IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE SOLARWINDS CORPORATION SECURITIES LITIGATION	Case No. 1:21-cv-00138-RP CLASS ACTION

LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

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Lead Plaintiff New York City District Council of Carpenters Pension Fund ("Lead Plaintiff" or "NYC Carpenters") on behalf of itself and the Settlement Class, will and hereby does respectfully move the Court, pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure, before the Honorable Robert Pitman, on July 28, 2023, at 2:00 p.m., for (1) entry of a judgment granting final approval of the $26 million Settlement reached in this Action (the "Settlement") and (2) entry of an order approving the proposed plan for allocating the proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Lead Plaintiff is pleased to present for the Court's final approval its agreement to settle this securities class action in exchange for a cash payment of $26,000,000.00 for the benefit of the Settlement Class.[2] Lead Plaintiff respectfully submits that the proposed Settlement is a very favorable result for the Settlement Class. The proposed Settlement was achieved after more than two years of litigation, which included Lead Plaintiff's thorough investigation, detailed complaint, successful opposition of Defendants' four motions to dismiss, and substantial discovery. The Settlement is the product of arm's-length negotiations between experienced and well-informed counsel, which included two formal mediation sessions before an experienced mediator, Michelle Yoshida of Phillips ADR Enterprises. The Settlement is based on a mediator's recommendation proposed by Ms. Yoshida at the conclusion of the second mediation session. As detailed in the

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[1]Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated November 28, 2022 (ECF No. 97-1) (the "Stipulation") or in the Declaration of Jonathan D. Uslaner in Support of: (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses (the "Uslaner Declaration" or "Uslaner Decl."), filed herewith. Citations to "¶ __" refer to paragraphs in the Uslaner Declaration and citations to "Ex. __" refer to exhibits to the Uslaner Declaration.

[2] The Settlement Amount has been deposited into the Escrow Account and is earning interest.

accompanying Uslaner Declaration and summarized herein, the proposed Settlement provides a substantial, certain, and near-term recovery for the Settlement Class while avoiding the significant risks of continued litigation, including the risk that the Settlement Class could recover less than the Settlement Amount—or nothing at all—after years of additional litigation, appeals, and delay.

The proposed Settlement is the result of Lead Plaintiff and Lead Counsel's substantial litigation efforts. Those efforts started over two years ago when Lead Plaintiff filed the initial complaint in the Action and Lead Counsel began a detailed investigation of the claims at issue, which included an extensive review of public SEC filings, conference calls, analyst reports, and news articles; interviews with over 50 former SolarWinds employees; and consultation with experts in damages, loss causation, and cybersecurity. ¶¶ 10-15. Based on this extensive investigation, Lead Plaintiff prepared a detailed 100-page consolidated Complaint. ¶¶ 16-17. Lead Plaintiff then opposed four motions to dismiss the Complaint filed by separate groups of Defendants through extensive briefing. ¶¶ 18-20. Lead Plaintiff was substantially successful in defeating Defendants' motions, as the Court sustained all claims asserted except a claim under Section 10(b) against Defendant Thompson. ¶¶ 21-24.

Lead Plaintiff also prepared and filed its motion for class certification, which was accompanied by an expert report from Lead Plaintiff's expert on market efficiency and class-wide damages. ¶ 38. Lead Plaintiff additionally conducted substantial fact discovery, which included comprehensive document requests, interrogatories, and document subpoenas directed to ten non-parties, including SolarWinds' directors and former executives. ¶¶ 26-37. Lead Counsel carefully obtained and analyzed the discovery received, including over 600,000 pages of documents produced by Defendants and non-parties. ¶ 35. As a result of these efforts, Lead Plaintiff and

Lead Counsel possessed a very well-developed understanding of the strengths and weaknesses of the claims when the Settlement was reached. ¶ 3.

