UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FADI DAHHAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. OVASCIENCE, INC., et al., Defendants.	No. 1:17-cv-10511-IT CLASS ACTION MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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STATUTES, RULES AND REGULATIONS

Court-appointed Lead Plaintiff, Freedman Family Investments LLC ("Lead Plaintiff"), by and through counsel, respectfully submits this memorandum of law in support of its motion pursuant to Federal Rule of Civil Procedure 23(e), requesting that the Court (i) approve the proposed Settlement, which the Court preliminarily approved on April 1, 2022 (the "Notice Order") (ECF 178); (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; and (iv) enter the proposed Order and Final Judgment.[1]

I. INTRODUCTION

As set forth herein and in the Astley Decl., the $15,000,000.00 all-cash Settlement represents an excellent result for the Class. Indeed, the Settlement was reached by experienced and knowledgeable counsel only after, *inter alia*, an extensive investigation by Lead Counsel, the filing of detailed complaints, full briefing regarding Defendants' motions to dismiss, review of millions of pages of documents, briefing motions to compel, class certification briefing and discovery, depositions, expert consultation, and arm's-length settlement negotiations conducted by two highly experienced, nationally-recognized mediators, Michelle Yoshida, Esq. of Phillips ADR, and the Hon. Daniel Weinstein (Ret.).

It is also Lead Counsel's informed opinion that in light of the significant risks and the delay, including the availability of funds to satisfy a large judgment, expense, and uncertainty of pursuing the Litigation through trial and any post-trial appeals, the Settlement is a certain and reasonable result for the Class. The benefit that the proposed Settlement will provide to the Class weighs in favor of final approval when considered against the risks that, absent the Settlement, the Class might

[1] Unless otherwise defined herein, all capitalized terms are defined in the Stipulation and Agreement of Settlement dated March 4, 2022 (the "Stipulation") (ECF 174) and the Declaration of Stephen R. Astley in Support of: (A) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation, and (B) Lead Counsel's Motion for Attorneys' Fees and Litigation Expenses, Charges and Costs ("Astley Decl."), submitted herewith.

recover less (or nothing at all) if the Litigation continued to be litigated through expert discovery, summary judgment, trial, and any post-trial appeals that would likely follow – a process that could last many additional years. While Lead Plaintiff believes that it has meritorious responses to each of Defendants' arguments against liability and damages, the proposed Settlement, if approved, will enable the Class to be compensated now for damages without incurring the risk of further litigation. Indeed, Lead Counsel estimates that the recovery here is approximately 4.5% of the estimated $327 million in maximum recoverable damages, in line with the median results for PSLRA class action settlements as published in a report by Cornerstone Research. *See* Astley Decl., ¶5 & Ex. B. Accordingly, Lead Counsel, with extensive experience in prosecuting shareholder class actions and other complex litigation, believes that the proposed Settlement satisfies each of the applicable Rule 23(e)(2) factors, is fair, reasonable, and adequate under the First Circuit's standards for approval, and is in the best interests of the Class. Likewise, the Plan of Allocation, based on the out-of-pocket measure of damages (*i.e.*, the difference between what Class Members paid for their OvaScience, Inc. ("OvaScience" or the "Company") common stock during the Class Period and what they would have paid had the misstatements not been made or omissions withheld), which Lead Counsel developed with the assistance of a damages consultant, and which is a fair, reasonable, and adequate method for distributing the Net Settlement Fund to Class Members, should be approved.

The fairness of the Settlement is further evidenced by the fact that, to date, no members of the Class have objected to it, and only two have sought exclusion from the Class.[2] Pursuant to the Court's Notice Order, 32,468 copies of the Notice have been sent to potential Class Members and nominees since April 22, 2022, and a Summary Notice was published in *The Wall Street Journal* and

[2] Four requests for exclusion from the Class were received in response to the Notice of Pendency of Class Action provided in 2020. ECF 123.

transmitted over the *PR Newswire*, a national newswire service, on May 6, 2022.[3] Additionally, Settlement-related documents were posted on the Settlement-specific website at www.OvaScienceSecuritiesLitigation.com. *Id.*, ¶14.[4] The deadline for Class Members to object to the Settlement and Plan of Allocation expires on July 5, 2022. Lead Counsel will address any timely objections in a reply memorandum due no later than July 19, 2022.

