor that strongly supports the requested one-third fee.

Of course, here the risk of further protracted litigation also presented "economic" considerations for Class Members and the Court. Further expensive litigation could well have eroded the value of any recovery at a later date, even if a settlement at the same level could have been obtained later. And the Georgia judicial system would also incur significant costs and draw

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of state court jurisdiction. Class Counsel respectfully submit that their taking such action further evidences their diligence throughout in protecting the interests of the Class, and further supports the requested fee.

on scarce judicial resources as this Action wore on. *See In re NetBank, Inc. Sec. Litig.*, 2011 WL 13176646, at *4; *see also Ellison*, 2012 WL 2050514 at *6. As such, the economics of the case, and Counsel's ability to reach a favorable settlement now, also support awarding the requested fee.

4. Customary Fees and Awards In Similar Cases;

The "customary fee" in a class action lawsuit of this nature is a contingency fee because few if any class members possess a sufficiently large stake in the litigation to justify paying attorneys on an hourly basis. *See Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988). And as already discussed at §I.B.2 above, the requested 33⅓ % fee percent is in line with similar fees awarded in Georgia and the Eleventh Circuit. *E.g.*, *Plymel*, 296 Ga. App. at 846-47 (typical fee range is 25 to 33%); *In re Flowers Foods, Inc. Sec. Litig.*, No. 7:16-CV-00222, 2019 WL 6771749, at *1 (M.D. Ga. Dec. 11, 2019) (awarding 33⅓ % fee); *Halliburton,* 2018 WL 1942227, at *12 (33⅓ % fee was "within the range of typical awards"); *Cabot E. Broward 2 LLC*, 2018 WL 5905415, at *7 (noting that attorneys' fees of 33% or more are frequently approved). Indeed, even the U.S. Supreme Court has indicated that a one-third fee is not unusual in contingent fee cases. Thus, this factor also supports the requested fee.

5. The Skill and Experience of Counsel

The two Lead Counsel firms practice nearly exclusively in the field of complex class action litigation and are two of the nation's leading securities class action litigation firms. *See* Fredericks Suppl. Aff., Exh. A (Scott+Scott T&E Aff.); Exh. B (Levi Korsinsky T&E Aff). Lead Counsel's skills and experience were an important factor in obtaining the excellent result achieved in the Settlement. Similarly, Liaison Counsel regularly litigates securities class actions and other complex actions and has specialized knowledge of the court systems in Georgia, providing innumerable benefits to Plaintiffs and the Class over the course of the litigation. *See* Fredericks Suppl. Aff., Exh. C (Bain T&E Aff.). Clearly, the skill and experience of all Counsel representing

Plaintiffs and the Class aided in obtaining the Settlement. Further, the quality of the work performed by Counsel in attaining the Settlement should be evaluated in light of the quality of opposing counsel. *Columbus Drywall*, 2012 WL 12540344 at *4. Here, Defendants were represented by King & Spalding LLP and Bryan Cave Leighton Paisner, LLP, two nationally prominent defense firms that zealously represented their clients throughout the Action. Plaintiffs' Counsel's ability to obtain a favorable Settlement for the Class despite this formidable legal opposition confirms the quality of the representation provided here. *See Earthlink, Inc.,* 2010 WL 5883596 at *5 (finding this factor weighed in favor of granting fee where "Class Counsel achieved class certification of this nationwide class action against a determined, sophisticated and skillful defense").

6. The Reaction of the Class

As set forth above, ***no*** objections to the requested fee have been filed. Although the May 25 deadline for objections has not yet passed, for now this factor also supports the requested fee.

7. Time and Labor Required, and Lodestar Cross-Check

Counsel here devoted over 3,907.45 hours to the investigation, litigation and ultimate resolution of this Action over the course of nearly three-and-a-half years. As summarized above, this work included extensive factual and legal research, successfully briefing and arguing hotly contested motions to dismiss and motions for class certifications, prevailing on Defendants' appeals to the Court of Appeals, engaging in an adversarial discovery process, and ultimately having their thorough mediation preparation pay off for the Class in the form of getting the Mediator to propose a highly favorable "mediator's proposal" which Defendants ultimately agreed to accept. *See also* Fredericks Suppl. Aff. at ¶¶87.

Finally, because a "lodestar cross-check" here results in a "negative multiplier," the "time and labor" factor provides even stronger support for the requested one-third fee.