The proposed Settlement resulted from extensive arm's-length negotiations over the course of approximately a year, including two full-day mediation sessions before Michelle Yoshida, an experienced mediator of securities class actions and other complex litigation. ¶¶ 41-43. The Parties began exploring the possibility of a settlement while Defendants' motions to dismiss were pending, in the fall of 2021, and selected Ms. Yoshida to serve as the mediator for the Action. The Parties exchanged detailed mediation statements addressing liability and damages issues in November 2021 and held an initial mediation session with Ms. Yoshida in December 2021, but they were not able to reach an agreement. ¶ 41. Following the Court's denial of Defendants' motions to dismiss, and after substantial document discovery had occurred, the Parties scheduled a second mediation session. ¶ 42. In advance of the second mediation session, the Parties exchanged additional mediation statements, which attached numerous exhibits of documents produced during the course of discovery. *Id.* The second session with Ms. Yoshida was held on October 26, 2022. ¶ 43. At the conclusion of that mediation session, Ms. Yoshida issued a mediator's recommendation to the Parties that the Action be resolved in exchange for a payment of $26,000,000 in cash, which the Parties accepted. *Id.*

Lead Plaintiff and Lead Counsel believe the proposed Settlement is a very favorable result for the Settlement Class, particularly given the risks that Lead Plaintiff faced in proving its securities fraud claims, as well as the delays that would accompany continued litigation. As discussed below and in the Uslaner Declaration, Lead Plaintiff faced challenges in establishing each element of its claims—including on issues of falsity, materiality, scienter, loss causation and damages. Among other things, Defendants had a threatening argument that they maintained

industry-standard cybersecurity controls and were simply the victim of one of the most sophisticated cybersecurity attacks in history. If Plaintiffs were unable to convince a jury on each element of Defendants' liability, investors would have recovered nothing.

Industry observers have observed that the Settlement in this Action is "significant and noteworthy." ¶ 50. Through the Settlement, Class Members will recover a substantial percentage (13% to 20%) of the absolute maximum damages that could be established at trial. ¶ 61. Meanwhile, Defendants had threatening arguments that the absolute maximum damages were much lower, or even zero. Particularly in light of these significant risks, the $26 million Settlement represents a very favorable resolution of the Action for the Settlement Class. ¶ 62.

The Settlement has the full support of Lead Plaintiff NYC Carpenters, which took an active role in the litigation. *See* O'Brien Decl. (Ex. 2), at ¶¶ 6-7. Additionally, although the deadline to object to the Settlement has not yet passed, to date, after mailing of more than 24,000 Notices to potential Settlement Class Members, no Settlement Class Members have objected to the Settlement or requested exclusion from the Settlement Class. ¶¶ 66, 69.

In light of these considerations and the other factors discussed below, Lead Plaintiff respectfully submits that the Settlement is fair, reasonable, and adequate and warrants final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND WARRANTS FINAL APPROVAL UNDER RULE 23(e)

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

The Fifth Circuit has long adhered to a general policy that favors and promotes the settlement of disputed claims, particularly in class actions. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."); *In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (noting the "'overriding public interest in favor of settlement' that [the Fifth Circuit has] recognized 'particularly in class action suits'") (citation omitted); *see also Marcus v. J.C. Penney Co., Inc.*, 2017 WL 6590976, at *3 (E.D. Tex. Dec. 18, 2017) ("There is a strong judicial policy in favor of settlements, particularly in the class action context."), *report and recommendation adopted*, 2018 WL 307024 (E.D. Tex. Jan. 4, 2018).

Rule 23(e)(2) provides that, in determining whether a class action settlement is fair, reasonable, and adequate, the Court should consider whether:

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

Fed. R. Civ. P. Rule 23(e)(2) (as amended on December 1, 2018).

The Fifth Circuit has also established a six-pronged test, which includes certain factors that overlap with the Rule 23(e)(2) factors, to be applied to the approval of class settlements:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.

Reed v. Gen. Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); *see also Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (applying *Reed* factors to proposed settlement of securities class

action).[3]

As discussed below, the proposed Settlement satisfies each of the factors established by Rule 23(e)(2) and the Fifth Circuit and thus, warrants approval.

