UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DENNIS WILSON, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. LSB INDUSTRIES, INC., JACK E. GOLSEN, BARRY H. GOLSEN, MARK T. BEHRMAN, TONY M. SHELBY, and HAROLD L. RIEKER, JR.	Case No. 1:15-cv-07614-RA-GWG

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court-appointed Lead Plaintiff, Dennis Wilson, and named plaintiff Camelot Event Driven Fund (collectively "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement resolving all claims asserted in this securities class action (the "Action"), and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

I. INTRODUCTION[2]

Subject to this Court's approval, Plaintiffs have agreed to settle all claims in this Action in exchange for a cash payment of $18.45 million. Plaintiffs and Lead Counsel are informed about the strengths and weaknesses of the class through Lead Counsel's extensive efforts in litigating the Action, and believe that the Settlement is an excellent recovery and in the best interest of the Settlement Class. Lead Counsel's efforts included among other things: (i) conducting a thorough investigation of LSB Industries, Inc. ("LSB" or the "Company") and the allegedly fraudulent misrepresentations and omissions made during the period from November 7, 2014 through November 5, 2015, inclusive (the "Settlement Class Period" or "Class Period"), concerning the status and cost of LSB's largest construction project, which was

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated January 17, 2019 (the "Stipulation"). *See* ECF No. 179-1.

[2] The Declaration of Casey E. Sadler in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Declaration" or "Decl."), filed concurrently herewith, is an integral part of this submission. For the sake of brevity, the Court is respectfully referred to it for a detailed description of, among other things: the history of the Action; the nature of the claims asserted; the negotiations leading to the Settlement; the risks and uncertainties of continued litigation; and the terms of the Plan of Allocation for the Settlement proceeds. All citations to "¶ __" and "Ex. __" in this memorandum refer, respectively, to paragraphs in, and exhibits to, the Declaration.

the disassembly of a shuttered ammonia plant in Donaldsonville, Louisiana and then transportation and attempted re-construction of the plant in El Dorado, Arkansas (the "El Dorado Project"); (ii) drafting the 59-page Corrected Amended Class Action Complaint for Violations of the Federal Securities Laws, filed on February 17, 2016 (the "CAC," ECF No. 27); (iii) researching, drafting, and filing an opposition to Defendants' motion to dismiss, filed with the Court on May 27, 2016 (ECF No. 39); (iv) filing a motion for leave to file a second amended complaint and responding to Defendants' opposition (ECF Nos. 45-46, 52); (v) successfully defeating Defendants' motion to dismiss and having the Court grant leave to amend following oral argument on the motions on March 2, 2017 (*see* ECF No. 56); (vi) drafting the 125-page Corrected Second Amended Class Action Complaint for Violation of the Federal Securities Laws, filed on April 5, 2017 (the "SAC," ECF No. 69); (vii) retaining a market efficiency expert who drafted expert reports in support of Plaintiffs' motion for class certification; (viii) engaging in class certification discovery, including defending the depositions of both proposed class representatives, Dennis Wilson and Camelot,[3] and the expert retained by Plaintiffs, taking Defendants' expert's deposition, and filing the class certification motion and reply (ECF No. 99-101, 112); (ix) filing a supplemental reply brief in support of class certification on May 16, 2018; (x) retaining and working with experts in engineering and ammonia plant construction, damages and loss causation, and accounting; (xi) conducting a targeted review of approximately 2.7 million pages of documents produced by Defendants and an additional 3.3 million pages of documents produced pursuant to the more than twenty third-party subpoenas issued by Lead

[3] During the course of the litigation, Quaker Event Arbitrage Fund transferred all of its property and assets to Camelot Event Driven Fund and Camelot assumed all liabilities for the Quaker Event Arbitrage Fund. On July 27, 2018, the Court substituted Camelot for Quaker Event Arbitrage Fund for all purposes. ECF No. 144. As such, Camelot refers to both Camelot and Quaker Event Arbitrage Fund herein.

Counsel; (xii) deposing twenty fact witnesses; (xiii) participating in two full day mediations, which included the drafting of substantial mediation statements; (xiv) negotiating with Defendants on an arm's-length basis to resolve the Action; and (xv) drafting the Stipulation and exhibits thereto and the preliminary approval motion. ¶ 4.

While Plaintiffs and Lead Counsel believe that the claims asserted are meritorious, they also recognize the substantial challenges to establishing that Defendants acted with scienter, demonstrating loss causation, proving class-wide damages, and achieving and collecting a greater recovery. Defendants would have contested falsity and scienter, as they did throughout the Action. Specifically, Defendants could have continued to raise plausible arguments that the alleged misstatements were protected by the PSLRA's safe harbor provision or were forward-looking statements or non-actionable opinions, that Defendants did not act with the requisite scienter, and that the Class Period should have been shortened. Defendants also could have made plausible damages and loss causation arguments that may have greatly reduced, or even eliminated, any potential recovery.