In performing a lodestar "cross-check," courts consider the total value of the legal services provided, based on (a) the number of hours billed by each professional or paraprofessional timekeeper, multiplied by (b) that timekeeper's reasonable hourly rate.[12] In performing a "cross-check," courts look only to summaries of the billable time (and accompanying hourly rates) incurred by class counsel, because requiring analysis of detailed individual time entries would effectively replace what is intended as a basic "cross-check" review with the type of more burdensome traditional lodestar analysis that the percentage-based method is meant to avoid. This is especially true where, as here, the class settlement (and resulting value of a percentage-based award) is not in the tens of millions. *See, e.g., Osman v. Grube, Inc*., No. 3:16-CV-00802-JJH, 2018 WL 2095172, at *3 (N.D. Ohio May 4, 2018) (in relatively smaller class actions "the risk of 'excessive' or 'windfall' [percentage] fees is not great," and "counsel may rely upon summaries to demonstrate the time and effort that went into litigating the lawsuit").

As stated in their respective time and expense affidavits (*see* Fredericks Suppl. Aff. at Exhs. 1, 2 & 3), the two Class Counsel firms and their local counsel have spent more than 3,907.45 hours of attorney and paraprofessional time on this matter, resulting in a total combined lodestar of $3,084,404.75. By contrast, the requested 33⅓% fee equates to only about $2.833 million. The resulting ratio between the requested 33⅓ % fee ($2.833 million) and Class Counsel's total lodestar ($3,084,404.75) is only 0.92. Ratios of less than 1.0, as here, are referred to as "negative multipliers."

Given that multipliers between 2 and 5 are commonly awarded in complex class actions with substantial contingency risks, the modest (and indeed negative) multiplier requested here

[12] Where, as here, Class Counsel include an out-of-town specialist firm, it is appropriate to use the hourly rates that courts nationwide have approved for that firm, as specialist counsel "tend to charge more [and] be found in larger cities where … litigation is more expensive." *Osman,* 2018 WL 2095172 at *4.

strongly confirms the reasonableness of the requested fee, and further underscores the amount of time and labor needed to litigate this case to a successful Settlement. *See, e.g.*, *Earthlink, Inc.*, 2010 WL 5883596 at *5 (using "a lodestar/multiplier cross-check" and finding that 1.62 lodestar multiplier is "clearly at the low end" in complex class actions) (citing *Elkins v. Equitable Life Ins. Co.*, Civil Action No. 96-296-CIV-T-17B, 1998 WL 133741, at *36 (M.D. Fla. Jan. 27, 1998) (multiplier of 2.34 was "much lower than the midrange of the multipliers"); *In re BioScrip, Inc. Sec. Litig*., 273 F. Supp. 3d 474, 497 (S.D.N.Y. 2017) (lodestar crosscheck of 1.39 "is at the lower range of comparable awards" and collecting cases for proposition that "lodestar multiples of over 4 are routinely awarded"); *City of Omaha Police & Fire Ret. Sys. v. LHC Grp*., No. 6:12-1609, 2015 WL 965696, at *10 (W.D. La. Mar. 3, 2015) ("Multipliers ranging from one to four frequently are awarded in common fund cases when the lodestar method is applied."); *Equifax*, 2020 WL 256132, at *39 (awarding 2.62 multiplier as "consistent with multipliers approved in other cases"); *Columbus Drywall*, 2012 WL 12540344, at *5 and n.4 (4.0 multiplier is "well within" the accepted range); *Pinto v. Princess Cruise Lines, Ltd.,* 513 F. Supp. 2d 1334, 1344 (S.D. Fla. 2007) (multipliers in complex class actions tend to range from 2.26 to 4.5) (citations omitted); *Ingram v. Coca-Cola Co*., 200 F.R.D. 685, 694-96 (N.D. Ga. 2001) (awarding multiplier between 2.5 and 4) [13].

* * *

In short, Class Counsel respectfully submit that their requested 33⅓ % fee is ***strongly*** supported by a review of all relevant criteria, and should therefore be approved.

[13] Although "preclusion of other employment" is not a major factor here, Class Counsel note that the time that they spent on this case was time that they could not devote to other matters. *See Earthlink, Inc.*, 2010 WL 5883596 at *5; *Equifax,* 2020 WL 256132, at *33. Thus, this factor also supports the requested fee.

IV. COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLE EXPENSES INCURRED SHOULD BE APPROVED

Class counsel's reasonable out-of-pocket expenses should be reimbursed. *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1272 (N.D. Ga. 2008); *NetBank*, 2011 WL 13353222, at *4. Here, Counsel request reimbursement of a total of $121,361.41 in litigation expenses, which consist primarily of the costs of experts, legal research (e.g. Westlaw charges), the Mediator's fees, Court fees, hearing and deposition transcript costs, and out-of-town travel costs. *See* Plaintiffs' Counsel's respective fee and expense affidavits, attached as Exhibits 1, 2, and 3 to the Fredericks Suppl. Aff.[14] Such costs are typical of those deemed reasonable and necessary by courts, and are routinely reimbursed in class actions of this type. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y. 2004); *Equifax*, 2020 WL 256132, at *40. These expenses were charged separately by Counsel and are not duplicated in the firms' hourly rates.[15]