A. Lead Plaintiff and Lead Counsel Have Adequately Represented the Settlement Class

In determining whether to approve a class action settlement, the Courts consider whether Lead Plaintiff and Lead Counsel "have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). Here, Lead Plaintiff vigorously litigated this Action on behalf of the Settlement Class for more than two years. Lead Plaintiff consulted with Lead Counsel on litigation strategy and case developments and actively participated in discovery, including by producing documents in response to Defendants' document requests. In addition, Lead Plaintiff has claims that are typical of other Settlement Class Members and has no conflict of interests with other members of the Settlement Class.

Plaintiffs' Counsel likewise have adequately represented the Settlement Class throughout the litigation. Among other things, Lead Counsel: (i) conducted an extensive investigation of the claims asserted in the Action, including interviews with over 50 former SolarWinds employees; (ii) researched and drafted a detailed consolidated Complaint; (iii) successfully opposed four motions to dismiss; (iv) engaged in substantial document discovery, which involved obtaining and reviewing more than 600,000 pages of documents produced by Defendants and non-parties; (v) prepared and filed Lead Plaintiff's motion to certify the class and an accompanying expert report; (vi) consulted with various experts in financial economics and cybersecurity; and

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[3] The factors set forth in Rule 23(e)(2), which were added by amendment effective December 1, 2018, are not intended to "displace any factor" traditionally used by the Courts of Appeal to assess final settlement approval, but rather to focus on core concerns to guide the approval decision. *See* Fed. R. Civ. P. 23, 2018 Advisory Committee Notes.

(vii) engaged in extended arms'-length settlement negotiations facilitated by Ms. Yoshida, including two formal mediations involving extensive written submissions. ¶¶ 3, 10-45. As a result of the significant time, effort, and resources that Lead Plaintiff and Lead Counsel dedicated to litigating this Action, Lead Plaintiff and Lead Counsel had a well-developed understanding of the strengths and weaknesses of the Action at the time the Settlement was reached, which informed their determination that the Settlement is fair, reasonable, and adequate. Accordingly, this factor strongly supports final approval of the Settlement.

B. The Settlement Was Reached After Substantial Discovery and Arms'-Length Negotiations Between Experienced Counsel, and with the Assistance of an Experienced Mediator

Rule 23(e)(2)(B) and the first *Reed* factor also support final approval because the Settlement was negotiated at arm's length after substantial discovery and there is no evidence of fraud or collusion. As discussed above, the Settlement was reached only after extensive arm's-length negotiations by experienced counsel with the assistance of Ms. Yoshida, an experienced and well-respected mediator. ¶¶ 41-45. The extensive arm's-length negotiations and involvement of an experienced mediator demonstrate that the Settlement is procedurally fair and is not the product of fraud or collusion. *See, e.g.*, *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063-65 (S.D. Tex. 2012) (approving settlement where parties engaged in arm's-length negotiations to gauge the strengths and weaknesses of the case); *Billitteri v. Sec. Am., Inc.*, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) (finding no fraud or collusion in settlement reached through counsel's diligent arm's-length negotiations before a neutral mediator); *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *4 (N.D. Tex. Apr. 25, 2018) (noting that "the settlement was not the result of improper dealings" where it "was obtained through formal mediation" with an experienced mediator). Thus, this factor powerfully supports final approval.

C. The Settlement is Fair and Adequate in Light of the Costs and Delay of Further Litigation

Rule 23(e)(2)(C)(i) and the second *Reed* factor further support final approval of the Settlement. Continued litigation of the Action would involve complex and lengthy pre-trial, trial, and post-trial proceedings that would delay the ultimate resolution of the claims without any guarantee of recovery for the Settlement Class. "When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Klein v. O'Neal*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010); *see also Heartland*, 851 F. Supp. 2d at 1064 (approving settlement and noting that litigating case to trial would be "time consuming, and '[i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years'") (citation omitted); *In re Dell Inc., Sec. Litig.*, 2010 WL 2371834, at *7 (W.D. Tex. June 11, 2010) (noting that "[s]ecurities litigation on the whole is 'notoriously difficult and unpredictable' . . . . Thus the complexity, expense, and likely duration of the suit weighs in favor of the settlement."), *aff'd*, 669 F.3d 632 (5th Cir. 2012).