As explained herein, the Settlement is fair, adequate, and reasonable under the governing standards in this Circuit. The $18.45 million Settlement falls well within the range of settlements in comparable securities fraud cases and eliminates the significant costs and risks of continuing litigation through trial and appeals. Additionally, to date, there have been no objections or requests for exclusion received from Settlement Class Members. ¶¶ 96, 125.

For these reasons, and those set forth below, Plaintiffs and Lead Counsel believe that the Settlement is in the best interests of the Settlement Class. In addition, the Plan of Allocation, which ties each investor's recovery to when the securities were acquired and sold, is a fair and reasonable method for distributing the Net Settlement Fund to the Settlement Class and warrants

approval.

II. THE PROPOSED SETTLEMENT MERITS FINAL APPROVAL

A court will approve a settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).[4] Although "[t]he decision to grant or deny such approval lies squarely within the discretion of the trial court, . . . this discretion should be exercised in light of the general judicial policy favoring settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Accordingly, public policy considerations strongly favor settlement, particularly in class actions. *Wal-Mart*, 396 F.3d at 116 ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context."). Furthermore, "[i]n evaluating the settlement of a securities class action, federal courts, including this [c]ourt, have long recognized that such litigation is notably difficult and notoriously uncertain." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 189 (S.D.N.Y. 2012); *In re Marsh & McLennan Cos., Sec. Litig.*, No. 04 CIV. 8144 (CM), 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) (same).

A. The Settlement is Entitled to a Presumption of Fairness Because it is the Product of Arm's-Length Negotiations Among Experienced Counsel

Courts may apply a presumption of fairness when a class settlement is the product of "arm's-length negotiations between experienced, capable counsel." *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) (quoting *Wal-Mart*, 396 F.3d at 116). Because counsel are "most closely acquainted with the facts of the underlying litigation," courts give "great weight" to the recommendations of counsel regarding settlement, especially when

[4] Unless otherwise noted, citations and quotation marks are omitted and emphasis is added.

negotiations are facilitated by an experienced third-party mediator. *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (finding that a mediator's involvement in settlement negotiations "helps to ensure that the proceedings were free of collusion and undue pressure").

Here, the Parties' negotiations, with the assistance of a third-party mediator, that ultimately resulted in the Settlement did not commence until after Lead Counsel engaged in an extensive litigation efforts that provided them with a thorough understanding of the strengths and weaknesses of the case. Specifically, before the second mediation session, Lead Counsel painstakingly reviewed publicly available information about the Company; interviewed numerous former LSB employees and third parties; consulted accounting, damages and loss causation experts and prepared two detailed amended complaints; engaged in extensive discovery, including a targeted review of 2.7 million pages of documents provided by Defendants and 3.3 million pages of documents produced by third parties, and conducted twenty fact depositions as well as an expert deposition as part of the class certification; fully briefed class certification; and participated in a prior full-day mediation with mediation statements exchanged beforehand. ¶¶ 16-17, 21-29, 37-42, 48-49, 55-58, 71-75. As part of the mediation process facilitated by Robert A. Meyer of JAMS, the Parties exchanged extremely detailed written statements and presentations concerning liability, damages, loss causation, and ability to pay, which informed each side as to the strengths and weaknesses of their respective cases, and engaged in two all-day in-person mediation sessions. No settlement, however, was reached at either of the mediation sessions. ¶¶ 48-49, 55-58. The Parties continued the discovery process and negotiations for several weeks through Mr. Meyer, who ultimately made a mediator's

recommendation that the Action be settled for $18.45 million, which the Parties accepted. ¶¶ 57-66.

The extensive and arm's-length nature of the settlement negotiations and the involvement of an experienced and respected mediator like Mr. Meyer support the conclusion that the Settlement is presumptively fair, adequate, and reasonable. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("A strong initial presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations."); *In re Priceline.com, Inc. Sec. Litig.*, No. 00-CV-1884 (AVC), 2007 WL 2115592, at *3 (D. Conn. July 20, 2007) ("The settlement in this case was ably negotiated at arms' length with the impartial participation of Judge Politan and attorney Meyer and is, therefore, entitled to a presumption of fairness and adequacy."); *In re Xerox Corp. Erisa Litig.*, No. 02-CV-1138 (AWT), 2009 WL 10687750, at *1 (D. Conn. Jan. 28, 2009) ("T]he proposed Settlement resulted from informed, extensive noncollusive arm's-length negotiations and numerous mediation sessions over a period of seven months before Robert Meyer[.]").

