UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

ADAM S. LEVY on behalf of himself and all others similarly situated, Plaintiff, v. THOMAS GUTIERREZ, RICHARD J. GAYNOR, RAJA BAL, J. MICHAL CONAWAY, KATHLEEN A. COTE, ERNEST L. GODSHALK, MATTHEW E. MASSENGILL, MARY PETROVICH, ROBERT E. SWITZ, NOEL G. WATSON, THOMAS WROE, JR., MORGAN STANLEY & CO. LLC, GOLDMAN, SACHS & CO., CANACCORD GENUITY INC., AND APPLE INC., Defendants.	No. 1:14-cv-00443-JL ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH DEFENDANT APPLE INC.

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Douglas Kurz ("Kurz" or "Lead Plaintiff") and plaintiff Palisade Strategic Master Fund (Cayman) Limited ("Palisade" or the "Securities Act Plaintiff" and, collectively with Lead Plaintiff, "Plaintiffs" or the "Class Representatives"), on behalf of themselves and the other members of the certified Class, respectfully submit this memorandum of law in support of final approval of the proposed settlement reached in the above-captioned securities class action (the "Action") with defendant Apple Inc. ("Apple") for $3,500,000 in cash (the "Apple Settlement" or "Settlement").[1]

PRELIMINARY STATEMENT

Class Representatives have agreed, subject to Court approval, to settle all claims asserted in this Action against Apple in exchange for a cash payment of $3,500,000. The currently proposed Apple Settlement is in addition to the two partial settlements in the Action previously approved by the Court—the settlement with the GTAT Individual Defendants for $27,000,000 in cash and the settlement with the Underwriter Defendants for $9,700,000 in cash—resulting in an aggregate cash recovery of $40,200,000 in this Action.[2] The claims asserted against Apple are the only remaining claims in this Action and, thus, if the Settlement is approved, the Action will be completely resolved.

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[1] Unless otherwise defined herein, all capitalized terms have the meanings set forth in the Stipulation and Agreement of Settlement with Defendant Apple Inc., filed with the Court on January 10, 2020 (the "Apple Settlement Stipulation") (Dkt. 252-1), or in the Declaration of Lauren A. Ormsbee in Support of: (I) Class Representatives' Motion for Final Approval of Settlement With Defendant Apple Inc.; and (II) Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Ormsbee Declaration" or "Ormsbee Decl."), filed herewith. Citations to "¶ __" refer to paragraphs in the Ormsbee Declaration and citations to "Ex. __" refer to exhibits to the Ormsbee Declaration.

[2] The respective settlements with the GTAT Individual Defendants (the "Individual Defendant Settlement") and Underwriter Defendants (the "Underwriter Defendant Settlement," and together with the Individual Defendant Settlement, the "Earlier Settlements") were approved by the Court on July 27, 2018. *See* Dkt. 192, 193.

(Cont'd)

If approved by the Court, the Apple Settlement, when added to the two Earlier Settlements, will result in the third-largest securities class action recovery in the history of the District of New Hampshire. This is a considerable achievement given that GTAT—the issuer of the securities that form the basis for this Action—filed for bankruptcy before the case was initiated and, as a result, was eliminated as a potential source of recovery for investors. Moreover, as detailed in the accompanying Ormsbee Declaration[3] and as set forth herein, the additional $3.5 million recovery achieved under the Apple Settlement represents a favorable recovery for the Class given the very significant risks attendant to the continued prosecution of the claims asserted against Apple in this Action.