II. HISTORY AND BACKGROUND OF THE LITIGATION

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Astley Decl. for a detailed discussion of the factual background and procedural history of the Litigation, the efforts undertaken by Lead Plaintiff and Plaintiff's Counsel during the course of the Litigation, the risks of continued litigation, and a discussion of the negotiations leading to the Settlement.

III. ARGUMENT

A. Applicable Standards Favor Approval of Class Action Settlements

In determining whether to approve the Settlement, the Court should be guided by the "'strong public policy in favor of settlements'" over continued litigation, particularly complex actions. *See, e.g.*, *United States v. Davis*, 261 F.3d 1, 27 (1st Cir. 2001);[5] *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000) (same). To grant final approval of a class action settlement, the court must find that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (same).

Rule 23(e)(2), as recently amended, provides that:

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[3] *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), on behalf of the Court-appointed Claims Administrator for the Settlement, Gilardi & Co. LLC ("Gilardi"), ¶¶4-12.

[4] The briefs and declarations in support of the motions to approve the Settlement, Plan of Allocation, and attorneys' fees and expenses will be posted to the website once they are filed.

[5] Citations are omitted and emphasis is added throughout, unless otherwise noted.

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable and adequate after considering whether:
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> (A) the class representatives and class counsel have adequately represented the class;
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> (B) the proposal was negotiated at arm's length;
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> (C) the relief provided for the class is adequate, taking into account:
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> (i) the costs, risks, and delay of trial and appeal;
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> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
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> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
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> (iv) any agreement required to be identified under Rule 23(e)(3); and
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> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). *See also Jean-Pierre v. J&L Cable TV Servs., Inc.*, 538 F. Supp. 3d 208, 213 (D. Mass. 2021) ("'If the parties negotiated at arm's length and conducted sufficient discovery, the district Court must presume the settlement is reasonable.'") (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009)).

While the First Circuit has not espoused any single test for determining whether a proposed settlement is fair, reasonable, and adequate,[6] courts within this Circuit commonly reference factors identified by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), *abrogated sub nom.*, *Goldberger v. Integrated Res., Inc.*, 209 F. 3d 43 (2d Cir. 2000). *See*

[6] *See, e.g.*, *In re Lupron Mktg. & Sales Prac. Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005) ("the First Circuit has not established a formal protocol for assessing the fairness of a settlement"); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003) ("There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement.").

Lupron, 228 F.R.D. at 93. Courts in this Circuit have further distilled the *Grinnell* factors into a more concise list, examining the

> (1) risk, complexity, expense and duration of the case; (2) comparison of the proposed settlement with the likely result of continued litigation; (3) reaction of the class to the settlement; (4) stage of the litigation and the amount of discovery completed; and (5) quality of counsel and conduct during litigation and settlement negotiations.

In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 259-60 (D.N.H. 2007).

Moreover, in evaluating whether a settlement is fair, reasonable, and adequate, courts are to balance the benefits of settlement against the risks of continued litigation. *Voss*, 592 F.3d at 251. "'[T]he court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff[s] after full and successful litigation of the claim[s].'" *Rolland v. Cellucci*, 191 F.R.D. 3, 14-15 (D. Mass. 2000). As the First Circuit has observed: "[A]ny settlement is the result of a compromise – each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion." *Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974); *see also Compact Disc*, 216 F.R.D. at 211 ("I am not to prejudge the merits of the case . . . and I am not to second-guess the settlement; I am only to determine if the parties' conclusion is reasonable."); *Lupron*, 228 F.R.D. at 97 (the court should not "hypothesize about larger amounts that might have been recovered"). The factors set forth in Rule 23(e)(2) are applied in tandem with the applicable First Circuit approval factors and "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)(2) Advisory Committee's Notes to 2018 Amendments. In this case, an examination of the foregoing factors firmly demonstrates that the Settlement satisfies both Rule 23(e)(2) and the applicable First Circuit factors, is fair, reasonable, and adequate to the Class, and should be approved by the Court.