The conclusion of Plaintiffs and Lead Counsel that the Settlement is fair, adequate, and reasonable and in the best interests of the Settlement Class further supports its approval. Plaintiffs took an active role in supervising this litigation and recommend that the Settlement be approved. *See* Ex. 3 (Declaration of Dennis Wilson) at ¶ 6; Ex. 4 (Declaration of Thomas Kirchner) at ¶ 6. Lead Counsel, who have extensive experience in prosecuting securities class actions, have also concluded that the Settlement is in the Settlement Class's best interests, and their judgment is entitled to "great weight." *Telik*, 576 F. Supp. 2d at 576; *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 CM GWG, 2014 WL 4401280, at *5 (S.D.N.Y. Sep. 4, 2014)

("great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation").

These facts strongly weigh in favor of affording the Settlement the presumption of fairness and granting final approval. *See Van Oss v. New York*, No. 10 CIV. 7524 (SAS), 2012 WL 2550959, at *1 (S.D.N.Y. July 2, 2012) (finding "a strong presumption of fairness attaches because the Settlement was reached by experienced counsel after extensive arm's length negotiations.").

B. The Settlement is Substantively Fair, Reasonable and Adequate Under the *Grinnell* Factors

The Settlement is also substantively fair, adequate, and reasonable. It is well-established that "in this Circuit, courts examine the fairness, adequacy, and reasonableness of a class settlement according to the *Grinnell* factors," which are:

> (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 action 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.

Wal-Mart, 396 F.3d at 117 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)); *Deutsche Bank*, 236 F.3d at 86.[5]

As demonstrated below, application of each of the four factors specified in Rule 23(e)(2), and the relevant, non-duplicative *Grinnell* factors, demonstrates that the Settlement warrants Court approval.

[5] As discussed in section II.C., *infra*, the settlement is fair and reasonable under the factors set out in Rule 23(e)(2), effective December 1, 2018.

1. Continued Litigation Would be Complex, Expensive, and Protracted

In general, "the more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 381-82 (S.D.N.Y. 2013). This is particularly true here, as "securities class actions are by their very nature complicated and district courts in this Circuit have 'long recognized' that securities class actions are 'notably difficult and notoriously uncertain' to litigate." *Aeropostale*, 2014 WL 1883494, at *5 (quoting *In re Bear Stearns Cos. Sec., Deriv. & ERISA Litig.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012)).

Further litigation would have required substantial additional expenditures of time and money, involving complex issues of law and fact, with a significant risk of a lower recovery. *See In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 CIV. 5575 (SWK), 2006 WL 903236, at *9 (S.D.N.Y. Apr. 6, 2006) ("In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws present considerable challenges, particularly with respect to loss causation and the calculation of damages."). Here, Plaintiffs allege that, throughout the Settlement Class Period, Defendants made materially false and misleading statements about the cost and status of the El Dorado Project. ¶ 20. Defendants, however, have raised a number of arguments and defenses that could have presented challenges for Plaintiffs to overcome in establishing falsity and scienter as required under the federal securities laws. For example, Defendants have argued and would have continued to argue that the Company reasonably relied on its primary contractor for the project, Leidos, to oversee the project and provide accurate estimates, and that the Company actively and adequately monitored Leidos's process. ¶ 79. Further, Defendants have argued and would continue to argue that there is no evidence of insider trading or other evidence of motive on behalf of the Individual Defendants, and that Defendants honestly believed their statements regarding the status and cost

of the El Dorado Project at the time they made the statements. ¶ 80. Additionally, if the Action proceeded, substantial expert testimony would be necessary regarding loss causation and the appropriate measure of damages. *See* ¶¶ 82-84, 86-87.

In the absence of the Settlement, the Action would have likely required summary judgment motions, litigating *Daubert* motions, proving Plaintiffs' claims at trial, and post-trial motion practice. Additionally, Defendants likely would have objected to Magistrate Judge Gorenstein's report and recommendation granting class certification. Throughout continued litigation, Plaintiffs undoubtedly would have faced a robust defense from Defendants' experienced counsel and would have incurred significant additional costs. *See In re Alloy, Inc. Sec. Litig.*, No. 03 Civ. 1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (securities fraud issues "likely to be litigated aggressively, at substantial expense to all parties"). Thus, it cannot be disputed that continued litigation would have been complex, expensive, and time consuming.

Moreover, even if Plaintiffs could recover an equally large judgment after a trial, the additional delay through post-trial motions and the appellate process could deny the Settlement Class any recovery for years, further reducing its value. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery"); *see also Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action.").

The Settlement eliminates the expense and delay of continued litigation, the depletion of existing insurance coverage, and the risk that the Settlement Class could receive no recovery. Accordingly, this *Grinnell* factor strongly supports approval of the Settlement.

2. The Lack of Objections and/or Opt-Outs Support Final Approval

The reaction of the class to a proposed settlement is a significant factor to weigh in considering its fairness and adequacy. *See Bear Stearns*, 909 F. Supp. 2d at 266-67. The absence of valid objections and requests for exclusion provides evidence of Settlement Class Members' approval of the terms of the Settlement. *See Wal-Mart*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001) (noting "the lack of objections may well evidence the fairness of the Settlement").