Continuing to litigate this Action would have required substantial additional time and delay, in the face of serious risks and with no guarantee of success. In the absence of the Settlement, this would have included, among other things, completing expert discovery, prevailing on class certification, surviving Defendants' anticipated motions for summary judgment, and then achieving a litigated verdict at trial. Defendants made serious arguments contesting key issues such as the falsity of Defendants' alleged misstatements, materiality, scienter, and loss causation. While Lead Counsel was prepared to rebut those arguments, it is clear that achieving a litigated verdict would have carried significant risk of a materially lower recovery—or none at all.

Moreover, if Lead Plaintiff did succeed at trial, it is virtually certain that Defendants would appeal, further delaying the receipt of any recovery by the Settlement Class. *See In re OCA, Inc.*

Sec. & Derivative Litig., 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) ("After trial, the parties could still expect years of appeals."); *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *19 (N.D. Tex. Nov. 8, 2005) (noting that even "if Plaintiffs were to succeed at trial, they still could expect a vigorous appeal by Defendants and an accompanying delay in the receipt of any relief"). Further, there is always a risk that a verdict could be reversed by the trial court or on appeal. *See, e.g.*, *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) (overturning jury verdict in favor of plaintiffs and granting judgment for defendants as a matter of law), *aff'd*, 688 F. 3d 713 (11th Cir. 2012). All of the foregoing would pose substantial expense for the Settlement Class and delay the ability to recover damages—assuming, of course, that Lead Plaintiff were ultimately successful on its claims.

In contrast, the Settlement provides a substantial, certain, and near-term cash recovery of $26 million, without exposing the Settlement Class Members to the risk, expense, and delay of continued litigation. Accordingly, this factor supports final approval of the Settlement.

D. The Stage of the Proceedings Warrants Final Approval of the Settlement

The third *Reed* factor also weighs in favor of final approval of the Settlement. The Settlement was reached after the Parties engaged in extensive and comprehensive litigation efforts over the course of two years. This included a detailed investigation by Lead Counsel, thorough briefing on Defendants' motions to dismiss, the filing of Lead Plaintiff's motion for class certification, and substantial fact discovery. ¶¶ 14-40. In addition, as previously noted, the Parties also engaged in months of hard-fought, arm's-length settlement negotiations. ¶¶ 41-45. As a result, Lead Plaintiff and Lead Counsel had "a full understanding of the legal and factual issues surrounding this case," including the strengths and weaknesses, when negotiating and evaluating the proposed Settlement. *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996); *see also Heartland*, 851 F. Supp. 2d at 1064 ("Under [this] factor, the key issue is whether 'the parties and

the district court possess ample information with which to evaluate the merits of the competing positions'"). Lead Plaintiff and Lead Counsel were able to make an informed evaluation of the case and reasonably conclude that the Settlement is highly favorable to the Settlement Class. ¶ 3.

E. The Settlement is Fair and Reasonable in Light of the Risks of Further Litigation

Rule 23(e)(2)(C)(i) and the fourth *Reed* factor further support final approval of the Settlement. While Lead Plaintiff and Lead Counsel believe the claims asserted against Defendants in this action are meritorious, they recognize that this Action presented a number of serious risks to establishing Defendants' liability. Weighing these risks against the certain and substantial recovery for the Settlement Class demonstrates that the Settlement is fair, reasonable, and adequate. *See, e.g., OCA*, 2009 WL 512081, at *13 (settlement approval favored where plaintiffs faced substantial risks in establishing elements of securities law violations); *Schwartz*, 2005 WL 3148350, at *18 ("plaintiffs' uncertain prospects of success through continued litigation" supported approval of securities class action settlement).

