SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

CHESTER COUNTY EMPLOYEES RETIREMENT FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. ALNYLAM PHARMACEUTICALS, INC., JOHN M. MARAGANORE, MICHAEL P. MASON, DENNIS A. AUSIELLO, MICHAEL W. BONNEY, JOHN K. CLARKE, MARSHA H. FANUCCI, STEVEN M. PAUL, DAVID E.I. PYOTT, PAUL R. SCHIMMEL, AMY W. SCHULMAN, PHILLIP A. SHARP, KEVIN P. STARR, GOLDMAN SACHS & CO. LLC, J.P. MORGAN SECURITIES LLC, BARCLAYS CAPITAL INC., CREDIT SUISSE SECURITIES (USA) LLC, PIPER JAFFRAY & CO., JMP SECURITIES LLC, NEEDHAM & COMPANY, LLC, CHARDAN CAPITAL MARKETS, LLC and B. RILEY FBR, INC. n/k/a B. RILEY SECURITIES, INC., Defendants.	Index No. 655272/2019 CLASS ACTION The Honorable Robert R. Reed Part 43 Motion Sequence No. 005 MEMORANDUM OF LAW IN SUPPORT OF: (1) PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AND APPROVAL OF THE PLAN OF ALLOCATION; AND (2) PLAINTIFF'S COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFF

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SECONDARY AUTHORITIES

Pursuant to Civil Practice Law and Rules ("CPLR") Article 9, plaintiff Chester County Employees Retirement Fund ("Plaintiff" or "CCERF"), on behalf of itself and the Settlement Class, respectfully submits this memorandum of law in support of: (1) final approval of the proposed $7,000,000 settlement (the "Settlement") of the above-captioned action (the "Action"); (2) approval of the Plan of Allocation (the "POA"); and (3) approval of Plaintiff's Counsel's motion for an award of attorneys' fees and expenses and an award to Plaintiff in connection with its representation of the Settlement Class.

The terms of the Settlement are set forth in the Stipulation of Settlement, dated November 3, 2021 (the "Stipulation"). NYSCEF No. 115.[1]

I. PRELIMINARY STATEMENT

The $7 million recovery is an outstanding result for the Settlement Class. It is the result of Plaintiff's and Plaintiff's Counsel's vigorous prosecution of the Action, together with arm's-length settlement negotiations among experienced and knowledgeable counsel, including a formal mediation session overseen by a nationally-recognized, neutral mediator. The Settlement represents approximately 50% of recoverable damages based on Defendants' primary loss causation and damages analysis, and approximately 10.5% of maximum recoverable damages based on the analysis of Plaintiff's damages consultant. It is particularly beneficial to the Settlement Class in light of the many risks of continued litigation, including Defendants' pending motion for reargument of the denial of their appeal, Plaintiff's pending motion for class certification, Defendants' anticipated summary judgment motions following fact and expert discovery, trial, and the inevitable appeals.

[1] All capitalized terms not otherwise defined herein have the meanings set forth in the Stipulation and the Affirmation of Michael G. Capeci in Support of: (1) Plaintiff's Motion for Final Approval of the Settlement and Approval of the Plan of Allocation; and (2) Plaintiff's Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Plaintiff ("Capeci Aff."), submitted herewith.

The response from the Settlement Class further confirms the fairness of the Settlement. Pursuant to the Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"), dated December 3, 2021 (NYSCEF No. 120), over 31,600 copies of the Notice were sent to potential Settlement Class Members and nominees beginning on December 17, 2021, and the Summary Notice was published in *The Wall Street Journal* and over the *PR Newswire* on December 17, 2021. *See* Schmidt Aff., ¶¶4-10.[2] To date, there have been no objections to the Settlement.[3] For these and each of the reasons discussed herein, the Settlement easily satisfies the standards for final settlement approval.

Plaintiff's Counsel also respectfully moves this Court for an award of attorneys' fees of one-third of the Settlement Amount and $42,854.09 in litigation expenses that were reasonably and necessarily incurred in prosecuting and resolving the Action, plus interest on both amounts. Plaintiff's Counsel's fee and expense request reflects the many significant risks taken by Plaintiff's Counsel in prosecuting the Action, as well as the tremendous result achieved in a difficult litigation. Additionally, Plaintiff seeks an award in the amount of $4,281.00 for the time it spent representing the Settlement Class. This request is permitted under the PSLRA and consistent with plaintiff awards in numerous, similar securities class actions. The Notice informed potential Settlement Class Members that Plaintiff's Counsel intended to apply to the Court for an award of attorneys' fees not to exceed one-third of the Settlement Amount, plus expenses of no greater than $45,000, and an award to Plaintiff of no greater than $15,000. *See* Schmidt Aff., Ex. A, Notice at 7. To date, there

[2] "Schmidt Aff." refers to the Affidavit of Kari L. Schmidt Regarding Dissemination of Class Notice and Report on Requests for Exclusion Received, dated March 7, 2022, submitted herewith.