Pursuant to the Preliminary Approval Order (ECF No. 180), the Court-appointed Claims Administrator, JND Legal Administration ("JND"), began mailing copies of the Postcard Notice on March 25, 2019. *See* Ex. 2 (Declaration of Luiggy Segura) at ¶ 6. As of May 17, 2019, JND had disseminated a total of 14,356 Postcard Notices to potential Settlement Class Members and nominees. *See id.*, ¶ 12. In addition, the Summary Notice was published in *Investor's Business Daily* and transmitted over *PR Newswire* on April 1, 2019. *See id.*, ¶ 13. The Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") contains a description of the Action, the Settlement, and information about Settlement Class Members' rights to participate in the Settlement by submitting a Claim Form; to object to the Settlement, the Plan of Allocation, Lead Counsel's motion for attorneys' fees and expenses; or to request exclusion from the Settlement Class. While the Court's deadline for Settlement Class Members to object or exclude themselves from the Settlement Class—June 7, 2019—has

not yet passed, to date, no objections or requests for exclusion have been received. ¶ 96; Segura Decl. at ¶¶ 16-17.

The Settlement Class's universally favorable reaction supports approving the Settlement. *See Bear Stearns*, 909 F. Supp. 2d at 267 ("Given the absence of significant exclusion or objection—the rate of exclusion is 5.1% and the rate of objection is less than 1%—this factor weighs strongly in favor of approval."); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *15 (S.D.N.Y. Feb. 1, 2007) (finding that 34 requests for exclusion in response to the mailing of nearly 400,000 notices was a "minimal" number that "militates in favor of approving the settlement as be fair, adequate, and reasonable.").

3. Plaintiffs Had Sufficient Information to Make Informed Decisions About Settling this Case

The third *Grinnell* factor, which looks to the "stage of the proceedings and the amount of discovery completed," *Wal-Mart*, 396 F.3d at 117, examines "whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *Bear Stearns*, 909 F. Supp. 2d at 267. To satisfy this factor, the Parties "need not have engaged in extensive discovery as long as they have engaged in sufficient investigation of the facts to enable the Court to intelligently make . . . an appraisal of the settlement." *AOL Time Warner*, 2006 WL 903236, at *10; *IMAX*, 283 F.R.D. at 190 ("The threshold necessary to render the decisions of counsel sufficiently well informed, however, is not an overly burdensome one to achieve—indeed, formal discovery need not have necessarily been undertaken yet by the parties.").

There is no question that, at the time the Parties agreed to settle, Plaintiffs and Lead Counsel understood the strengths and weaknesses of the claims and defenses asserted, and could make informed appraisals regarding the chances of success. Lead Counsel engaged in extensive discovery which entailed, *inter alia*: a targeted review of nearly 6 million pages of documents obtained from Defendants and third parties; conducting twenty-one depositions and being prepared to imminently conduct two more depositions; and preparing for and defending the depositions of each of the Plaintiffs and Plaintiffs' market efficiency expert. ¶¶ 71-75. In addition, Lead Counsel expended significant time and resources analyzing and litigating the legal and factual issues in the Action, including, but not limited to: (i) thoroughly reviewing publicly available information concerning LSB, including SEC filings, analyst reports, investor presentations, and financial press; (ii) interviewing former LSB employees with knowledge of its practices; (iii) preparing the detailed 59-page CAC based on this investigation; (iv) researching and preparing the detailed 125-page SAC; (v) preparing and exchanging two detailed mediation statements and presentations addressing liability, expert damage analyses, loss causation, and ability to pay in preparation mediation; and (vi) participating in two full-day mediations and substantial additional follow-up negotiations. *See e.g.*, ¶ 4.

In light of the extensive amount of information obtained and analyzed by Lead Counsel, Plaintiffs and Lead Counsel clearly possessed sufficient information to understand the strengths and weaknesses of the Action and were well-positioned to negotiate the Settlement. Consequently, this factor strongly supports final approval of the Settlement. *See Bear Stearns*, 909 F. Supp. 2d at 267 (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of the settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a

number of significant legal issues"); *see also Aeropostale, Inc.*, 2014 WL 1883494 at *6 (finding that conducting "extensive formal discovery, including the review and analysis of over 1.3 million pages of documents from Defendants and various third parties as well as substantially completing fact depositions," demonstrated that "Lead Plaintiff and Lead Counsel have developed a comprehensive understanding of the key legal and factual issues in the litigation") (citing *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01–CV–11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004)).

4. Plaintiffs Faced Major Risks in Establishing Liability and Damages

In assessing the fairness, reasonableness, and adequacy of a settlement, courts should consider the "risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463; *Wal-Mart*, 396 F.3d at 117. Analyzing these risks "does not require the Court to adjudicate the disputed issues or decide unsettled questions; rather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 2004); *AOL Time Warner*, 2006 WL 903236, at *11 (same). In other words, "the Court should balance the benefits afforded to members of the Class and the immediacy and certainty of a substantial recovery for them against the continuing risks of litigation." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002). Courts should, therefore, "approve settlements where plaintiffs would have faced significant legal and factual obstacles to proving their case." *Global Crossing*, 225 F.R.D. at 459.

