UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CHRISTOPHER MACHADO, and MICHAEL RUBIN, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. ENDURANCE INTERNATIONAL GROUP HOLDINGS, INC., HARI RAVICHANDRAN, and TIVANKA ELLAWALA, Defendants.	Case No.: 1:15-cv-11775-GAO

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

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Christopher Machado ("Lead Plaintiff") and named Plaintiff Michael Rubin (together with Lead Plaintiff, "Plaintiffs"), on behalf of themselves and the Settlement Class, respectfully submit this memorandum in support of their motion for: (i) final approval of the proposed settlement of this securities class action; (ii) approval of the proposed Plan of Allocation; and (iii) final certification of the Settlement Class.[1]

PRELIMINARY STATEMENT[2]

After more than three years of litigation, Plaintiffs, through their counsel, have obtained a $18,650,000 all cash, non-reversionary settlement for the benefit of the Settlement Class. As described below and in the Glancy Declaration, the Settlement is an excellent result for the Settlement Class, providing a significant and certain recovery in a case that presented numerous hurdles and risks. In fact, the Settlement represents between 6% and 26% of the Settlement Class's maximum recoverable class-wide aggregate damages, which is an extremely favorable result when compared to the median recovery in securities class action settlements with similar aggregate damages. Moreover, the Settlement was reached only after extensive, arm's-length negotiations conducted by experienced counsel with the assistance of Judge Daniel Weinstein

[1] Unless otherwise defined herein, all capitalized terms have the same meanings as set forth in the Stipulation and Agreement of Settlement dated July 6, 2018 (the "Stipulation"), previously filed with the Court (ECF No. 77-1), or the Declaration of Lionel Z. Glancy in Support of (I) Plaintiffs' Motion for Final Approval of Class Action Settlement, Class Certification, and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Glancy Declaration" or "Decl."), filed concurrently herewith. Unless otherwise noted, all citations to "¶__" and "Ex." refer, respectively, to paragraphs in, and exhibits to, the Glancy Declaration.

[2] The Glancy Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*, the factual and procedural history of the Action (¶¶7-14); the efforts involved in the drafting and defending of the complaints (¶¶ 15-34); the risks of continued litigation (¶¶ 48-59); the negotiations leading to the Settlement (¶¶35-43); and the Plan of Allocation (¶¶67-73).

(Ret.) ("Judge Weinstein"), and it is the result of a mediator's recommendation that followed an all-day mediation session and months of follow-up negotiations. The Settlement is, therefore, both substantively and procedurally fair.

Plaintiffs' and Lead Counsel's substantial efforts and well-developed understanding of the strengths and weaknesses of the Action also support final approval. Plaintiffs' efforts, which are detailed in the Glancy Declaration, included, among other things: (i) a comprehensive factual investigation aided by an experienced private investigator; (ii) rigorous analysis of Endurance's public filings and Defendants' public statements; (iii) review of news articles and analyst reports about the company; (iv) interviews of numerous former Endurance employees in connection with the drafting of three amended complaints; (v) review and analysis of Endurance's settlement with the U.S. Securities and Exchange Commission ("SEC"); (vi) consultations with experts on accounting, loss causation and damages; (vii) review, compilation, and analysis of over 1.4 million pages of documents produced by Defendants; (viii) negotiating and executing a tolling agreement with Defendants related to the Securities Act claims; (ix) researching and drafting oppositions to Defendants' two motions to dismiss; and (x) preparation of a detailed mediation statement, along with exhibits. ¶ 3; ¶¶ 10-42. In view of the foregoing, Plaintiffs and their counsel had a comprehensive understanding of the strengths and weaknesses of the case and had sufficient information to make an informed decision regarding the fairness of the Settlement before entering into it and presenting it to the Court.

Plaintiffs and Lead Counsel believe that the Settlement is an outstanding result for the Settlement Class. Their belief is supported by, among other things, the certainty of an $18.65 million recovery today versus the significant risk of a smaller or even no recovery following years of additional litigation; an analysis of the facts adduced to date; past experience in

litigating complex securities class actions; the serious disputes between the parties concerning the merits and damages; and the favorable reaction of the Settlement Class. ¶¶ 58-59. Plaintiffs, therefore, respectfully submit that the Settlement is fair, reasonable and adequate.