B. The Proposed Settlement Merits Final Approval

1. The Settlement Satisfies the Requirements of Rule 23(e)(2)

As explained in Lead Plaintiff's Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement, Re-Certification of the Class, and Approval of Notice to the Class (the "Preliminary Approval Memorandum") (ECF 173) at 10-17, and as acknowledged by the Notice Order, Lead Plaintiff has met all of the requirements imposed by Rule 23(e)(2). Courts analyzing the recently amended Rule 23(e)(2) factors have noted that a plaintiff's satisfaction of these factors at final approval is virtually assured where, as here, little has changed between preliminary and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg. Sales Prac. & Prods. Liab. Litig.*, 2019 U.S. Dist. LEXIS 75205, at *29 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"); *Snyder v. Ocwen Loan Servicing, LLC*, 2019 U.S. Dist. LEXIS 80926, at *14 (N.D. Ill. May 14, 2019) (noting in analyzing Rule 23(e)(2) that "[s]ignificant portions of the Court's analysis remain materially unchanged from the previous order [granting preliminary approval]").

a. Lead Plaintiff and Lead Counsel Adequately Represented the Class

Lead Plaintiff and Lead Counsel have adequately represented the Class as required by Fed. R. Civ. P. 23(e)(2)(A). They have diligently prosecuted this Litigation on the Class' behalf. Among other things, Lead Counsel conducted a thorough pre-filing investigation, drafted detailed complaints, successfully opposed Defendants' motions to dismiss, obtained, reviewed, and analyzed millions of pages of non-public documents, conducted depositions, successfully obtained class certification over Defendants' opposition, engaged in mediation, and achieved a Settlement of $15 million, which will provide a significant recovery to the Class. Lead Plaintiff actively and faithfully oversaw the prosecution of the case over the course of the Litigation in accordance with its duties as

a Lead Plaintiff. *See* Declaration of Edward Freedman ("Freedman Decl."), submitted herewith. Lead Plaintiff and Lead Counsel stood ready to, and at all times did, advocate for the best interests of the Class.

2. The Settlement Was Reached After Significant Investigation and Discovery and Is the Product of Arm's-Length Negotiations Among Experienced Counsel

Rule 23(e)(2)(B) is clearly satisfied. Where, as here, the settling parties have bargained at arm's length, "'there is a presumption in favor of the settlement.'" *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quoting *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)); *see also Roberts v. TJX Cos.*, 2016 U.S. Dist. LEXIS 136987, at *20 (D. Mass. Sept. 30, 2016) (where "the parties' Settlement is the product of arms-length negotiation by competent counsel, . . . it is entitled to a presumption of reasonableness"). Moreover, where, as here, the settlement was reached with the assistance of an experienced mediator, there is "a presumption that the settlement achieved meets the requirements of due process." *In re Penthouse Exec. Club Comp. Litig.*, 2013 U.S. Dist. LEXIS 63065, at *8 (S.D.N.Y. Apr. 30, 2013) ("[t]he assistance of [an] experienced mediator . . . reinforces that the Settlement Agreement is non-collusive.").

At the time of the Settlement, all parties were in an excellent position to evaluate the strengths and weaknesses of their respective claims and defenses. As described more fully in the Astley Decl., Lead Counsel conducted a detailed investigation prior to and during the prosecution of this Litigation. In response to their requests and following negotiations over the scope of discovery, Defendants and non-parties produced to Lead Counsel hundreds of thousands of non-public documents. The Parties' settlement negotiations included the exchange of comprehensive mediation statements which detailed their respective positions, and formal all-day mediation sessions, first under the guidance of Ms. Yoshida, and thereafter, with Judge Weinstein. At the mediations, the

Parties' positions were fully explored. This accumulation of information permitted Lead Plaintiff and Lead Counsel to be well-informed about the strengths and weaknesses of the case, resulting in a significant recovery of $15,000,000.00 for the Class. Thus, the proposed Settlement is procedurally fair and entitled to a presumption of reasonableness. *See Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("settlement negotiations . . . conducted at arms' length . . . support 'a strong initial presumption' of the Settlement's substantive fairness").