(i) Risks of Establishing Liability

"The difficulty of establishing liability is a common risk of securities litigation," particularly where, as here, Defendants had credible defenses. *AOL Time Warner*, 2006 WL 903236, at *11. While Plaintiffs believe they would be able to prove falsity and scienter, they

recognize the risks of establishing these elements at summary judgment and trial. *See id.* (recognizing that "avoiding dismissal at the pleading stage does not guarantee that scienter will be adequately proven at trial"). Indeed, scienter is often considered "the most difficult and controversial aspect of a securities fraud claim." *Fishoff v. Coty Inc.*, No. 09 Civ. 628 (SAS), 2010 WL 305358, at *2 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011).

Here, Defendants maintained throughout the Action that Plaintiffs could not establish falsity regarding their statements pertaining to the cost and progress of the El Dorado Project (*i.e.*, Plaintiffs' core allegations). Specifically, Defendants argued, and would have continued to argue, that the Company reasonably relied on its primary contractor to provide accurate estimates and that the Company adequately monitored the contractor's processes. ¶ 79. Moreover, Defendants argued that Plaintiffs failed to show that any of the Individual Defendants engaged in insider trading or had any other motive to mislead investors, and that the Defendants were simply presenting in good faith their best estimates of the cost and timing of the project as they acquired more information from their contractor, Leidos. ¶ 80. Defendants also argued that the Class Period should have been shortened, arguing that at the earliest Defendants may have known that the project was not on time and not on budget was in July or August 2015, not November 2014. ¶ 51. While Magistrate Judge Gorenstein rejected these arguments in the context of class certification, holding that Defendants' arguments impermissibly descended into the merits and did not relate to the requirements for class certification (ECF No. 154 at 38-43), he acknowledged that Defendants could once again raise these arguments at summary judgement and trial. *See id.* at 42-43. If Defendants could successfully demonstrate that they did not know that the El Dorado Project was behind schedule and over budget until July or August 2015 (and were not reckless in relying on Leidos's estimates before that point), Defendants could have

obtained a subsequent order truncating the Class Period, which would have resulted in a substantial reduction in the amount of recoverable damages. While Plaintiffs were confident that they would be successful in demonstrating falsity and scienter for the entire Class Period, there is a risk that the Court or a jury may have accepted Defendants' arguments.

(ii) Risks of Establishing Loss Causation and Damages

In addition to Defendants' scienter based argument for shortening the Class Period, Defendants had other significant causation and damages defenses, relating to proper measure of damages and the need for Plaintiffs to disaggregate the impact of non-fraudulent disclosures from the decline in the value of LSB's securities. In order to have prevailed, Plaintiffs would need to establish that it was the revelation of Defendants' misrepresentations or omissions that caused Plaintiffs to incur a loss, and not non-fraud related business or macroeconomic factors. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear "the burden of *proving* that the defendant's misrepresentations caused the loss for which the plaintiff seeks to recover" (emphasis added)). Disentangling the market's reaction to various pieces of news is a "complicated concept, both factually and legally." *Global Crossing*, 225 F.R.D. at 459. Accordingly, the "[c]alculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Id.*

The Parties held extremely disparate views with respect to damages, and Defendants' challenges to loss causation and damages could pose a serious risk to the Settlement Class at summary judgment, trial, and on appeal. *See, e.g., Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 716 (11th Cir. 2012) (reversing plaintiffs' jury verdict for failure to prove loss causation); *In re Scientific Atl., Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1379-80 (N.D. Ga. 2010) (granting motion for summary judgment because plaintiffs did not disentangle fraud-related and

non-fraud-related portions of stock decline). Specifically, Defendants could credibly argue that the one of the three alleged disclosure announcements was not statistically significant. Further, as to the first and last alleged corrective disclosures on August 7 and November 6, 2015, Defendants would have continued to assert that a substantial portion of the decline was due to the disclosure of other information, unrelated to the alleged fraud. *See* ¶ 83.

If Defendants were to prevail on such an argument at any stage, it would significantly reduce potential damages. In complex securities cases, it is axiomatic that the Parties would rely on expert testimony to assist the jury in determining damages. *See Global Crossing*, 225 F.R.D. at 459 ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury."). While Plaintiffs argued that the stock price declines were attributable to the disclosure and corrections of the alleged misstatements and omissions and would have presented expert testimony addressing loss causation and damages, Defendants would have proffered their own expert to offer contrary testimony with respect to all of the price declines. *See IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in securities class actions often descend into a battle of experts."). In such a "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found" by the jury. *Telik*, 576 F. Supp. 2d at 579-80.