At the time the Settlement was reached, Class Representatives and their counsel were well-informed of the strengths and weaknesses of their case based on their extensive, hard-fought prosecution of the claims asserted in the Action. Over the course of more than five years of highly contested litigation, two of which were exclusively litigated against Apple, Class Counsel, *inter alia*: (i) investigated, researched, drafted, and filed the 131-page Consolidated Class Action Complaint (the "Complaint") (¶25); (ii) briefed in opposition to and successfully defeated in large part the multiple motions to dismiss the Complaint filed by Defendants (including Apple) (¶¶4, 26, 28); (iii) following the settlements reached with the Individual and Underwriter Defendants, successfully moved for certification of the Class, which involved copious briefing, the taking and defending of multiple depositions, the filing of two substantial expert reports, and several hours of oral argument on the motion (¶¶4, 37-47); (iv) engaged in wide-ranging discovery regarding the

[3] The Ormsbee Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*, the nature of the claims asserted against Apple in the Action (¶¶6-7, 25); the history and prosecution of the Action (¶¶22-71); and the risks and uncertainties of continued litigation of the claims against Apple (¶¶72-97).

claims against Apple which remained after the Earlier Settlements, including the review and analysis of over 400,000 documents totaling over 2.3 million pages, and conducting, defending, or actively participating in 28 fact, class, and expert depositions, including the depositions of GTAT's former CEO, two CFOs and COO, and seven expert depositions related to class and expert discovery (¶¶4, 9-11, 40, 48-62); (v) evaluated and began the research and drafting of oppositions to both Apple's motion for summary judgment and Apple's motion to exclude the opinion of Lead Plaintiff's damages and loss causation expert (¶¶63-67); and (vi) engaged in arm's-length settlement negotiations with Apple's Counsel (¶¶68-70).

While Class Representatives and Class Counsel continue to believe that the "control" person claims asserted against Apple in this litigation are meritorious, they recognize that the continued litigation of those claims presented several substantial risks to achieving a recovery from Apple in this case. For example, Apple has vehemently disputed the primary liability of the Individual Defendants in this Action, which is required to hold Apple liable for the control person claims asserted against it. Apple has argued that many, if not all, of the allegedly false statements made by the Individual Defendants during the Class Period were immunized from liability because they were protected by the PSLRA's "safe harbor" provision or were otherwise immaterial as a matter of law. Apple has also argued that GTAT's sapphire venture with Apple was extremely risky—the Company was trying to manufacture sapphire of sufficient quality to be used as the screens for smartphones, which had never been done before (or since)—and the Individual Defendants and the Company provided many risk warnings in GTAT's SEC filings such that investors were well aware that the project could fail. Moreover, even if Class Representatives succeeded in proving that the Individual Defendants made materially false and misleading

statements and omissions, Apple would have continued to advance substantial arguments that the Individual Defendants did not act with the requisite scienter to commit securities fraud.

Furthermore, Class Representative would have confronted additional challenges in establishing loss causation with respect to one or both of the alleged corrective disclosures, even if they were able to establish the liability of the Individual Defendants. In this regard, Apple has argued, among other things, that (i) the September 9, 2014 announcement revealing the new iPhone (which did not include sapphire cover glass) did not correct any prior misstatement by GTAT; and (ii) the October 6, 2014 announcement of GTAT's bankruptcy announcement was also not a corrective disclosure because the Company's bankruptcy was a business decision by GTAT that was made despite the fact that GTAT could perform under the Apple Agreement.

Finally, Apple would have continued to argue that, even if Class Representatives could prove primary liability claims against the Individual Defendants, Apple was not a "control" person under the securities laws and, therefore, the Class was not entitled to any additional recovery beyond the amounts already recovered in the Action.

The proposed Apple Settlement avoids these risks and delays while providing a substantial, certain, and immediate benefit to the Class in the form of an additional cash payment of $3,500,000. Furthermore, Class Representatives have closely monitored and participated in the litigation of the claims against Apple and they recommend that the Settlement be approved. *See* Declaration of Lead Plaintiff Douglas Kurz ("Kurz Declaration"), Ex. 1, at ¶¶3-5, 9; Declaration of Bradley R. Goldman, on behalf of Securities Act Plaintiff Palisade ("Goldman Decl."), Ex. 2, at ¶¶ 4-6, 10. Likewise, Class Counsel, which has extensive experience in prosecuting securities class actions, strongly believes that the proposed Settlement is fair, reasonable, and adequate and in the best interests of the Class.