Moreover, the judgment of experienced and well-informed class counsel should be afforded great weight by the Court. *Rolland*, 191 F.R.D. at 10 ("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*, 50 F. Supp. 2d at 77 ("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 settlement provides to the Class relief that is fair, reasonable and adequate."). Lead Counsel is a national shareholder's rights law firm with significant experience in PSLRA securities litigation, as well as other shareholder and complex litigation. *See* www.rgrdlaw.com.

3. The Risk, Complexity, and Expense of Continued Litigation Favors Final Approval

The Settlement is also substantively fair. *See* Fed. R. Civ. P. 23(e)(2)(C)(i). While Lead Plaintiff believes that the claims asserted against Defendants have merit, it recognizes that there were significant risks as to whether Lead Plaintiff would ultimately be able to prove liability and establish damages on its claims. Continued litigation would be complex, risky, and costly. *See In re Stockeryale, Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 94004, at *8 (D.N.H. Dec. 18, 2007) (this factor "'captures the probable costs, in both time and money, of continued litigation"). Securities class

actions are "notorious[ly] complex[]" and "[t]he difficulty of establishing liability is a common risk of securities litigation.'" *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 2006 U.S. Dist. LEXIS 17588, at *31, *39 (S.D.N.Y. Apr. 6, 2006). The Settlement provides an immediate benefit to the Class that when balanced against the potential costs and risks associated with continued litigation, supports a finding that the Settlement is fair, reasonable, and adequate. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 74 (D. Mass. 2005) ("'Although fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery.'").

As a threshold matter, Defendants argued that Lead Plaintiff lacked standing to allege claims against Defendants. Defendants argued that because Lead Plaintiff cannot prove that Defendants knew that the December 17, 2014 statement regarding the goal of initiating 1,000 cycles in 2015 was unattainable as of March 30, 2015, the last day on which Lead Plaintiff purchased its OvaScience shares, Lead Plaintiff cannot represent the Class. *See* Defendants' Memorandum in Opposition to Lead Plaintiff's Motion for Class Certification (ECF 63), at 5-8.[7] Defendants have also vigorously contested their liability on the merits and have denied and continue to deny each and every claim and allegation of wrongdoing alleged by Lead Plaintiff. Specifically, Defendants have argued that Lead Plaintiff cannot demonstrate that any of their statements were fraudulent, arguing that nothing they said was false, deceptive, or misleading at the time they were made. Defendants maintain that AUGMENT was a new, experimental fertility treatment and that Defendants continued to reveal truthful information regarding the safety and efficacy of AUGMENT as it emerged. Astley Decl., ¶45. Defendants also argued that many of their statements were inactionable because they were

[7] Although the Court rejected this argument in its Order on Class Certification (ECF 99) at 8, it did warn that "[t]he court's determination does not rule out the possibility that Defendants' concerns regarding the adequacy of Freedman Family may come to bear once the case reaches the merits." *Id.*

forward-looking and accompanied by adequate cautionary language, and, therefore, protected under the PSLRA's statutory safe harbor. *Id.*, ¶46.

Defendants likewise argued that Lead Plaintiff could not establish scienter. *Id.*, ¶48. They argued there was insufficient motive to support a strong inference of scienter and that Lead Plaintiff would be unable to show that Defendants had actual knowledge that their forward-looking statements regarding AUGMENT treatments were false at the time they were made. *Id.*, ¶49. "Proving scienter is hard to do." *Christine Asia Co. v. Jack Yun Ma*, 2019 U.S. Dist. LEXIS 179836, at *46 (S.D.N.Y. Oct. 16, 2019). *See also Kalnit v. Eichler*, 99 F. Supp. 2d 327, 345 (S.D.N.Y. 2000), *aff'd*, 264 F. 3d 131 (2d Cir. 2001) ("The element of scienter is often the most difficult and controversial aspect of a securities fraud claim.").