Therefore, even if liability were established at trial, "a jury could find that damages were only a fraction of the amount that plaintiffs contend" because "[a] jury could be swayed by experts for the Defendants, who would minimize the amount of Plaintiffs' losses." *Del Global*, 186 F. Supp. 2d at 365. If a jury were to accept Defendants' arguments, damages in this case could be greatly reduced or even eliminated. *Marsh & McLennan*, 2009 WL 5178546, at *6

("[i]f there is anything in the world that is uncertain when a case like [a securities class action] is taken to trial, it is what the jury will come up with as a number for damages."). As a result, "the risks faced by the securities plaintiffs in establishing damages are substantial, and this factor favors approving the settlement." *Global Crossing*, 225 F.R.D. at 459.

5. Risks of Maintaining Class Action Status Through Trial

Although Magistrate Judge Gorenstein had issued a report and recommendation granting class certification, Defendants undoubtedly would have objected to his ruling, arguing that the Plaintiffs were atypical and inadequate class representatives and that Plaintiffs had failed to demonstrate that the market for LSB Securities was efficient. Moreover, if the Court ultimately granted class certification, Defendants could move to decertify the class (in whole or in part) at any time. *See* Fed. R. Civ. P. 23(c)(2); *Global Crossing*, 225 F.R.D. at 460 ("[E]ven if plaintiffs could obtain class certification, there could be a risk of decertification at a later stage."). Here, "the uncertainty surrounding class certification supports approval of the Settlement," *Marsh & McLennan*, 2009 WL 5178546, at *6, because "even the process of class certification would have subjected Plaintiffs to considerably more risk than the unopposed certification that was ordered for the sole purpose of the Settlement." *AOL Time Warner*, 2006 WL 903236, at *12.

6. The Settlement Amount is in the Range of Reasonableness in Light of the Best Possible Recovery and all the Attendant Risks of Litigation

Courts typically analyze the last two *Grinnell* factors together. *See Grinnell*, 495 F.2d at 463. In so doing, courts "consider[] and weigh[] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM) (PED), 2010 WL 4537550, at *20 (S.D.N.Y. Nov. 8, 2010) (quoting *Grinnell*, 495 F.2d at 462). A court's "determination of whether a given settlement amount is reasonable in

light of the best possibl[e] recovery does not involve the use of a mathematical equation yielding a particularized sum." *Bear Stearns*, 909 F. Supp. 2d at 269. Instead, the Second Circuit has held "[t]here is a range of reasonableness with respect to a settlement—a range which 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." *Wal-Mart*, 396 F.3d at 119.

Plaintiffs submit that the $18.45 million Settlement is well within the range of reasonableness in light of the best possible recovery and all the attendant risks of litigation. If Plaintiffs overcame all the obstacles noted above to establishing liability and proving loss causation and damages, the maximum recoverable damages at trial would be approximately $136.8 million. ¶ 84. Under that scenario, the $18.45 million settlement represents approximately 13.5% of the Class's maximum damages. However, if Defendants prevailed in shortening the Class Period on and their loss causation arguments (*see* Sec. II.B.4(b), *supra*; ¶¶ 82-83), Plaintiffs' estimated damages would be greatly reduced. ¶ 83. Under this scenario, the Settlement represents approximately 27.5% to 45.5% of the Class's maximum damages. *See* ECF No. 178 at 14. A recovery in the range of 13.5 – 45.5% of damages is an extremely favorable outcome. *See Merrill Lynch*, 2007 WL 313474, at *10 (finding settlement representing recovery of approximately 6.25% of estimated damages to be "at the higher end of the range of reasonableness of recovery in class actions securities litigations"); *see also* Ex. 1 (excerpts from Stefan Boettsich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* (NERA 29 Jan. 2019) at 35 (the median ratio of settlements between 1996 through 2018 to investment losses was 8.4% for cases alleging investor losses between $20 million and $49 million, 4.7% for cases alleging investor losses of between $50 million and $99 million and 3.1% for cases alleging investor losses of between $100 million and $199 million.).

Moreover, weighing "[t]he 'best possible' recovery necessarily assumes Plaintiffs' success on both liability and damages covering the full Class Period alleged in the Complaint as well as the ability of Defendants to pay the judgment." *Del Global*, 186 F. Supp. 2d at 365. This case has been pending for almost four years, and could be expected to last several more years had the Settlement not been reached. "While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery." *In re Blech Sec. Litig.*, No. 94 CIV. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000).

In sum, the *Grinnell* factors – including Plaintiffs' well-developed understanding of the strengths and weaknesses of the case, and the significant risks, expense, and delay of further litigation – support a finding that the Settlement is fair, adequate, and reasonable.