[3] If any timely objections are subsequently received, Plaintiff's Counsel will address them in Plaintiff's reply brief due April 5, 2022.

have been no objections to Plaintiff's Counsel's fee and expense request and requested Plaintiff award. It has the full support of the Plaintiff. *See* CCERF Aff., ¶12.[4]

Accordingly, Plaintiff respectfully requests that the Court grant final approval of the Settlement and POA, and grant Plaintiff's Counsel's requested award of attorneys' fees and expenses and award to Plaintiff.

II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Plaintiff respectfully refers the Court to the accompanying Capeci Affirmation for a detailed discussion of the facts and history of the Action, including the extensive efforts undertaken by Plaintiff and Plaintiff's Counsel, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement. Capeci Aff., ¶¶23-51, 58-69, 75-81.

III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE, AND SHOULD BE APPROVED BY THE COURT

It is well settled that New York courts strongly favor settlements as a matter of public policy. *See* IDT Corp. v. Tyco Grp., S.A.R.L., 13 N.Y.3d 209, 213 (2009) ("[s]tipulations of settlement are judicially favored and may not be lightly set aside").[5] The Court of Appeals in *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993), held that "strong policy considerations" favor settlements because "[a] negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit." *See also* Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96,

[4] "CCERF Aff." refers to the Affidavit of Nicole R. Forzato, Esq. in Support of Final Settlement Approval and Award of Attorneys' Fees and Expenses and Award to Plaintiff, dated March 3, 2022, submitted herewith.

[5] Unless otherwise noted, all emphasis in quotations is added and all internal citations and quotation marks are omitted.

116 (2d Cir. 2005) (holding that courts should be "mindful of the strong judicial policy in favor of settlements").

Under New York law, class action settlement approval involves three steps. First, a scheduling order is entered setting forth the procedure for approving the settlement. Second, notice of the proposed settlement and its terms are disseminated to class members. Finally, the Court holds a hearing in which the fairness, adequacy, and reasonableness of the settlement is presented and class members can be heard. *See In re Colt Indus. S'holder Litig.*, 77 N.Y.2d 185, 189 (1991).

Plaintiff has satisfied the first two steps. On December 3, 2021, the Court entered the Preliminary Approval Order. NYSCEF No. 120. Then, pursuant to that Order, Notice was mailed to potential Settlement Class Members who could be reasonably located beginning on December 17, 2021. Schmidt Aff., ¶¶4-9. The third step will be met because a fairness hearing is presently scheduled for April 12, 2022, at 2:30 p.m. before the Court.

CPLR §908 states that "[a] class action shall not be dismissed, discontinued or compromised without the approval of the [C]ourt." While §908 does not prescribe specific guidelines for evaluating proposed settlements, New York courts focus their inquiry on "the fairness of the settlement, its adequacy, its reasonableness, and the best interests of the class members." *Hosue v. Calypso St. Barth, Inc.*, 2017 N.Y. Misc. LEXIS 3440, at *4 (Sup. Ct. N.Y. Cnty. Sept. 11, 2017). Courts have determined fairness, adequacy and reasonableness based on the following factors: (i) the likelihood that plaintiffs will succeed on the merits; (ii) the extent of support from the parties; (iii) the judgment of counsel; (iv) the presence of good faith bargaining; and (v) the complexity and nature of the issues of law and fact. *See Fernandez v. Hospitality*, 2015 N.Y. Misc. LEXIS 2193, at *3 (Sup. Ct. N.Y. Cnty. June 20, 2015).

These factors overwhelmingly favor approving the Settlement. Plaintiff and Plaintiff's Counsel thoroughly examined the facts and the law applicable to the claims and defenses asserted in

the Action, and weighed the benefits of the Settlement against the risk, delay and cost of further litigation, including the possibility of appeals. Capeci Aff., ¶59. Plaintiff respectfully submits that the Settlement is fair, reasonable and adequate, and merits this Court's approval.

A. The Likelihood Plaintiff Will Succeed

The probability of a plaintiff's success on the merits is an important factor in assessing a settlement. *See In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160 (1st Dep't 1990) ("[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement"), *aff'd*, 77 N.Y.2d at 185; *see also Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *3-*4 (courts must "balance the value of a proposed settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation").

The Action presented numerous factual and legal obstacles to Plaintiff prevailing on the merits. The claims asserted in this Action were extensively briefed in connection with Defendants' motion to dismiss and related appeal and motion for reargument. While Plaintiff and Plaintiff's Counsel were prepared to continue litigating the Action, surviving Defendants' motion for reargument was not assured, nor was obtaining class certification or overcoming the very likely future motion for summary judgment by Defendants following the close of fact and expert discovery. Defendants have continuously denied any wrongdoing and are represented by a highly respected defense team. Although Plaintiff believes it adequately alleged Securities Act claims, there would be no recovery if Defendants' continued litigation efforts, including appellate efforts, were successful.