Plaintiffs also move for approval of the proposed Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with Plaintiffs' damages expert and is designed to fairly and equitably distribute the proceeds of the Settlement to Settlement Class Members. ¶¶ 69-73. Plaintiffs respectfully submit that it too should be approved.

For these reasons, and those set forth below and in the Glancy Declaration, Plaintiffs respectfully request that the Court grant final approval of the Settlement and Plan of Allocation and grant final certification of the Settlement Class for settlement purposes.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims to ensure that it is procedurally and substantively "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *see also Hill v. State Street Corp.*, 2015 WL 127728, at *6 (D. Mass. 2015) (O'Toole, J.) ("Courts generally consider both the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial.")[3] According to the recently amended Rule 23(e)(2), which governs final approval, the four specific factors to consider when determining whether a proposed settlement is fair, reasonable, and adequate are:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

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

(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).

These factors do not "displace" any previously adopted factors, but "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." FED. R. CIV. P. 23(e) advisory committee's notes to 2018 amendment, 324 F.R.D. 904, 918. "Accordingly, the Court [should] appl[y] the framework set forth in Rule 23, while continuing to draw guidance from the [First] Circuit's factors and relevant precedent." *Hefler v. Wells Fargo & Company*, 2018 WL 6619983, at *4 (N.D. Cal. 2018); *see also Swinton v. SquareTrade, Inc*., 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019) ("The Court will therefore consider the Rule 23(e)(2) factors along with the factors developed by courts in the Eighth Circuit."). Prior to the Rule 23(e)(2) amendment, courts in the First Circuit considered the "*Grinnell* factors," initially set forth by the Second Circuit in *Detroit v. Grinnell Corp*., 495 F.2d 448, 463 (2d Cir. 1974):

> (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 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.

Health Benefits Fund v. First Databank, Inc., 602 F. Supp. 2d 277, 280-81 (D. Mass 2009) (quoting *Grinnell*, 495 F.2d at 463); *see also Hill*, 2015 WL 127728, at *6.

As explained below and in the Glancy Declaration, application of each of the four factors specified in Rule 23(e)(2), and the relevant, non-duplicative *Grinnell* factors, demonstrate that the Settlement merits final approval.

A. Plaintiffs and Lead Counsel Adequately Represented the Settlement Class

The first Rule 23(e)(2) factor is whether the "class representative[] and class counsel have adequately represented the class." FED. R. CIV. P. 23(e)(2)(A). Adequacy is demonstrated where "the interests of the representative party will not conflict with the interests of any of the class members, and second, that the counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985).

Here, Plaintiffs' claims are typical of and co-extensive with the claims of the Settlement Class, and they have no antagonistic interests; rather, Plaintiffs' interests in obtaining the largest possible recovery in this Action is aligned with the other Settlement Class Members. *See In re Puerto Rican Cabotage Antitrust Litig.*, 269 F.R.D. 125, 133 (D.P.R. 2010) ("Plaintiffs, like other members of the proposed class, have the same incentives to maximize recovery for the wrongs allegedly perpetrated on them by Defendants."). Additionally, Lead Plaintiff Machado filed the initial complaint in the Action, was 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 himself and the Settlement Class. ¶ 75; Ex. 3 ("Machado Decl.") at ¶¶ 3-5. Similarly, Mr. Rubin – who purchased Endurance common stock in the IPO – made the decision to join the Action as an additional named Plaintiff in order to ensure the Securities Act claims could be brought on behalf of the class and actively participated thereafter. *See* ¶ 30; Ex. 4 ("Rubin Decl.") at ¶¶ 3-5.

Plaintiffs also retained counsel who are highly experienced in securities litigation, and who have a long and successful track record of representing investors in such cases. Court appointed Lead and Liaison Counsel, Glancy Prongay & Murray LLP ("GPM") and Block & Leviton LLP ("B&L"), respectively, as well as additional Plaintiffs' Counsel, WeissLaw, LLP

("WeissLaw"), have all successfully prosecuted securities class actions and complex litigation in federal and state courts throughout the country, including in this District. *See* Exs. 6, 7, and 8 (GPM, B&L and WeissLaw firm resumes). Moreover, as set forth in detail above (*supra* at 2), and in the Glancy Declaration, Lead Counsel vigorously prosecuted Plaintiffs' claims throughout the litigation by, among other things, conducting an extremely detailed investigation into the Company, which included interviews with former employees and consulting with damages and accounting experts, drafting three amended complaints to reflect the ongoing revelations relating to Endurance's alleged fraud, and defending those allegations in multiple rounds of motion to dismiss briefing, reviewing (and painstakingly assembling into a reviewable format) 1.4 million pages of documents produced by Defendants, as well as unremittingly pursuing settlement efforts for months following the parties' all-day mediation session. ¶¶ 3; 10-41.