Lead Plaintiff also faced significant risks in proving loss causation and damages. Astley Decl., ¶¶51-52. Defendants would maintain that there was no "causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Likewise, the level of damages, if any, would have been the subject of expert testimony by each side. Which expert's position would be accepted by the Court or the jury was unknown. Astley Decl., ¶52.

Finally, and crucially, OvaScience no longer exists as a going concern, and its directors' and officers' insurance policies, which continued to waste, were likely the only source of recovery for the Class. *Id.*, ¶54. Further litigation may well have resulted in a pyrrhic victory for the Class, as there is no assurance that Defendants could satisfy a judgment, leaving Lead Plaintiff and the Class empty-handed. *In re Signet Jewelers Ltd. Sec. Litig.*, 2020 U.S. Dist. LEXIS 128998, at *37 (S.D.N.Y. July 21, 2020).

Although Lead Plaintiff believes that following the completion of discovery it would avoid dismissal of the Litigation at summary judgment, there remained significant hurdles to recovery, at trial and any post-trial appeals. *See, e.g.*, *Stockeryale*, 2007 U.S. Dist. LEXIS 94004, at *10 (this factor supported settlement where the defendants had defenses to liability and loss causation that "could result in no liability and zero recovery for the class"). This Settlement obviates those risks.

4. Comparing the Proposed Settlement to the Likely Result of Continued Litigation Weighs in Favor of Final Approval

This factor requires the Court to consider the reasonableness of the settlement fund in light of the possible recovery in the litigation and risks of further litigation. The issue is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case. Thus, the court "consider[s] and weigh[s] 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." *Grinnell*, 495 F.2d at 462. Courts agree that the determination of a "reasonable" settlement "'is not susceptible of a mathematical equation yielding a particularized sum.'" *In re PaineWebber P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. Mar. 20, 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *accord Relafen*, 231 F.R.D. at 73 ("'A high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes.'"). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Here, the $15,000,000.00 cash Settlement is well within the range of reasonableness under the circumstances so as to warrant final approval of the Settlement. It represents approximately 4.5% of the likely maximum recoverable damages, which exceeds the median settlement value for securities fraud cases on both a dollar and percentage basis. *See* Astley Decl., ¶¶5-6. Further, according to a study performed by Cornerstone Research, the median ratio of settlement to investor

losses between 2012 and 2020 was 5%. *Id*. The percentage recovery here is in line with that reported median.

Thus, under the circumstances here, the Settlement achieved represents an excellent result for the Class and is reasonable in light of the best possible recovery, especially when compared to the funds available to satisfy a judgment and the overall range of recovery involving securities class action settlements of this size. *See, e.g.*, *KBC Asset Mgmt. NV et al v. Aegerion Pharms., Inc. et al*, No. 1:14-cv-10105-MLW, Order and Final Judgment (D. Mass. Nov. 30, 2017) (ECF 170) (approving 2.63% recovery); *Medoff v. CVS Caremark Corp.*, 2016 U.S. Dist. LEXIS 19135, at *18 (D.R.I. Feb. 17, 2016) (approving a 5.33% recovery).

5. Lead Plaintiff Had Sufficient Information to Make Informed Decisions About Settling this Case

This factor questions "'whether the parties had adequate information about their claims such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012). "The threshold necessary to render the decisions of counsel sufficiently well informed, . . . is not an overly burdensome one to achieve – indeed, formal discovery need not have necessarily been undertaken yet by the parties." *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 190 (S.D.N.Y. 2012); *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 474 (D.P.R. 2011) (even where formal discovery had not occurred, counsel's investigation and informal discovery provided "sufficient information to make a well informed decision").