Specifically, Defendants strongly disputed Plaintiff's alleged theory of liability, that APOLLO did not support using patisiran to effectively treat cardiomyopathy associated with hATTR amyloidosis, which was not disclosed in the Registration Statement. Capeci Aff., ¶¶17-20, 25-26.

Defendants argued that the FDA Report did support using patisiran to effectively treat cardiomyopathy and that the Registration Statement was consistent with the FDA Report. *Id.* Defendants further argued that the statements challenged by Plaintiff from the Registration Statement were inactionable opinion statements that did not convey concrete facts. *Id.*, ¶25. And Defendants strongly contested Plaintiff's §12(a)(2) claims against the Individual Defendants, arguing that their signature on the Registration Statement was insufficient to establish statutory seller liability. Plaintiff's Counsel believed that these hurdles could be overcome, and that liability could be established, but nevertheless, the risk remained that the Court on summary judgment, or a jury at trial, would agree with Defendants' arguments, precluding any recovery. *Id.*, ¶¶59, 67. For instance, although the Individual Defendants were unsuccessful arguing in their motion to dismiss that they were not statutory sellers under §12(a)(2), on appeal the First Department agreed with Defendants and dismissed Plaintiff's §12(a)(2) claim against the Individual Defendants. *Id.*, ¶47.

In addition, Defendants argued that the Complaint was untimely under the one-year statute of limitations applicable to Securities Act claims because the FDA Report was purportedly released on September 7, 2018, and Plaintiff did not file the initial complaint until September 12, 2019. *See* Capeci Aff., ¶25. Plaintiff's Counsel believed that the Complaint was timely filed because the market did not learn about the FDA Report until September 12, 2018, but nonetheless the risk remained that the Court on summary judgment, or a jury at trial, would agree that the placement of the FDA Report on the FDA's website was sufficient to start the limitations period. *Id.*, ¶26. Such a result would preclude any recovery for the Settlement Class.

Furthermore, the issues of loss causation and damages were featured prominently by Defendants at the mediation and would have been central to any motion for summary judgment. Capeci Aff., ¶63. Damages under the Securities Act may be reduced or eliminated if the defendant establishes that there are no statistically significant declines in the stock price following the Offering.

See 15 U.S.C. §77k(e). Defendants advised Plaintiff that they retained experts who would opine on whether the stock price declines were statistically significant. Defendants argued that none of the declines in Alnylam's common stock price after the Offering was statistically significant, meaning that damages would be zero. *Id.*, ¶63. Alternatively, Defendants argued that, at most, only the declines in Alnylam's common stock price in August and September 2018 related to the FDA Report were sufficiently related to the Complaint's allegations to count for damages. *Id*. If a jury accepted this argument, Plaintiff's damages consultant estimated that there would be approximately $13.8 million of reasonably recoverable damages. *Id.*, ¶66. Under this scenario, the Settlement represents a recovery of approximately 50% of recoverable damages. *Id.*, ¶99.

Plaintiff would have presented a cogent and persuasive expert's view addressing loss causation and statutory damages under the Securities Act. According to Plaintiff's damages consultant, the full damages suffered by the Settlement Class were approximately $66.42 million. Accordingly, the Settlement represents a recovery of approximately 10.5% of full damages.

The issues of causation and damages would have been resolved through a "battle of the experts" the outcome of which "is virtually impossible to predict." *See In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001). This uncertainty supports approval of the Settlement. *See In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 161-62 (S.D.N.Y. 2011) (approving settlement where the litigation risks included a likely "battle of the experts" on whether specific stock declines counted for Securities Act damages).

When balanced with the risks Plaintiff faced in litigating this Action, the Settlement presents a very good result for the Settlement Class and warrants approval.

B. The Extent of Support from the Parties and the Judgment of Counsel

The support of the parties and the judgment of counsel support granting final approval. *See Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199, 199 (1st Dep't 1997).

Plaintiff and the Settlement Class strongly support approval of the Settlement. CCERF Aff., ¶11. Although the March 22, 2022 deadline for objections has not yet passed, to date, there have been no objections to any aspect of the Settlement. A lack of objections is generally indicative of the class's approval of a proposed settlement. *See* *Pressner v. MortgageIT Holdings, Inc.*, 2007 N.Y. Misc. LEXIS 4420, at *6 (Sup. Ct. N.Y. Cnty. May 29, 2007) (approving settlement "since there has been no objection to the proposed settlement").