Finally, the Court has previously found that Plaintiffs and Lead Counsel have adequately represented the Settlement Class. *See* Preliminary Approval Order, Dkt. No. 80 at 2-3. Consequently, this factor supports final approval of the Settlement.

B. The Settlement was Reached Following Sufficient Discovery and Extensive Arm's-Length Negotiations Between Experienced Counsel Conducted Under the Auspices of a Well-Respected Mediator

The second Rule 23(e)(2) factor is whether the settlement was "negotiated at arm's length." FED. R. CIV. P. 23(e)(2)(B).[4] "If the parties negotiated at arm's length and conducted sufficient discovery, the district court ***must*** presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) (emphasis added); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. 2011) (counsel's investigation and informal discovery provided "sufficient information to make a well

[4] *Grinnell*, 495 F.2d at 463 (third factor).

informed decision."). Also, "a … mediator's involvement in … settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

Here, the Settlement merits a presumption of reasonableness because it is the product of substantial arm's-length negotiations between experienced counsel who had thoroughly evaluated the merits of the claims and were well-aware of the strengths and weaknesses of the case. ¶¶ 10-44 (detailing the investigation and work performed by Plaintiffs' Counsel). And, the mediation process—which included a full-day mediation that did not result in a settlement, months of follow up negotiations, and a mediator's recommendation—was led by Judge Weinstein, a well-respected mediator who has significant experience mediating securities class actions and other complex litigation.[5] Judge Weinstein strongly endorses the Settlement as fair, reasonable and adequate, as detailed in his attached declaration. Ex. 1 at ¶ 10.

Furthermore, courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("The Court's fairness determination also reflects the weight it has placed on the judgment of the parties' respective counsel, who are experienced attorneys and have represented to the Court that they believe the

[5] *See City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom., Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015) ("[t]his initial presumption of fairness and adequacy applies here because the Settlement was reached by experienced, fully-informed counsel after arm's-length negotiations and, ultimately, with the assistance of Judge Daniel Weinstein, one of the nation's premier mediators in complex, multi-party, high stakes litigation") (collecting cases).

settlement provides to the Class relief that is fair, reasonable and adequate."). Such is the case here, where Lead Counsel, who have extensive experience in securities class action litigation and were well-informed about the facts of the case, strongly believe that the $18.65 million Settlement is in the best interests of the Settlement Class in light of the significant risks of continued litigation. These representations "should be given significant weight." *Cellucci*, 191 F.R.D. at 10.

Plaintiffs, who were thoroughly involved in all aspects of the litigation, also support the Settlement. This support weighs in favor of the Settlement's approval. *See* Machado Decl. at ¶ 7; Rubin Decl. at ¶ 7; *see also In re StockerYale, Inc. Sec. Litig.*, 2007 WL 4589772, at *3 (D.N.H. December 18, 2007) ("The Court finds it significant that the Lead Plaintiffs are fully in support of the settlement. Thus, this factor favors settlement as well.").

C. The Settlement Relief Provided to the Settlement Class is Adequate in Light of the Costs and Risks of Further Litigation and Other Relevant Factors

Under Rule 23(e)(2)(C), the Court must also consider whether "the relief provided for the class is adequate, taking into account … the costs, risks, and delay of trial and appeal" along with other relevant factors. FED. R. CIV. P. 23(e)(2)(C). This factor essentially incorporates five of the traditional *Grinnell* factors: the complexity, expense, and likely duration of the litigation (first factor); the risks of establishing liability and damages (fourth and fifth factor); the risks of maintaining the class action through the trial (sixth factor); and the range of reasonableness of the settlement fund in light of the best possible recovery and the attendant risks of litigation (eighth and ninth factors). *Cf. Grinnell*, 495 F.2d at 463. As demonstrated below, each of these factors supports approval of the Settlement.