C. Other Factors Established by Rule 23(e)(2) Support Final Approval

On December 1, 2018, amendments to Rule 23(e)(2) went into effect that provide the Court with factors to consider when determining whether a proposed settlement is fair, reasonable, and adequate. The factors are not intended to "displace" any previously adopted factors, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See* Advisory Committee Notes to the 2018 Amendments to the Federal Rules of Civil Procedure; *see also Swinton v. SquareTrade, Inc.*, No. 18-CV-00144, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019). As such, these factors are to be considered in addition to the *Grinnell* factors. Rule 23(e)(2) provides for the following factors not duplicative of the *Grinnell* factors:

> (A) the class representatives and class counsel have adequately represented the class;
> […]
> (C) the relief provided for the class is adequate, taking into account:

> […]
>
> (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 equitable relative to each other.

Fed. R. Civ. P. 23(e)(2).

First, Plaintiffs and Lead Counsel have adequately represented the Settlement Class both during the litigation of this Action and during its settlement. Plaintiffs' claims are typical of and coextensive with the claims of the Settlement Class, and they have no antagonistic interests; rather, Plaintiffs' interest in obtaining the largest possible recovery in this Action is aligned with the other Settlement Class Members. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Additionally, Plaintiffs were highly involved in each stage of the litigation and worked closely with Lead Counsel throughout the pendency of this Action to achieve the best possible result for themselves and the Settlement Class. *See* Wilson Decl. (Ex. 3), ¶ 4; Kirchner Decl. (Ex. 4), ¶ 4. Also, Plaintiffs retained counsel who are highly experienced in securities litigation, and who have a long and successful track record of representing investors in such cases. Lead Counsel, GPM, has successfully prosecuted securities class actions and complex litigation in federal and state courts throughout the country for more than 26 years. *See* Ex. 8 (GPM firm résumé). Moreover, as explained in greater detail in the Declaration, Lead Counsel vigorously prosecuted the Class's claims.

Second, the method for processing Settlement Class Members' claims and distributing relief to eligible claimants includes well-established, effective procedures for processing claims

submitted by potential Settlement Class Members and efficiently distributing the Net Settlement Fund. Here, JND, the Court-approved Claims Administrator, will process claims under the guidance of Lead Counsel, allow claimants an opportunity to cure any deficiencies in their claims or request the Court to review a denial of their claims, and, following Court approval, mail or wire Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the Plan of Allocation). Ex. 2 at ¶18. Claims processing like the method proposed here is standard in securities class action settlements as it has been long found to be effective, as well as necessary insofar as neither Plaintiffs nor Defendants possess the individual investor trading data required for a claims-free process to distribute the Net Settlement Fund.

Third, as discussed in the accompanying Fee and Expense Application, Lead Counsel is applying for a percentage of the common fund fee award to compensate them for the services they have rendered for the Settlement Class. The proposed attorneys' fees of 33 1/3% of the Settlement Fund (which, by definition, includes interest earned on the Settlement Amount) is reasonable in light of the work performed and the results obtained. More importantly, approval of the requested attorneys' fees is separate from approval of the Settlement, and the Settlement may not be terminated based on any ruling with respect to attorneys' fees. *See* Stipulation ¶ 15.

Fourth, with respect to Rule 23(e)(2)(C)(iv), the Parties have entered into a confidential agreement which establishes certain conditions under which Defendants may terminate the Settlement if Settlement Class Members, who collectively purchased a specific number of shares of LSB Securities, request exclusion (or "opt out") from the Settlement. This type of agreement is standard in securities class action settlements and has no negative impact on the fairness of the Settlement. *See, e.g.*, *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, at *5 (N.D. Cal. Aug. 25, 2016) (observing that such "opt-out deals are not uncommon as plaintiffs

had sufficient information to make an informed decision about the settlement after conducting a significant investigation and working with experts throughout the litigation).

Fifth, under the proposed Plan of Allocation, each Authorized Claimant will receive his, her, or its *pro rata* share of the Net Settlement Fund. Specifically, an Authorized Claimant's *pro rata* share shall be the Authorized Claimant's Recognized Claim divided by the total of Recognized Claims of all Authorized Claimants, multiplied by the total amount in the Net Settlement Fund. ¶ 102. Plaintiffs will receive the same level of *pro rata* recovery, based on their Recognized Claim as calculated by the Plan of Allocation, as all other similarly situated Settlement Class Members.

Accordingly, each of these factors favors approval of the Settlement.

D. <u>The Plan of Allocation Should Be Approved</u>

"When formulated by competent and experienced counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *IMAX*, 283 F.R.D. at 192; *see also Marsh & McLennan*, 2009 WL 5178546, at *13 ("In determining whether a plan of allocation is fair, courts look largely to the opinion of counsel.").