In addition, based on its extensive investigation, analyses of applicable legal principles, and discovery efforts, Plaintiff's Counsel had a firm understanding of the strengths and weaknesses of its case. *See, e.g.*, Capeci Aff., ¶87. Plaintiff's Counsel reviewed Alnylam's press releases, SEC filings, analyst reports, media reports, and other publicly disclosed reports regarding Defendants. *Id.*, ¶71. Additionally, Plaintiff's Counsel drafted and filed detailed complaints, successfully opposed Defendants' motion to dismiss and their appeal of that decision, reviewed over 18,000 documents (approximately 708,000 pages) produced by Defendants, moved for class certification, and drafted and negotiated the Settlement papers. *Id*. Given the thoroughness of Plaintiff's Counsel's prosecution of the case and the benefits that will be provided to the Settlement Class, Plaintiff's Counsel has concluded that the Settlement is fair, reasonable and adequate, particularly when contrasted against the significant risks, costs and uncertainties of continued litigation as just discussed. Courts have repeatedly given considerable weight to counsel's well-informed views regarding settlement. *See, e.g.*, *Michels v. Phoenix Home Life Mut. Ins. Co.*, 1997 N.Y. Misc. LEXIS 171, at *85 (Sup. Ct. Albany Cnty. Jan. 3, 1997).

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

As discussed in the Capeci Affirmation (¶¶49, 51, 75-81), the Settlement resulted from informed, extensive, arm's-length negotiations, including the submission of lengthy mediation

statements and a formal mediation session on August 9, 2021, under the direction of an experienced mediator, Robert A. Meyer, Esq. Though an agreement was not reached on August 9, the parties continued to negotiate and were able to reach an agreement on August 31. In addition, counsel on both sides are highly experienced and knowledgeable with respect to securities class action litigation. *Id*., ¶¶92-94. There is absolutely no hint of collusion in the resolution of the Action.

Where, as here, the settlement was negotiated at arm's length between knowledgeable and experienced counsel, particularly with a well-respected mediator, approval is warranted. *See, e.g.*, *Michels*, 1997 N.Y. Misc. LEXIS 171, at *86.

D. The Complexity and Nature of the Issues of Law and Fact Support Final Approval of the Settlement

Securities class actions involve complex issues of law and fact that present considerable risk to a plaintiff's case. Here, as demonstrated by the legal and factual issues in this Action, *see* §III.A. above, and the Capeci Affirmation (¶¶59-70), it certainly qualifies as complex and risky. *See, e.g.*, *Hosue*, 2017 N.Y. Misc. LEXIS 3440, at *5 (approving settlement because "Class Counsel took into account the risks of establishing liability, and also considered the time, delay, and financial repercussions in the event of trial and appeal by Defendant"). In particular, the Action involved complex factual issues (*e.g.*, efficacy of patisiran on cardiomyopathy) as well as complex issues of loss causation and damages (*e.g.*, whether certain stock declines were statistically significant) that would require the use of expert testimony and the inherent risks of a "battle of the experts." There was simply no assurance that even if Plaintiff had survived Defendants' pending motion for reargument, Plaintiff would be able to certify a class, survive a summary judgment motion, or prevail at trial, let alone be successful in the inevitable appeals at each stage. The Settlement eliminates these substantial risks.

In sum, the Settlement meets all the factors weighed by New York courts in determining whether a settlement is fair, reasonable, and adequate, and should be approved.

IV. THE PLAN OF ALLOCATION IS FAIR AND ADEQUATE

Under federal precedent, the standard for approval of the POA is the same as the standard for approving settlements, *i.e.*, the POA "'must be fair and adequate.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002)). "When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds need have only a reasonable, rational basis." *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014). While CPLR Article 9 does not specifically mention plans of allocation, New York courts acknowledge their importance in common fund settlements. *See 212 Inv. Corp. v. Kaplan*, 2008 N.Y. Misc. LEXIS 3348, at *10-*13 (Sup. Ct. N.Y. Cnty. May 27, 2008).

The POA, which is set forth in the Notice, is based on the statutory formula for computing damages under the Securities Act. It treats all Settlement Class Members in a similar manner: all Authorized Claimants, *i.e.*, Settlement Class Members who submit timely, valid Proofs of Claim that are approved for payment, will receive a *pro rata* share of the Net Settlement Fund – in the proportion that the Authorized Claimant's claim bears to the total of the claims of all Authorized Claimants, so long as such Authorized Claimant's payment amount is $10.00 or more. *See* Schmidt Aff., Ex. A, Notice at 4-5. It is a fair method to divide the Net Settlement Fund for distribution based on the claims alleged by Plaintiff. *See* Capeci Aff., ¶¶82-84.

The POA is fair and reasonable and should be approved. There have been no objections to the POA to date, further supporting approval. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 367.

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

The Stipulation requires that the Court must certify the Settlement Class in connection with the proposed Settlement. This Court preliminarily certified the Settlement Class in the Preliminary Approval Order. NYSCEF No. 120. Because the elements of CPLR §§901 and 902 are satisfied, and nothing has changed since the Court entered its Preliminary Approval Order to undermine the propriety of preliminary certification, the Court should grant final certification of the Settlement Class.