1. The Complexity, Expense, and Likely Duration of Continued Litigation Support Approval of the Settlement

This factor "captures the probable costs, in both time and money, of continued litigation."

StockerYale, 2007 WL 4589772, at *3. Here, it simply cannot be disputed that continuing to litigate this case through the pending motion to dismiss, into and through the conclusion of fact and expert discovery, class certification, summary judgment, trial, and appeals would require substantial time and expense, all with no guarantee of any, let alone greater, success. Accordingly, this factor supports final approval. *See In re OCA, Inc. Sec. & Derivative Litig.*, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) (noting continued litigation, including through discovery, class certification, trial and appeals, "would consume substantial judicial and attorney time and resources, and avoiding such costs weighs in favor of settlement"); *StockerYale*, 2007 WL 4589772, at *3 (the "time and expense [of a securities class action] leading up to trial would have been significant."); *Hill*, 2015 WL 127728, at *8.

2. The Risks of Establishing Liability and Damages Support Approval of the Settlement

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. In so doing, the Court need not "decide the merits of the case[,] resolve unsettled legal questions," (*Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)), or "foresee with absolute certainty the outcome of the case." *Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014). "[R]ather, 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. 2004). While Lead Counsel believe that Plaintiffs' claims are meritorious, they also recognize that they faced substantial obstacles to proving liability and establishing loss causation and damages. When compared to the certainty of the significant recovery achieved by the Settlement, these risks militated against further litigation, and informed Plaintiffs' and Lead Counsel's belief that the Settlement is fair,

reasonable and adequate.

Risks That Plaintiffs' Claims Were Time Barred: Defendants argued that both Plaintiffs' Securities Act and Exchange Act claims were barred under the applicable statute of limitations, and Defendants' Securities Act statute of limitations argument presented a unique question as to whether statute of limitations applies in the relation-back context. ¶ 52. If Defendants' statute of limitation arguments were successful, Plaintiffs' Securities Act claims and Exchange Act claims relating to the IPO would have been time barred.

Establishing Liability: Even if Plaintiffs' claims survived Defendants' statute of limitation arguments, Plaintiffs faced numerous hurdles to establishing liability. *See In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *8 (S.D.N.Y. Dec. 19, 2014) ("Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet."). Specifically, they confronted substantial risks and uncertainties in proving, *inter alia*, that Defendants' alleged misstatements were materially false and misleading and that Defendants acted with scienter. Defendants had powerful arguments that they had not made any materially false or misleading statements or material omissions regarding the non-GAAP metrics (*e.g.*, ARPS and Total Subscribers) that were at the heart of the case. Defendants argued, *inter alia*, that Endurance's reported ARPS and Total Subscribers figures were technically accurate and the calculation method for both ARPS and Total Subscribers was fully disclosed. Defendants further argued that regardless of their technical accuracy, the alleged misstatements regarding non-GAAP metrics were not material to investors. ¶ 50.

Plaintiffs also would have faced significant obstacles in proving that the Defendants acted with an intent to commit fraud or with severe recklessness. In particular, Defendants would have pointed to the Company's prompt disclosure of the existence of errors in its metrics even before

the size of the errors was known. Defendants also would rely on the Individual Defendants' trading histories. Defendants asserted that Ravishandran and Ellawala retained the vast majority of their shares, 74% and 91% respectively, that their sales took place before many of the alleged false statements were made, and those sales were all made into registered follow-on offerings, which Defendants argued undermined any inference of scienter. *See In re Prestige Brands Holding, Inc.*, 2006 WL 2147719, at *7 (S.D.N.Y. July 10, 2006) ("Early Investors and Promoters routinely sell stock in IPOs, and such sales raise no inference of fraud."). Defendants would point to the results of the SEC investigation into Endurance, wherein the SEC ultimately did not pursue scienter based claims against the Individual Defendants, but rather negligence based claims under the Securities Act. In short, scienter was a major issue for Plaintiffs. *In re Gilat Satellite Networks, Ltd.*, 2007 WL 2743675, at *11 (E.D.N.Y. Sept. 18, 2007) ("Establishing scienter is 'a difficult burden to meet.'"). ¶ 51.