First, Lead Plaintiff faced substantial risks in proving that Defendants made materially false and misleading statements. ¶¶ 53-55. Defendants would contend that SolarWinds did, in fact, have all necessary cybersecurity practices and protocols in place during the Class Period. Specifically, Defendants would argue that SolarWinds (i) had a dedicated Information Security Team, (ii) had written information security policies, (iii) trained its employees on cybersecurity, (iv) enforced a policy requiring the use of complex passwords, (v) imposed role-based limitations on users' access to Company systems, and (vi) followed the voluntary guidance of the NIST Cybersecurity Framework. ¶ 53. In addition, Defendants would have argued that any alleged deficiencies in SolarWinds' cybersecurity systems did not cause the cyberattack at issue, but that it was the result of a very sophisticated cyber-attacker that would have succeeded regardless of the

alleged deficiencies. ¶ 54. Defendants would also have contended that Lead Plaintiff would be unable to establish the materiality of their alleged misstatements concerning SolarWinds' commitment to cybersecurity because those statements were vague and optimistic statements that constitute puffery under the law. ¶ 55. While Defendants' arguments concerning falsity and materiality were unsuccessful at the motion-to-dismiss stage, they might have succeeded on a more complete factual record at summary judgment or before a jury at trial.

Second, the Action also presented substantial risks to proving that Defendants acted with scienter, *i.e.*, that Defendants acted intentionally or severely recklessly when making the alleged misstatements and omissions. ¶ 56. Defendants vigorously contended that they believed their statements to be true and that they had no motive to commit fraud. *Id.* In this regard, Defendants would have pointed to, among other things, the absence of alleged suspicious "insider sales" by Defendant Brown, and argued that the allegedly suspicious insider sales by Defendants Thoma Bravo and Silver Lake had no bearing on decision-making or knowledge within SolarWinds. ¶ 57.

Third, Lead Plaintiff also faced significant risks in proving loss causation and damages. ¶¶ 58-59. In order to establish loss causation, Lead Plaintiff would be required to prove that the stock declines that give rise to their damages were caused by the disclosure of facts concerning Defendants' alleged misstatements. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). Lead Plaintiff and Lead Counsel anticipate that Defendants would argue at trial, and subsequent stages of the proceedings, that the declines in the price of SolarWinds common stock identified by Lead Plaintiff were not caused entirely—or at all—by the alleged corrective disclosures. As noted above, Defendants would argue that investors' losses were caused by the cybersecurity attack—but not by allegedly misleading statements or omissions or alleged deficiencies in the Company's cybersecurity controls. ¶ 59. Defendants also would have argued

that the cyberattack was so sophisticated that it would have defeated even the most robust security measures and, thus, the price declines that resulted from its disclosure could not be causally connected to any alleged misstatements made by Defendant about the purported quality of SolarWinds' cybersecurity controls. *Id.*

Loss causation and damages would have been hotly contested issues at any trial and these issues would ultimately come down to an unpredictable battle of financial experts, which further increases the litigation risk for Lead Plaintiff and the class and supports the reasonableness of the Settlement. *See, e.g.*, *Baker v. SeaWorld Ent., Inc.*, 2020 WL 4260712, at *7 (S.D. Cal. July 24, 2020) (the fact that "Plaintiffs' ability to prove loss causation and damages would 'come down to an unpredictable battle of the experts,'" supported approval of the securities class action settlement); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 665 (S.D.N.Y. 2015) ("On the issue of damages, a trial would likely have turned heavily on a 'battle of the experts' between the parties' respective economists. It is impossible to predict which party's model of damages—if either—the jury would credit.").