A. The Settlement Class Satisfies the Requirements of CPLR §901

"Appellate courts in this State have repeatedly held that the class action statute should be liberally construed." *Pruitt v. Rockefeller Ctr. Props.*, 167 A.D.2d 14, 21 (1st Dep't 1991). In *Pruitt*, shareholders who purchased stock in a public offering brought claims under the Securities Act alleging that the registration statement included materially inaccurate financial information. *Id.* at 18. In reversing the trial court's denial of class certification, the court in *Pruitt* held that class certification was "particularly appropriate" in Securities Act cases because "class members have allegedly sustained damages in amounts insufficient to justify individual actions" and "it would be impractical and inefficient for individual class members to prosecute separate actions" given that millions of shares were issued in the offering. *Id.* at 21. *Pruitt* also held that "the class action remedy is frequently utilized" in Securities Act cases. *Id.*

Under CPLR §901, the Court may certify a class if: "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class;

and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR §901.

All five prerequisites of CPLR §901 are easily met here and, therefore, the preliminary certification of the Settlement Class should be made final. Specifically:

(1) **Numerosity** is established because Defendants issued over 6.4 million shares in the Offering. Capeci Aff., ¶15. *See* *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014) (recognizing that "the legislature contemplated classes involving as few as 18 members").

(2) **Commonality** is demonstrated because all potential Settlement Class Members, including Plaintiff, must prove the same facts to establish Defendants' liability, *i.e.*, that the Registration Statement misstated or omitted material facts in violation of the Securities Act. *See* *Pruitt*, 167 A.D.2d at 21 (finding "common questions of law and fact" where Securities Act claims turned on "the truth or falsity of the prospectus' statements").

(3) **Typicality** is met because Plaintiff's claims are exactly the same as potential Settlement Class Members' and require the Court to address the same legal and factual questions. *See* *id.* at 22 (finding that typicality is easily met in Securities Act cases because "plaintiff's claims are identical to those of the other members of the class since he alleges, as would they, that he purchased the stock on the basis of a false and misleading prospectus").

(4) **Adequacy** is satisfied because Plaintiff: (i) is a member of the class it seeks to represent and has the same interests and injuries as other class members; (ii) maintained an interest in prosecuting the Action; and (iii) retained experienced counsel with a track record in class actions and has zealously advocated for the class's interests. *See* *id.* at 24.

(5) **Superiority** is shown because a class action is a more efficient and fair mechanism for litigating Securities Act claims arising from the Offering compared to individual litigations. *See* *N.Y.C. Coal. to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 52 (1st Dep't 1997) ("the possibility of multiple lawsuits and inconsistent rulings also weighs in favor of granting class certification").

B. The Discretionary CPLR §902 Factors Also Support Certification

The Court can also consider the discretionary CPLR §902 factors in deciding whether to grant final certification of the Settlement Class, including: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation

concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action. CPLR §902.

Unlike the mandatory factors enumerated in CPLR §901(a), the factors listed in CPLR §902 have been described as pragmatic or "feasibility considerations." *Chimenti v. Am. Express Co.*, 97 A.D.2d 351, 352 (1st Dep't 1983). Indeed, CPLR §902 consists of "[d]iscretionary factors" that are mostly "implicit in CPLR §901." 1 Weinstein, Korn & Miller, *CPLR Manual*, §7.07(c)(8) (2021); *see also Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc. 2d 941, 948 (Sup. Ct. N.Y. Cnty. 1978) (describing the CPLR §902 factors as "considerations [that] are implicit in CPLR §901 [that] have hitherto been discussed").

CPLR §902 Factors 1, 2, 4, and 5 relate to commonality, typicality, and superiority, all of which, as described above, are readily satisfied. *See supra* 12. Factor 3 is inapplicable here because no other lawsuits regarding the Offering or Registration Statement alleging Securities Act claims have been filed by anyone other than CCERF in either state or federal court. Capeci Aff., ¶23. In other words, CCERF is the only Alnylam shareholder who prosecuted Securities Act claims relating to the Offering. *Id*.

With respect to Factor 4, this Court is a particularly desirable forum for resolving this controversy because of the Commercial Division's expertise in adjudicating business disputes and because Alnylam's common stock publicly trades on the Nasdaq, the Manhattan-based exchange featured prominently in the Registration Statement. Thus, there is a high desirability to concentrating these Securities Act claims in the New York County Commercial Division.

For the foregoing reasons, each CPLR §§901 and 902 factor supports granting final certification of the Settlement Class.

VI. PLAINTIFF'S COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND AWARD TO PLAINTIFF IS FAIR AND REASONABLE

Plaintiff's Counsel respectfully requests an award of attorneys' fees of one-third of the Settlement Amount, or $2,333,333.33. The Notice apprised potential Settlement Class Members that Plaintiff's Counsel would seek the requested amount. Schmidt Aff., Ex. A, Notice at 7. To date, there have been no objections to Plaintiff's Counsel's fee request. Additionally, the requested fees have the full support of Plaintiff. CCERF Aff., ¶12. Courts "give serious consideration to negotiated fees" because such arrangements "offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis." *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008). For these reasons, and those detailed below, Plaintiff's Counsel respectfully requests that the full amount of the fee request be granted.