Against that backdrop, the Settlement represents a highly favorable recovery for the Class. *See Gulbankian v. MW Mfrs., Inc.*, 2014 WL 7384075, at *3 (D. Mass. Dec. 29, 2014) ("Settlement . . . avoids substantial risks and costs for both sides, giving a certain positive outcome in the face of a costly and uncertain one."); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) ("Instead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class. In the circumstances of such as case as this, it may be preferable 'to take the bird in the hand instead of the prospective flock in the bush.'").

Loss Causation and Damages: Even if Plaintiffs successfully established liability, they also faced substantial risk in proving loss causation and damages. *See Dura Pharm., 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'"). Defendants argued that the release of the Gotham Report on April 28, 2015 was not a corrective disclosure because it did not reveal any new facts to the market. *See In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 512 (2d Cir. 2010) ("negative characterization of already-public information" cannot constitute corrective disclosure to satisfy loss causation requirement). Defendants also argued that stock price decline following Endurance's quarterly press release issued on November 2, 2015 contained confounding news, which was responsible for the price drop. And, Defendants argued that the 8-K filed with the SEC on December 17, 2015 disclosing that Endurance was the subject of an SEC investigation was not a corrective disclosure because the announcement of an investigation into wrongdoing does not itself reveal any wrongdoing. *Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013) (the disclosure of "the commencement of an SEC investigation, without more, is insufficient to constitute a corrective disclosure for purposes of § 10(b)."). If Defendants' arguments concerning the April 28, 2015, November 2, 2015, and December 17, 2015 disclosures were accepted by the Court or a jury, then the Settlement Class's damages would have been significantly reduced. ¶¶ 53-55.

Additionally, Plaintiffs would have to proffer expert testimony to prove: (i) the "true value" of Endurance common stock had there been no alleged material misstatements during the class period; (ii) the amount by which Endurance shares were inflated by the alleged material misstatements; and (iii) the amount of inflation removed by the disclosures on April 28, 2015, August 4, 2015, November 2, 2015, and December 17, 2015 of the alleged true facts. Defendants almost certainly would have presented their own damages expert(s) to argue conflicting conclusions and reason(s) for Endurance's share price decline, requiring a jury to decide the "battle of the experts" – an intrinsically expensive and unpredictable process. ¶ 56.

Courts have recognized that such a "battle of experts" is a significant litigation risk, and weighs in favor of approving a settlement. *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 260-61 (D.N.H. 2007).

Finally, even if the Plaintiffs were to prevail on liability and damages at trial, they faced additional risk on appeal. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) ($81 million jury verdict for plaintiffs against an accounting firm reversed on appeal on loss causation grounds and judgment entered for defendant). Accordingly, this factor weighs in favor of final approval. *See Bussie v. Allmerica Financial Corp.*, 50 F. Supp. 2d 59, 76 (D. Mass. 1999) ("the reality that the Class would encounter significant, and potentially insurmountable, obstacles to a litigated recovery underscores the reasonableness of the compromise set forth in the Settlement Agreement."). ¶ 58.

3. The Risk of Maintaining the Class Action Through Trial

At the time the Settlement was reached, Plaintiffs had not yet moved for class certification. Although Plaintiffs believe such a motion would have been meritorious, there is no guarantee that the Court would have agreed or, even if it did, that the First Circuit would not have granted a Rule 23(f) motion for interlocutory review and overturned the decision. Furthermore, Rule 23 provides that a class certification order may be altered or amended any time before a decision on the merits. Thus, as in any class action suit, there was a risk that even if the class was certified, it would be modified or decertified prior to a decision on the merits. "The numerous opportunities for certification to fail could lead to delay and create substantial risk of Plaintiffs failing completely." *Roberts v. TJX Cos., Inc.*, 2016 WL 8677312, at *7 (D. Mass. Sept. 30, 2016). Consequently, this factor favors approving the Settlement.

4. The Range of Possible Recovery and the Attendant Risks of Litigation Support Approval of the Settlement

Courts commonly analyze the last two *Grinnell* factors together. *See Grinnell,* 495 F.2d

at 463. In doing so, 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." *Id*. at 462. This is not a "mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc*., 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Instead, "there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Shapiro*, 2014 WL 1224666, at *11 (settlement fund must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case").