F. The Settlement is Well Within the Range of Reasonableness

Rule 23(e)(2)(C)(i) asks the Court to consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," and the fifth *Reed* factor similarly considers "whether the terms of the settlement 'fall within *a reasonable range of recovery*, given the likelihood of the plaintiffs' success on the merits.'" *Billitteri*, 2011 WL 3586217, at *12 (emphasis in original). In assessing the reasonableness of a proposed settlement under both these analyses, the inquiry "should contrast settlement rewards with likely rewards if [the] case goes to trial." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 239 (5th Cir. 1982); *see also Erica P. John Fund*, 2018 WL 1942227, at *5 ("In ascertaining whether a settlement falls within the range of possible approval, courts will compare the settlement amount

to the relief the class could expect to recover at trial, *i.e.*, the strength of the plaintiffs' case."). As part of this inquiry, courts recognize the uncertainty of securities litigation and the potential difficulty of proving liability and damages at trial. *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (recognizing the complexity of securities fraud class action claims).

Here, the Settlement is well within the range of reasonableness, particularly given the multiple risks associated with further litigation of the Action. Lead Plaintiff understands, based on its expert's analysis that, assuming it prevailed on all liability arguments, the maximum damages that could be established at trial would be approximately $130 million to $200 million. ¶ 61. However, the risks of establishing liability here were significant, and Defendants asserted that the maximum damages were much lower or even zero. As such, the $26,000,000 recovery under by the Settlement, which represents approximately 13% to 20% of the maximum potential damages, is highly favorable result for the Settlement Class. *See, e.g.*, *In re Biolase, Inc. Sec. Litig*., 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (finding that a settlement recovery of 8% of estimated damages "equals or surpasses the recovery in many other securities class actions"); *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 4 F. Supp. 3d 94, 103 (D.D.C. 2013) (settlement approximating "4-8% of the 'best case scenario' potential recovery" deemed reasonable); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (noting that the average settlements in securities class actions "have ranged from 3% to 7% of the class members' estimated losses").

G. Lead Counsel and Lead Plaintiff, and the Reaction of the Settlement Class to Date, Support Final Approval of the Settlement

Lead Counsel and Lead Plaintiff both fully endorse approval of the Settlement, which further supports final approval. *See J.C. Penney*, 2017 WL 6590976, at *3 ("Significant weight is given to the opinion of class counsel concerning whether the settlement is in the best interest of

the class and the court is not to substitute its own judgment for that of counsel."); *Schwartz*, 2005 WL 3148350, at *21 ("where the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of [the] case'").

Lead Counsel has conducted a thorough fact-finding investigation into the claims against Defendants and, after two years of litigation and hard-fought settlement negotiations, has a firm understanding of the strengths and risks attendant to these claims. Based on this understanding, as well as Lead Counsel's substantial experience litigating complex securities class actions like this one, Lead Counsel has concluded that the Settlement is fair, reasonable, and adequate. Additionally, the recommendation of Lead Plaintiff—which was actively involved throughout the course of the litigation—further supports approval of the Settlement. *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).

The positive response of Settlement Class Members to date also supports final approval of the Settlement. The Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), has mailed 24,946 copies of the Notice to potential Settlement Class Members and nominees through June 22, 2023. *See* Declaration of Alexander P. Villanova (Ex. 4) ("Villanova Decl."), at ¶ 8. The Notice describes the essential terms of the Settlement and informs Settlement Class Members of their right to opt-out of the Settlement Class or object to any aspect of the Settlement. As set forth in the Notice, the deadline for Settlement Class Members to submit objections or request exclusion from the Settlement Class is July 7, 2023. While this

deadline has not yet passed, to date, there have been no objections to the Settlement or Plan of Allocation and no requests for exclusion from the Settlement Class. ¶ 69; Villanova Decl. ¶ 14.[4]

H. The Other Factors Set Forth in Rule 23(e)(2) Support Final Approval of the Settlement

Rule 23(e)(2) also considers (i) the effectiveness of the proposed method of distributing relief to the class; (ii) the terms of any proposed award of attorneys' fees; (iii) any agreements made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii), (iii), and (iv); Fed. R. Civ. P. 23(e)(2)(D).