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

Pursuant to CPLR §909, Plaintiff's Counsel respectfully requests that the Court award attorneys' fees based on a percentage of the common fund achieved in the Settlement. *See Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *11-*12 (finding that the preferable method for awarding attorneys' fees in a common fund class action settlement is the percentage method); *Lopez v. Dinex Grp., LLC*, 2015 N.Y. Misc. LEXIS 3657, at *14-*15 (Sup. Ct. N.Y. Cnty. Oct. 6, 2015) (same); *Charles v. Avis Budget Car Rental, LLC*, 2017 N.Y. Misc. LEXIS 5082, at *10-*11 (Sup. Ct. N.Y. Cnty. Dec. 14, 2017) (same).[6]

[6] Federal courts have concluded that the Private Securities Litigation Reform Act of 1995 ("PSLRA") expresses a preference for the percentage of the fund method, as opposed to the lodestar method, in determining attorneys' fees in securities class actions. *See, e.g.*, *Maley*, 186 F. Supp. 2d at 370.

The Supreme Court recognizes that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for their services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-class action, the customary fee arrangement would be contingent and in the range of one-third of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 904 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

The requested one-third fee is reasonable and squarely within the range of percentage fees awarded within the Manhattan Supreme Court and New York federal courts in comparable class action cases. *See, e.g.*, *In re Altice USA, Inc. Sec. Litig.*, Index No. 711788/2018, NYSCEF No. 161 (Sup. Ct. Queens Cnty. Feb. 28, 2022) (awarding one-third fee in securities class action); *In re SciPlay Corp. Sec. Litig.*, Index No. 655984/2019, NYSCEF No. 152 (Sup. Ct. N.Y. Cnty. Nov. 17, 2021) (awarding one-third fee in securities class action); *In re EverQuote, Inc. Sec. Litig.*, Index No. 651177/2019, NYSCEF No. 132 (Sup. Ct. N.Y. Cnty. June 11, 2020) (awarding one-third fees to Robbins Geller in Securities Act class action, plus expenses); *Charles*, 2017 N.Y. Misc. LEXIS 5082, at *12-*13 (awarding fees of 33%, plus expenses); *Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *11-*15 (awarding one-third fees, plus expenses); *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *15-*20 (awarding one-third fees, plus expenses).

B. The Relevant Factors Confirm that the Requested Fee Is Reasonable

In determining the award of attorneys' fees, New York courts consider the following factors: (i) the risks of the litigation; (ii) whether counsel had the benefit of a prior judgment; (iii) the standing at bar of counsel for the plaintiffs and defendants; (iv) the magnitude and complexity of the litigation and responsibility undertaken; (v) the amount recovered; (vi) the knowledge the court has of the case's history and the work done by counsel prior to trial; and (vii) what it would be

reasonable for counsel to charge a victorious plaintiff. *See, e.g.*, *Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *14-*15. Each of these factors support approval of the requested fee.

1. The Risks of the Action

It is widely recognized that "shareholder actions are notoriously complex and difficult to prove." *See In re Bayer AG Sec. Litig.*, 2008 WL 5336691, at *5 (S.D.N.Y. Dec. 15, 2008). As detailed above, the Action was no exception because it involved complex issues of law and fact that presented considerable risk to Plaintiff's case, which was being litigated on a fully contingent basis by Plaintiff's Counsel. *See supra* §III.A. and Capeci Aff., ¶69. In the face of risks such as Defendants' pending motion for reargument and Plaintiff's pending motion for class certification, Plaintiff's Counsel secured a very good result for the Settlement Class without any assurance of being compensated for its time and expenses.[7] Accordingly, the significant risks of litigation here weigh in favor of Plaintiff's Counsel's fee request.

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

At no relevant time has there been a prior court judgment against Defendants that would have benefitted Plaintiff's claims. Capeci Aff., ¶91. Thus, this factor supports the requested fees.

3. Plaintiff's Counsel and Defense Counsel Are Preeminent Firms in the Securities Class Action Realm

Robbins Geller is a highly skilled practitioner in the securities class action bar. *See* accompanying Affirmation of Michael G. Capeci Filed on Behalf of Robbins Geller Rudman &

[7] Unlike Defendants' Counsel, who are paid hourly rates and reimbursed for their expenses on a regular basis, Plaintiff's Counsel has not been compensated for any time or expense since the Action began in September 2019, and would have received no compensation or payment of its expenses had the Action not been successfully resolved. Indeed, success in complex contingent litigation like this Action is not assured. *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, 2009 WL 1709050 (N.D. Cal. June 19, 2009), *aff'd*, 627 F.3d 376 (9th Cir. 2010) (court granted summary judgment for defendants after eight years of litigation, after plaintiffs' counsel incurred over $7 million in expenses, and worked over 100,000 hours, representing a lodestar of $40 million).

Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses, Ex. E ("Robbins Geller Aff."). Nonetheless, Plaintiff's Counsel submits that the quality of its representation is best evidenced by the very good result achieved for the Settlement Class. The Settlement is attributable to the diligence, determination, hard work, and reputation of counsel, who developed, litigated, and successfully resolved the Action to obtain a substantial cash recovery.

Defendants are represented by lawyers from two of the most well-regarded law firms in the world, Skadden, Arps, Slate, Meagher & Flom LLP and Shearman & Sterling LLP, who presented a very skilled defense and spared no effort or expense in representing their clients. Notwithstanding this formidable opposition, Plaintiff's Counsel's ability to present a strong case and its willingness to vigorously prosecute the Action through trial and the inevitable appeals enabled it to achieve the very favorable result for the Settlement Class. Thus, this factor supports the requested fees.

4. The Magnitude and Complexity of the Action and the Responsibility Undertaken

As explained above in discussing the risks of the litigation factor, the Action raised a number of complex questions concerning liability, statute of limitations, and damages. *See supra* §III.A. and Capeci Aff., ¶¶58-69. The magnitude of the Action is similarly unquestionable because the Settlement Class's potential damages were upwards of tens of millions of dollars. For the reasons explained above, the magnitude and complexity of the Action support the fee request.

5. The Amount Recovered

Perhaps the most important factor in determining a reasonable fee amount is the result obtained. At the end of the day this is what Plaintiff and the Settlement Class care most about. They would gladly pay more for a great result than less for a bad result.

The Settlement Amount here is a great result for the Settlement Class, particularly in light of Defendants' position that the amount of damages in the Action is between zero and $13.8 million.

See supra §III.A. The percentage recovery under the latter amount is approximately 50%. *Id.* Even under Plaintiff's consultant's damage calculation, the percentage recovery is approximately 10.5%. *Id.* This range of recovery (10.5% to 50%) is truly significant as it is multiples above the median percentage recovery in securities class action settlements in 2021 of 1.8%. Janeen McIntosh and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* (NERA Economic Consulting Jan. 25, 2022), 24 at Figure 22. The substantial recovery fully supports the fee request.

6. The Action's History and Work Done by Plaintiff's Counsel

A detailed description of the procedural history of the Action and Plaintiff's Counsel's prosecution of the Action (including key pleadings, discovery efforts, motions, and mediation efforts) is set forth in the accompanying Capeci Affirmation. For the sake of brevity, the Court is respectfully referred to that affirmation, which demonstrates that Plaintiff's Counsel's time invested in litigating the Action was substantial. *Id.*, ¶¶23-51. Thus, this factor supports the fee request.

7. The Fees Charged to a Victorious Plaintiff

As discussed above, courts recognize that the typical fee arrangement in non-class cases is one-third of any recovery. *See* *Stenson*, 465 U.S. at 904 (discussing standard one-third recovery in tort suits). In addition, several courts within the Manhattan Supreme Court and New York federal district court have awarded a one-third fee in similar securities class actions. *See* §VI.A. above. Because the requested fee comports with such arrangements, this factor supports the fee request.

C. The Fee Request Is Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, New York courts may cross-check the proposed award against counsel's lodestar. *See, e.g.*, *Clemons v. A.C.I. Found., Ltd.*, 2017 N.Y. Misc. LEXIS 1788, at *11 (Sup. Ct. N.Y. Cnty. May 11, 2017) ("[a]pplying the lodestar method as a comparison"). Under the lodestar method, "the court

scrutinizes the hours billed in the case and multiplies that amount by a reasonable hourly rate . . . . Upon determining the lodestar amount, the court may, in its discretion and under specific circumstances, increase the lodestar amount by applying a multiplier based on certain more subjective factors, such as the difficulty of the case, the risk of success and the quality of representation." *Ousmane v. City of New York*, 2009 N.Y. Misc. LEXIS 574, at *24-*25 (Sup. Ct. N.Y. Cnty. Mar. 17, 2009).

Plaintiff's Counsel's fee request is reasonable under the lodestar method. Plaintiff's Counsel has spent, in the aggregate, 2,312 hours in prosecuting the Action, producing a total lodestar amount of $1,489,966.50 when multiplied by Plaintiff's Counsel's 2021 billing rates. *See* Robbins Geller Aff., ¶4.[8] The amount of attorneys' fees requested by Plaintiff's Counsel herein, approximately $2.33 million, represents a modest multiplier of 1.57 to counsel's aggregate lodestar.

The 1.57 multiplier is well within (if not below) the range of multipliers commonly awarded in class actions in New York state and federal courts. *See, e.g.*, *Fernandez*, 2015 N.Y. Misc. LEXIS 2193, at *14 (awarding fees representing a 2.5 multiplier);[9] *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *19 (awarding fees representing a 3.15 multiplier); *In re BHP Billiton Ltd. Sec. Litig.*, 2019 WL 1577313, at *1 (S.D.N.Y. Apr. 10, 2019), *aff'd sub. nom. City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App'x 17 (2d Cir. Mar. 12, 2020) (awarding fees representing a 2.7 multiplier); *In re*

[8] In determining whether counsel rates are reasonable, the Court should take into account the attorneys' professional reputation, experience, and status. Here, Plaintiff's Counsel are experienced securities practitioners with track records of success, with Robbins Geller being among the most prominent and well-regarded securities practitioners in the nation. *See generally* Robbins Geller Aff. Therefore, Plaintiff's Counsel's hourly rates are reasonable here. *See In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007) (approving counsel's hourly rates).