Here, Plaintiffs' damages expert estimates that if the Court denied Defendants' motion to dismiss in full, if Plaintiffs fully prevailed on each of their claims at both summary judgment and after a jury trial, if the Court certified the same class period as the Settlement Class Period, and if the Court and jury accepted Plaintiffs' damages theory, including proof of loss causation as to each of the four stock price drop dates alleged in this case—*i.e.*, Plaintiffs' ***best case scenario***, the total ***maximum*** damages would be approximately $310 million. Defendants, however, would have argued that maximum recoverable class-wide damages amounted to no more than $71 million. Thus, the $18.65 million Settlement Amount equates to a recovery of approximately 6% to 26% of the total ***maximum*** damages ***potentially*** available in this Action. In comparison, from 1996 through 2018, the median recovery in securities class actions with estimated damages ranging from $200-$399 million was 2.6%, and for those cases with damages ranging from $50-99 million the median recovery was 4.7%. ¶ 46; Ex. 5 (citing NERA Report at 35, Fig. 27).

As discussed above, if a jury or the Court had credited even some of Defendants'

arguments with respect to liability or damages, the Settlement Class might have recovered nothing, or significantly less than the Settlement Amount, many years in the future. Given these risks, the Settlement is an extremely favorable outcome for the Class and it is certainly well-within the range of reasonableness. *See Medoff v. CVS Caremark Corp.*, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (approving a settlement representing 5.33% of estimated recoverable damages as "well above the median percentage of settlement recoveries in comparable securities class action cases"); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (a recovery of approximately 6.25% was "at the higher end of the range of reasonableness of recovery in class action[] securities litigations").

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

Under Rule 23(e)(2)(C), courts also must consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorneys' fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors support the Settlement's approval or is neutral and thus do not suggest any basis for concluding the Settlement is inadequate.

First, 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 Legal Administration ("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 claim denial, and, lastly, mail or wire

Authorized Claimants their *pro rata* share of the Net Settlement Fund (per the Plan of Allocation), after Court-approval.[6] 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. *See New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 233-34, 245 (E.D. Mich. 2016) (approving settlement with a nearly identical distribution process).

Second, as discussed in the accompanying fee and expense application, Lead Counsel is applying for a percentage of the common fund fee award to compensate all Plaintiffs' Counsel for the services they have rendered on behalf of the Settlement Class. The proposed attorneys' fee 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 ¶16.

Third, in accordance with Rule 23(e)(2)(C)(iv), the parties entered into a confidential agreement which establishes certain conditions under which Endurance may terminate the Settlement if Settlement Class Members, who collectively purchased a specific number of shares of Endurance common stock, 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 Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227,

[6] This is not a claims-made settlement. If the Settlement is approved, Defendants will not have any right to the return of a portion of the Settlement based on the number or value of the claims submitted. *See* Stipulation ¶13.

at *5 (N.D. Tex. Apr. 25, 2018) (approving settlement with similar confidential agreement).

D. The Settlement Treats Class Members Equitably Relative to Each Other

Rule 23(e)(2)(D) requires courts to evaluate whether the settlement treats class members equitable relative to one another. FED. R. CIV. P. 23(e)(2)(D). 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. ¶ 72. 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.

E. The Positive Reaction of the Settlement Class Supports Settlement Approval

Though not included in Rule 23(e)(2), the reaction of the Settlement Class "albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Hill*, 2015 WL 127728, at *8. A small percentage of objections and opt-outs constitutes strong evidence that a settlement is fair and reasonable. *Bussie*, 50 F. Supp. 2d at 77.

Here, in accordance with the Court's Preliminary Approval Order, over 30,000 copies of the Postcard Notice were sent to potential Settlement Class Members and nominees and the Summary Notice was published both in the national edition of *Investor's Business Daily* and transmitted over the *PR Newswire*. *See* Segura Decl. ¶ 14 & Ex. B. JND also established a dedicated website (www.endurancesecuritieslitigation.com) providing Settlement information and downloadable copies of the Notice and Claim Form to potential Settlement Class Members, as well as copies of the Stipulation, Preliminary Approval Order, and the Complaint.