1. The Proposed Method of Distributing Settlement Proceeds is Effective

The proceeds of the Settlement will be distributed to Settlement Class Members who submit eligible Claim Forms with required documentation to Epiq. Epiq will review and process the claims received, provide claimants with an opportunity to cure any deficiencies or request review of the denial of their claims by the Court, and will ultimately mail or wire claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plant of Allocation.[5] This type of claims processing is standard in securities class actions and has long been used and found to be effective. *See, e.g.*, *OCA*, 2009 WL 512081, at *6; *Dell*, 2010 WL 2371864, at *10.

2. The Requested Fees and Expenses are Fair and Reasonable

Lead Counsel has filed a motion for an award of attorneys' fees and Litigation Expenses concurrently with this motion. As detailed therein, Lead Counsel has applied for attorneys' fees in an amount—25% of the Settlement Fund—that is consistent with attorneys' fee awards

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[4] Under the schedule set by the Court, Lead Plaintiff will file reply papers in further support of final approval on July 21, 2023, addressing any requests for exclusion and objections that may be received.

[5] The Settlement is not a claims-made settlement. If the Settlement is approved, Defendants will have no right to the return of any portion of Settlement based on the number or value of Claims submitted. *See* Stipulation ¶ 13.

approved in comparable securities class actions litigated on a purely contingent basis. *See Schwartz*, 2005 WL 3148350, at *27 ("courts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the percentage-of-the recovery method"); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ("attorneys' fees in the range from twenty-five percent (25%) to [33%] have been routinely awarded in class actions"). The fee request is also reasonable in light of the extensive efforts of Plaintiffs' Counsel and the substantial risks in the litigation.

Pursuant to the terms of the Stipulation, and as is standard in securities class actions, attorneys' fees and expenses will be paid upon any such award granted by the Court, and shall be reimbursed to the Settlement Fund if the award is reduced or reversed in any subsequent legal proceedings. *See* Stipulation ¶ 16.

3. The Supplemental Agreement Does Not Affect the Fairness of the Settlement

Rule 23(e)(2)(C)(iv) asks the Court to consider any additional agreements made by the Parties in connection with the Settlement. Here, the only such agreement is the Parties' confidential Supplemental Agreement that sets forth the conditions under which SolarWinds would be able to terminate the Settlement if the number of Settlement Class Members who request exclusion from the Settlement Class reaches a certain threshold. *See* Stipulation ¶ 36. This type of agreement is standard in securities class actions and is routinely maintained as confidential to avoid allowing potential opt-outs to use this provision as leverage. *See In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020). The agreement has no negative impact on the fairness of the Settlement. *See, e.g.*, *Erica P. John Fund*, 2018 WL 1942227, at *5 (granting final approval of securities settlement that included a similar agreement).

4. The Settlement Treats Settlement Class Members Equitably

Finally, the proposed Settlement treats members of the Settlement Class equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D). There is no preferential treatment for any members of the Settlement Class. Lead Plaintiff will receive a recovery based on the same formula under the Plan of Allocation as all other Settlement Class Members (other than an award for reimbursement for the time their employees spent working on the Action or other such costs as permitted by the PSLRA). As discussed immediately below, the Net Settlement Fund will be distributed among Settlement Class Members in accordance with the Plan of Allocation, which provides a fair and equitable method of allocation.

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

The standard for approval of a plan of allocation of the settlement funds is the same as that for approving a settlement: whether it is "fair, adequate and reasonable and is not the product of collusion between the parties." *Chicken Antitrust Litig.*, 669 F.2d at 238. A plan of allocation need not be perfect—to be fair, reasonable, and adequate, "[t]he allocation formula 'need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.'" *Dell*, 2010 WL 2371834, at *10.