[9] As recognized in *Fernandez*, lead counsel's multiplier is slightly overstated because it does not account for "time that they will be required to spend administering the settlement going forward." *Id.* at *15.

BISYS Sec. Litig., 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007) (awarding fees representing a 2.99 multiplier and finding that the multiplier "falls well within the parameters set in this district and elsewhere"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 590 (S.D.N.Y. 2008) ("[i]n contingent litigation, lodestar multiples of over 4 are routinely awarded").

Plaintiff's Counsel invested substantial time and effort prosecuting this Action to a successful completion. The requested fee, therefore, is manifestly reasonable, whether calculated as a percentage-of-the-fund or under the lodestar method.

D. Plaintiff's Counsel's Expenses Were Reasonably Incurred and Necessary to the Prosecution of this Action

Plaintiff's Counsel also respectfully requests an award of $42,854.09 in expenses incurred while prosecuting the Action. Plaintiff's Counsel has submitted affirmations regarding these expenses, which include, among other things, the costs of hiring a damages consultant and mediating the Settlement Class's claims – all of which were critical to Plaintiff's success in achieving the Settlement. *See* Robbins Geller Aff., ¶¶5-7; Capeci Aff., ¶¶103-105. "It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class." *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *30 (S.D.N.Y. Nov. 8, 2010); *see also Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *20 ("Courts typically allow counsel to recover their reasonable out-of-pocket expenses.").

The Notice informed potential Settlement Class Members that Plaintiff's Counsel would seek up to $45,000 in expenses and, so far, no objection to this amount has been received. *See* Schmidt Aff., Ex. A, Notice at 7. Accordingly, Plaintiff's Counsel respectfully requests $42,854.09 in expenses, plus interest earned on such amount at the same rate as that earned by the Settlement Fund.

E. Service Award to Plaintiff

Plaintiff also respectfully requests an award of $4,281.00 for the significant time it spent representing the Settlement Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class" may be made to "any representative party serving on behalf of the class." 15 U.S.C. §77z-1(a)(4). Among other things, Plaintiff reviewed pleadings and briefs in the Action, regularly communicated with Plaintiff's Counsel, searched for and provided to Plaintiff's Counsel documents responsive to Defendants' document requests, prepared for and provided deposition testimony in connection with Plaintiff's motion for class certification, monitored the progress of settlement negotiations, and approved the Settlement. *See* CCERF Aff., ¶¶6-10. In performing this work, four CCERF employees (including three attorneys and Mr. Robert Kagel, who provided deposition testimony on behalf of CCERF in the Action) spent 60 hours at rates ranging from $54.29 to $87.91 per hour. *Id.*, ¶14. As a result of these efforts, Plaintiff filed the initial complaint in the Action and then stepped forward to lead the Action after no other Alnylam investors sought to prosecute these claims in state or federal court. Capeci Aff., ¶23. In other words, but for efforts of CCERF, no recovery would have occurred for the benefit of the Settlement Class.

The requested service award is within the range of such awards granted by New York courts. *See, e.g.*, *Charles*, 2017 N.Y. Misc. LEXIS 5082, at *5-*7 (awarding $10,000 service award); *Lopez*, 2015 N.Y. Misc. LEXIS 3657, at *6-*10 (awarding $20,000 service award); *Hosue*, 2017 N.Y. Misc. LEXIS 3440, at *6-*8 (awarding $5,000 service award); *City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 2015 WL 13639234, at *4 (S.D.N.Y. Oct. 15, 2015) (awarding $16,800 to several plaintiffs "to compensate them for their reasonable costs and expenses directly relating to their representation of the Class").

The Notice informed potential Settlement Class Members that an award to Plaintiff of up to $15,000 would be sought and, to date, no objections to this request have been received. Thus, Plaintiff respectfully requests that the Court grant an award of $4,281.00.

VII. CONCLUSION

The $7 million, all-cash Settlement achieved by Plaintiff and Plaintiff's Counsel confers a substantial benefit on the Settlement Class. For the foregoing reasons, Plaintiff respectfully requests that this Court enter the proposed Judgment and Order Granting Final Approval of Class Action Settlement, which will be submitted with Plaintiff's Counsel's reply submission on April 5, 2022, thereby approving the Settlement and the POA, and awarding attorneys' fees of one-third of the $7,000,000 recovery, plus expenses in the amount of $42,854.09, plus interest on both amounts, and an award of $4,281.00 to CCERF.

DATED: March 8, 2022

Respectfully submitted,

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

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