The Postcard Notice set out the Settlement's essential terms and informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class

or object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. The pertinent information and documents were also posted online. *Id*. at ¶ 16. While the deadline for Settlement Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been received.[7]

F. The Ability of Endurance to Withstand a Greater Judgment

Despite the outstanding recovery obtained here, Plaintiffs believe that Endurance could withstand a judgment greater than the $18.65 million settlement. However, "a defendant is not required to empty its coffers before a settlement can be found adequate." *In re Sturm, Ruger & Co. Sec. Litig.*, 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012); *see In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (same). Indeed, this factor, standing alone, is not sufficient to preclude a finding of substantive fairness where, as here, the other factors weigh heavily in favor of approving a settlement. *See Deutsche Bank*, 236 F.3d at 86. This factor is therefore neutral with respect to approval of the Settlement. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 73 (D. Mass. 2005); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 97 (D. Mass. 2005).

In sum, all of the relevant factors support a finding that the Settlement is fair, reasonable, and adequate.

II. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's Preliminary Approval Order certified the Settlement Class for Settlement purposes only pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. Dkt. No. 80 at 2-3. Nothing has changed to alter the propriety of the Court's decision and, for all the reasons stated in Plaintiffs' Preliminary Approval Brief (Dkt. No. 78), Plaintiffs respectfully

[7] The deadline for submitting objections and requesting exclusion from the Settlement Class is August 23, 2019. Plaintiffs will file reply papers by September 6, 2019, addressing any exclusion requests and objections received.

request that the Court affirm its determinations certifying the Settlement Class.

III. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE APPROVED

In the Preliminary Approval Order, the Court preliminarily approved the Plan of Allocation. Plaintiffs now request final approval of the Plan of Allocation. A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262; *see also City of Providence*, 2014 WL 1883494, at *10 (holding that "[a] plan of allocation 'need only have a reasonable, rational basis'"). In addition, "[w]hen evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel." *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014).

The Plan of Allocation is detailed in the long form Notice and incorporated by reference into the Stipulation. *See* Stipulation, ¶ 1(ll); Segura Decl., Ex. C at 12-15. The full Notice is posted online at www.endurancesecuritieslitigation.com, is downloadable, and is mailed to Settlement Class Members upon request.

The proposed Plan of Allocation reflects an assessment of the damages that Plaintiffs contend could have been recovered under the theories of liability asserted in the Action. More specifically, the Plan of Allocation reflects, and is based on, Plaintiffs' allegations that the price of Endurance common stock was artificially inflated during the period from October 25, 2013 to December 16, 2015, due to Defendants' materially false and misleading statements. The Plan of Allocation is based on the premise that the decreases in the price of Endurance's common stock adjusted for general equity market-related and industry-related movements predicted through a statistical event study, that followed the alleged corrective disclosures on (i) April 28, 2015, (ii) August 4, 2015, (iii) November 2, 2015, and (iv) December 17, 2015, may be used to measure

the artificial inflation in the price of Endurance common stock prior to these disclosures. ¶ 69; Notice at ¶¶ 50-66. The same methodology would have been proffered by Plaintiffs at summary judgment and trial had the Action not settled.

An individual Claimant's recovery under the Plan of Allocation will depend on a number of factors, including how many shares of Endurance common stock the Claimant purchased, acquired, or sold during the Settlement Class Period, when that Claimant bought, acquired, or sold the shares, and the number of valid claims filed by other Claimants. The Plan of Allocation also incorporates the "Lookback Period" damage claim ceiling provisions of the Private Securities Litigation Reform Act of 1995. If a Claimant has an overall market gain with respect to his, her, or its overall transactions in Endurance stock during the Settlement Class Period, or if the Claimant purchased shares during the Settlement Class Period, but did not hold any of those shares through at least one of the alleged corrective disclosures, the Claimant's recovery under the Plan of Allocation will be zero, as any loss suffered would not have been caused by the revelation of the alleged fraud. ¶ 71.

Plaintiffs and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and equitable distribution of the Net Settlement Fund among Settlement Class Members similar to the result if Plaintiffs prevailed at trial. ¶ 73. As of August 9, 2019, no objections to the Plan of Allocation have been filed on the Court's docket. ¶ 6. For these reasons, Plaintiffs respectfully request that the Court approve the proposed Plan of Allocation.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate; and finally certify the Settlement Class for the purposes of settlement.

DATED: August 9, 2019

Respectfully submitted,

BLOCK & LEVITON LLP

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Lead Counsel for Plaintiffs and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

/s/ Jason M. Leviton
Jason M. Leviton