The proposed Plan of Allocation was developed by Lead Counsel in consultation with Lead Plaintiff's damages expert and takes into account the economic losses that Settlement Class Members suffered as a result of Defendants' alleged misrepresentations. Under the Plan, a "Recognized Loss Amount" will be calculated for each purchase or acquisition of SolarWinds common stock during the Class Period listed in the Claim Form and for which adequate documentation is provided. The formula for calculating a claimant's Recognized Loss Amount is the same as that typically used in plans of allocation in other securities class action asserting

Section 10(b) claims. In general, for each purchase of SolarWinds common stock during the Class Period, the Recognized Loss Amount will be (a) the difference between the estimated artificial inflation in the stock price on date of purchase and the estimated artificial inflation on date of sale, or (b) the difference between the actual purchase price and sales price of the stock, whichever is less. ¶ 74. Lead Plaintiff's damages expert calculated the amount of estimated artificial inflation in the price of SolarWinds stock by considering price changes in reaction to certain public announcements allegedly revealing the truth concerning Defendants' alleged misrepresentations and material omissions, adjusting for price changes on those days that were attributable to market or industry forces. ¶ 73.

The sum of the Recognized Loss Amounts for all of a claimant's purchases of SolarWinds common stock during the Class Period is the claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶¶ 76-77. The Net Settlement Fund will be distributed to Authorized Claimants on this *pro rata* basis until the Net Settlement Fund is depleted or it is no longer cost effective to do so. ¶ 78.

Accordingly, Lead Counsel believes that the 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 alleged misconduct. ¶ 79. To date, no objections to the proposed Plan of Allocation have been received. *Id.*

III. CERTIFICATION OF THE SETTLEMENT CLASS REMAINS WARRANTED

The Court previously found, for settlement purposes, that: (1) the Settlement Class met or was likely to meet each element required for class certification under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and (2) it would likely be able to certify Lead Plaintiff as the Class Representative and Lead Counsel as Class Counsel for the Settlement Class pursuant to Rule

23(g). *See* ECF No. 103, at ¶¶ 1-3. None of the facts regarding certification of the Settlement Class have changed since Lead Plaintiff submitted its Motion for Preliminary Approval of Settlement, and there has been no objection to certification of the Settlement Class.[6] Accordingly, Lead Plaintiff respectfully requests that the Court grant final certification of the Settlement Class and appoint Lead Plaintiff as Class Representative and Lead Counsel as Class Counsel, for settlement purposes only, pursuant to Rules 23(a), (b)(3), and (g).

IV. NOTICE TO THE SETTLEMENT CLASS SATISFIED RULE 23 AND DUE PROCESS

Notice to the Settlement Class satisfied the requirements of Rule 23, which requires "the best notice that is 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). Notice also satisfied Rule 23(e)(1), which requires that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Maher v. Zapata Corp.*, 714 F. 2d 436, 451 (5th Cir. 1983); *see In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010) ("a settlement notice need only satisfy the 'broad reasonableness standards imposed by due process'").

Both the substance of the notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards. In accordance with the Court's Preliminary Approval Order, Epiq began mailing copies of the Court-approved Notice and Claim Form to potential Settlement Class Members and nominees on March 9, 2023. *See* Villanova Decl. ¶¶ 2-5. As of June 22, 2023, Epiq had disseminated 24,946 copies of the Notice Packet to potential

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[6] Lead Plaintiff's motion in support of preliminary approval of the Settlement (ECF No. 97), and the reasons supporting certification of the Settlement Class set forth therein (*id.* at 12-18), are incorporated herein by reference.

Settlement Class Members and nominees. *See id.* ¶ 8. In addition, Epiq caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *PR Newswire* on March 21, 2023, and maintains and updates as required a website and toll-free telephone number dedicated to the Settlement. *See id.* ¶¶ 9-13. This combination of individual mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, and transmitted over a newswire, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also Schwartz*, 2005 WL 3148350, at *10.

CONCLUSION

Plaintiffs respectfully request that the Court approve the proposed Settlement and Plan of Allocation as fair, reasonable, and adequate, and grant final certification of the Settlement Class for settlement purposes.

DATED: June 23, 2023

Respectfully submitted,

/s/ Jonathan D. Uslaner

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, I electronically filed the foregoing by using the court's CM/ECF system. Per agreement among the parties, all parties will be served by the CM/ECF system.

By: */s/ Jonathan D. Uslaner*
Jonathan D. Uslaner