As detailed in the Astley Declaration, prior to filing, Lead Counsel conducted a thorough review of OvaScience's press releases, public statements, SEC filings, and securities analysts' reports and advisories about the Company and reviewed other publicly available information relating

to OvaScience and AUGMENT. Lead Counsel researched the applicable law with respect to the claims asserted and the potential defenses thereto and prepared the Amended Complaint and opposition to the OvaScience Defendants' motion to dismiss. Lead Counsel moved for and obtained class certification, conducted extensive document and other written discovery, reviewed millions of pages of non-public documents, and took four fact witness depositions. Lead Plaintiff also moved to amend its complaint to add the Longwood Defendants to the case, and thereafter briefed those defendants' motion to dismiss the Second Amended Complaint. Finally, the parties exchanged detailed evidentiary-based mediation statements and follow-up submissions and engaged in negotiations under the guidance of experienced mediators. Thus, Lead Plaintiff and Lead Counsel engaged in sufficient investigation and discovery to thoroughly understand the claims, merits, and weaknesses of the Litigation before agreeing to the Settlement.

6. The Favorable Reaction of the Class to Date Supports Final Approval

To date, no objections have been filed, and only two exclusion requests were submitted. *See id*., ¶64. Such a favorable reaction of the Class to the Settlement also supports its approval. While not dispositive, "[t]he number of requests for exclusion from the settlement, as well as the number and substance of objections filed. . . . constitutes strong evidence of fairness of proposed settlement and supports judicial approval." *Bussie*, 50 F. Supp. 2d at 77. Moreover, Lead Plaintiff fully supports the Settlement. Freedman Decl., ¶11. *See Stockeryale*, 2007 U.S. Dist. LEXIS 94004, at *9 ("The Court finds it significant that the Lead Plaintiffs are fully in support of the settlement.").

Pursuant to the Notice Order, beginning on April 22, 2022, the Claims Administrator caused a total of over 32,400 Notice Packages to be mailed to potential Class Members, including brokers and other nominees. *See* Murray Decl., ¶¶4-11. The Claims Administrator also caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *PR Newswire*

on May 6, 2022. *Id.*, ¶12. As noted, no objections have been received and only two requests for exclusion from the Settlement have been submitted.[8] The Class Members' positive reaction to the Settlement fully supports final approval.

C. The Plan of Allocation of Settlement Proceeds Should Be Approved

A plan of allocation of settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable, and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."). A plan of allocation is fair and reasonable as long as it has a "'reasonable, rational basis.'" *City of Providence v. Aéropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at *29 (S.D.N.Y. May 9, 2014) ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel.'"), *aff'd sub nom.*, *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, and the plan "'need not necessarily treat all class members equally.'" *Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, at *78 (N.D. Tex. Nov. 8, 2005). A reasonable plan of allocation "'may consider the relative strength and values of different categories of claims.'" *IMAX*, 283 F.R.D. at 192; *see In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35 (D.N.H. 2006) (approving a plan of allocation that took into consideration "the strengths and weaknesses of the claims of the various types of class members").

Here, the Plan of Allocation was developed by Lead Counsel in consultation with its damages consultant and it calculates a recognized loss based on the amount of the alleged inflation in OvaScience common stock at various times during the Class Period allocable to the alleged fraud, and also takes into account the PSLRA-mandated 90-day lookback. Astley Decl., ¶¶66-70. Lead

[8] These two requests for exclusion are in addition to the four requests for exclusion submitted in response to the Notice of Pendency of Class Action provided in 2020. ECF 123, ¶15.

Counsel believes the proposed Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members and that the Plan of Allocation treats Class Members equitably relative to each, and by providing that each Authorized Claimant shall receive a *pro rata* share of the Net Settlement Fund based on recognized losses. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii). Further, Lead Counsel's opinion is entitled to "considerable weight" by the Court in deciding whether to approve the plan. *See In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *see also In re Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *40 ("In determining whether a plan of allocation is reasonable, courts give great weight to the opinion of experienced counsel.").