The proposed Plan of Allocation is set forth in the Notice made available to the Settlement Class on the Settlement Website. *See* Ex. 2, Exhibit B at ¶¶ 55-83. Lead Counsel developed the Plan of Allocation in consultation with Plaintiffs' damages expert with the objective of equitably distributing the Net Settlement Fund. The Plan of Allocation was developed based on an event study, which calculated the estimated amount of artificial inflation in the price of LSB Securities during the Settlement Class Period as a result of Defendants' alleged materially false and misleading statements and omissions. ¶100. In calculating this estimated alleged artificial inflation, the damages expert considered price changes in LSB Securities in reaction to the alleged corrective disclosures. Under the Plan of Allocation, a

"Recognized Loss Amount" will be calculated for each transaction of LSB Securities, during the Settlement Class Period for which adequate documentation is provided. The calculation of Recognized Loss Amounts is explained in detail in the Notice and incorporates several factors, including when and for what price the LSB Securities were purchased, sold, or written and the estimated artificial inflation in the LSB Securities' respective prices at the time of purchase and sale, as determined by Plaintiffs' damages expert. *See In re Datatec Sys. Inc. Sec. Litig.*, No. 04-CV-525 (GEB), 2007 WL 4225828, at *5 (D.N.J. Nov. 28, 2007) ("plans that allocate money depending on the timing of purchases and sales of the securities at issue are common"). The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their total Recognized Loss Amounts.

Lead Counsel believes that the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action, and their opinion as to allocation is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *Am. Bank Note*, 127 F. Supp. 2d at 430. To date, no objections to the Plan of Allocation have been received, suggesting that the Settlement Class also finds the Plan of Allocation to be fair and reasonable. *See* ¶ 96; *In re Nasdaq Mkt.-Makers Antitrust Litig.*, No. 94 Civ. 3996 RWS, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) (holding that the "small number of objections to the Proposed Plan" was entitled to "substantial weight" in approving the plan). Moreover, similar plans have repeatedly been approved by courts in this District. *See, e.g.*, *Global Crossing*, 225 F.R.D. at 462 ("Pro-rata distribution of settlement funds based on investment loss is clearly a reasonable approach.").

For each of the forgoing reasons, Plaintiffs respectfully submit that the proposed Plan of Allocation is fair and reasonable, and merits final approval from the Court.

E. Notice to the Settlement Class Satisfied all the Requirements of Rule 23 and Due Process

For any class certified under Rule 23(b)(3), due process and Rule 23 require that class members be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974).

Courts routinely find that a combination of a mailed post card directing class members to a more detailed online notice sufficient to satisfy due process requirements. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 183 n.3 (S.D.N.Y. 2014) (citing cases). In accordance with the Preliminary Approval Order, JND, the Court-approved Claims Administrator, mailed, via first-class mail, 14,356 individual copies of the Postcard Notice to potential Settlement Class Members who could be identified with reasonable effort, as well as brokerage firms and other nominees who regularly act as nominees for beneficial purchasers of stock. Ex. 2 (Segura Decl.) at ¶ 12. The Postcard Notice directed potential Settlement Class Members to downloadable versions of the Notice and Claim Form posted online at www.LSBSecuritiesLitigation.com. *Id.* at ¶ 15. In addition, JND arranged for the Summary Notice to be published in *Investor's Business Daily* and transmitted over the *PR Newswire* on April 1, 2019. *Id.* at ¶ 12. Claims can be mailed to JND, or can be submitted online. *Id.* ¶ 15.

The Notice provides all the necessary information required per Rule 23(c)(2)(B). The Notice sets forth in plain, easily understandable language: (a) the nature of the action; (b) the Settlement Class Definition; (c) a description of the claims at issue and the defenses to those claims; (d) the ability of Settlement Class Members to enter an appearance through counsel;

(e) the Settlement Class Member's ability to be excluded and the process for exclusion from the Settlement Class; (f) the binding effect of a Class judgment; (g) the contact information for Lead Counsel to answer questions; (h) the address for the Settlement website; and (i) instructions on how to access the case file in person. Additionally, the notice program satisfies the requirements of the PSLRA, 15 U.S.C. § 78u-4(a)(7), by setting forth in plain, easily understandable language: (a) a cover page summarizing the information in the Notice; (b) a statement of plaintiff recovery, and the estimated recovery per damaged share; (c) a statement of potential outcomes of the case; (d) a statement of attorneys' fees or costs sought; (e) identification of lawyers' representatives; and the (vi) reasons for settlement.

In sum, the notice program fairly apprises Settlement Class Members of their rights with respect to the Settlement, and is the best notice practicable under the circumstances.

F. Final Certification of the Settlement Class

The Court's Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 180 at ¶ 1. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in Plaintiffs' Preliminary Approval Brief (*see* ECF No. 178 at 15-22), Plaintiffs respectfully request that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

III. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that the Court grant their motion.

Dated: May 24, 2019

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PROOF OF SERVICE

I, the undersigned say:

I am not a party to the above case and am over eighteen years old.

On May 24, 2019, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Southern District of New York, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 24, 2019.

s/ Casey E. Sadler
Casey E. Sadler