Moreover, the Notice informed potential Class Members that Counsel would apply for payment of Litigation Expenses in an amount not to exceed $190,000. *See* Notice at 1. However,

[14] Class Counsel also collectively seek reimbursement of $6,125 for a portion of the costs they each paid to a specialist appellate firm (Kellogg Huber) to prepare an *amicus curiae* brief to the U.S. Supreme Court in October 2017 in connection with the *Cyan* case, and the question of whether state courts (such as this Court) continue to have concurrent jurisdiction over Securities Act claims following the passage of certain amendments in 1998. An adverse decision in the Supreme Court would have overturned this Court's prior ruling (*see* Order on Motion to Dismiss, dated May 2, 2017, at 2-4) holding that State Courts continue to retain such concurrent jurisdiction, and required dismissal of this Action. The U.S. Supreme Court ultimately adopted the arguments of the *amicus* brief that Class Counsel had funded (and which this Court had adopted in its earlier ruling here). *See Cyan, Inc. v. Beaver Cty. Empl. Ret. Fund*, 138 S. Ct. 1061 (2018). Class Counsel respectfully submit that their role in retaining specialist appellate counsel to file an *amicus* brief was a shrewd investment on behalf of the Class, and that it is appropriate for the Class here to contribute $5,000 to the out-of-pocket costs incurred in retaining specialist counsel in connection with that appeal. (Class Counsel have similarly allocated the remaining $25,000 in amicus costs to other state court class actions where the same issue was raised).

[15] Class Counsel note that their applications include an accrual for the actual and reasonable estimated costs and expenses for travel to Atlanta for the required Final Approval Hearing. Should that hearing occur telephonically, Class Counsel will reduce any reimbursement for costs accordingly.

the total amount of expenses requested is substantially lower, at only $121,361.41. The lack of objections to the higher amount (let alone the actual amount) also supports the expense request.

V. PLAINTIFFS' REQUEST FOR A SERVICE AWARD FOR THEIR WORK ON BEHALF OF THE CLASS SHOULD BE APPROVED

Finally, each of the two Class Representatives requests an award of $15,000 for the time and effort they expended in connection with litigating this Action on behalf of the Class. As set forth in the respective Raczewski and Bauer Affidavits (attached as Exhibits 4 and 5 to the Fredericks Suppl. Decl.), both of these plaintiffs (*inter alia*) regularly reviewed pleadings and briefs; regularly communicated with Class Counsel regarding case developments; searched for, gathered, and produced documents in response to Defendants' document requests; prepared for, traveled, and sat for out-of-town depositions in Atlanta; and consulted with Class Counsel as to settlement prospects and settlement strategy and objectives prior to the mediation, and have also approved the proposed Settlement.

Moreover, without their active participation (including their willingness to be deposed), ***there would be no recovery at all for the Class***. Indeed, they were the only two Class members who ever stepped forward to bring the claims asserted. In addition, public policy supports the grant of service and incentive awards to named plaintiffs who bring meritorious litigation, *see, e.g.*, *Ellison*, 2012 WL 2050514 at *6 (awarding $10,000 each as incentive payments to two class representatives in consumer class action), and the amounts requested are fully consistent with similar awards in other class and securities cases in Georgia and the Eleventh Circuit. *See e.g.*, *JWD Auto. v. DJM Advisory Grp. LLC*, No. 2:15-cv-793-FtM-29MRM, 2018 WL 7959181, at *3 (M.D. Fla. Jan. 9, 2018) (awarding $15,000 incentive award to class representative); *Carter v. Forjas Taurus S.A.*, No. 1:13-CV-24583-PAS, 2016 WL 3982489, at *15 (S.D. Fla. July 22, 2016)

(awarding $15,000 to class representative for service over 2½ year period, including participation in discovery and sitting for deposition), *aff'd* 701 Fed. Appx. 759 (11th Cir. 2017).

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court (A) enter the Parties' [Proposed] Final Order and Judgment approving the Settlement and POA, in the form previously agreed to by the Parties and submitted to the Court as Exhibit B to the Stipulation; and (B) enter an order (1) approving Plaintiffs' Counsel's request for attorneys' fees equal to 33⅓ % of the Settlement Fund; (2) granting Plaintiffs' Counsel's request for reimbursement of their expenses in the amount of $121,361.41; and (3) awarding $15,000 to each Class Representative for their work on behalf of the Class.

DATED: May 11, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing PLAINTIFFS' AND CLASS COUNSEL'S MOTION FOR (A) FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION AND (B) ATTORNEYS' FEES AND LITIGATION EXPENSES AND MEMORANDUM IN SUPPORT to be filed with the Clerk of Court through the Odyssey eFileGA system and served a true and correct copy of the same by electronic mail upon the following:

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This 11th day of May, 2020.

/s/ *David A. Bain*
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