Further, to date, no objections to the Plan of Allocation have been filed, suggesting that the Class also finds the Plan of Allocation to be fair, reasonable, and adequate. Similar plans have repeatedly been approved by courts within this District. *See*, *e.g.*, *Machado v. Endurance Int'l Grp. Holdings, Inc.*, 2019 U.S. Dist. LEXIS 158528, at *4 (D. Mass. Sept. 13, 2019); *McGee v. Constant Contact, Inc. et al*, 15-13114-MLW, Order Approving Plan of Allocation (D. Mass. May 27, 2020) (ECF 119); *KBC*, Order Approving Plan of Allocation (ECF 168); *see also Cabletron*, 239 F.R.D. at 35 (approving a plan where claimants would "receive a pro rata share of the Net Settlement Fund").

D. Notice to the Class Satisfied the Requirements of Rule 23, Complies With Due Process, and Is Reasonable

The Notice provided to the Class satisfied the requirements of Fed. R. Civ. P. 23(c)(2)(B), 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); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). The Notice also satisfied Fed. R. Civ. P. 23(e)(1), which requires that notice of a settlement be directed "in a reasonable manner to all

class members who would be bound" by the settlement (Fed. R. Civ. P. 23(e)(1)(B)), and that the notice "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them.'" *Bogan*, 492 F.2d at 382.

Both the substance of the Court-approved Notice and the method of dissemination to potential members of the Class satisfy these standards. The Notice program was carried out by a nationally-recognized claims administrator, Gilardi. The Notice contains the information required by Fed. R. Civ. P. 23(c)(2)(B), including: (i) an explanation of the nature of the Litigation and claims asserted; (ii) the definition of the Class; (iii) a description of the claims, issues, and defenses in the Litigation and the key terms of the Settlement, including the consideration amount and the releases to be given; (iv) the Plan of Allocation; (v) the Parties' reasons for proposing the Settlement; (vi) a description of the attorneys' fees and expenses that will be sought; (vii) an explanation of Class Members' right to enter an appearance through an attorney and to request exclusion from the Class and to object to the Settlement, the Plan of Allocation, or the requested attorneys' fees or expenses, as well as the time and manner for requesting exclusion and filing objections; and (viii) notice of the binding effect of a judgment on Class Members. The Notice also provides instructions for submitting a Proof of Claim in order to be eligible to receive a distribution from the Net Settlement Fund, relevant deadlines, and contact information, including a dedicated toll-free telephone hotline and link to the Settlement website.

In accordance with the Court's Notice Order, Gilardi has mailed 32,468 copies of the Notice Package by first-class mail to potential members of the Class and their nominees. *See* Murray Decl., ¶11. In addition, Gilardi caused the Summary Notice to be published in *The Wall Street Journal* and transmitted over the *PR Newswire* on May 6, 2022. *Id.*, ¶12. Copies of the Notice, Proof of Claim, Notice Order, and Stipulation were made available on the Settlement website maintained by Gilardi,

www.OvaScienceSecuritiesLitigation.com. *Id.*, ¶14. This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in a widely circulated business publication, transmitted over a newswire, and set forth on a dedicated website, constitutes "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Stockeryale*, 2007 U.S. Dist. LEXIS 94004, at *7-*8 (finding that due process was satisfied where notice mailed by first class mail to all class members who could be identified with reasonable effort and summary notice was published once in *Investor's Business Daily* and over *PR Newswire*); *Cabletron*, 239 F.R.D. at 35-6 (combination of individually mailed notice packets, published notice in *The Wall Street Journal*, a dedicated website, and a dedicated phone hotline met the notice standard). *See also Medoff*, 2016 U.S. Dist. LEXIS 19135, at *24 (D.R.I. Feb. 17, 2016).

IV. CONCLUSION

Based on the foregoing, Lead Plaintiff respectfully requests that the Court (i) grant final approval of the proposed Settlement; (ii) approve the proposed Plan of Allocation; (iii) find that notice to the Class satisfied due process; and (iv) enter the proposed Order and Final Judgment.

DATED: June 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will, be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, if any, on June 21, 2022.

s/ Stephen R. Astley
STEPHEN R. ASTLEY