For these reasons and the reasons set forth below, Class Representatives respectfully submit that the Apple Settlement is fair, reasonable, and adequate and warrants final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. *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); *see also see Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010); *City P'Ship Co. v. Atlantic Acquisition Ltd. P'Ship*, 100 F.3d 1041, 1043 (1st Cir. 1996).

The determination of whether a settlement is fair, reasonable, and adequate is within the Court's sound discretion. *See City P'Ship*, 100 F.3d at 1043-44. The Court should not "prejudge the merits of the case" or "second-guess the settlement." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 211 (D. Me. 2003). Instead, the Court's role is limited to "determin[ing] if the parties' conclusion is reasonable." *Id*. Indeed, "[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. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 68 (D. Mass. 1997) (citation omitted).

In evaluating a settlement, the Court should also consider the strong public policy favoring settlement, particularly in class actions. *See Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (noting the "strong public policy in favor of settlements") (citation omitted); *In re Tyco Int'l Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007) ("public policy

generally favors settlement – particularly in class actions as massive as the case at bar"); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014) ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation. Thus, the procedural and substantive fairness of a settlement should be examined 'in light of the "strong judicial policy in favor of settlement[ ]" of class action suits.'") (citation omitted).

Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering 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. 23(e)(2). These factors strongly support approval of the Settlement here.

In addition, while "[t]he First Circuit has not established a fixed test for evaluating the fairness of a settlement," *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 602 F. Supp. 2d 277, 280 (D. Mass. 2009) (citation omitted), many Courts in this Circuit have considered the following factors, initially set forth by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), in conducting their analysis:

> (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial;

> (7) the ability of defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

First Databank, 602 F. Supp. 2d at 280-81 (quoting *Grinnell*, 495 F.2d at 463); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005) (same); *In re Lupron Mktg. & Sales Prac. Litig.*, 228 F.R.D. 75, 93-94 (D. Mass. 2005) (same); *In re StockerYale, Inc. Sec. Litig.*, No. 1:05cv00177-SM, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007) (same).[4]

The Advisory Committee Notes to the 2018 amendments to the Federal Rules of Civil Procedure indicate that the four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the Court of Appeals, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Advisory Committee Notes to 2018 Amendments.

Accordingly, Class Representatives will discuss the fairness, reasonableness, and adequacy of the Settlement principally in relation to the four factors set forth in Rule 23(e)(2), but will also discuss the application of relevant, non-duplicative *Grinnell* factors. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 310 F.R.D. 11, 29 (E.D.N.Y. 2019) ("The Court understands the new Rule 23(e) factors to add to, rather than displace, the *Grinnell* factors.").

A. Class Representatives and Class Counsel Have Adequately Represented the Class

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A).

[4] Other courts in this Circuit have considered similar but slightly different sets of factors. *See, e.g.*, *Tyco,* 535 F. Supp. 2d at 259-260; *Compact Disc*, 216 F.R.D. at 206.

Here, Class Representatives and Class Counsel have adequately represented the Class in both their vigorous prosecution of the Action and in the negotiation and achievement of the Apple Settlement. Class Representatives have claims that are typical of and coextensive with those of other Class Members and have no interests antagonistic to the interests of other Class Members. On the contrary, Class Representatives—like other Class Members—have an interest in obtaining the largest possible recovery from Apple in this Action. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.") (citation omitted). In addition, Court-appointed Class Counsel is highly qualified and experienced in securities litigation, as set forth in its firm resume (*see* Ex. 4A-3), and was able to successfully conduct the litigation against skilled opposing counsel.

Accordingly, as the Court previously found in certifying the Class and appointing Lead Plaintiff Kurz and Securities Act Plaintiff Palisade as Class Representatives and Lead Counsel BLB&G as Class Counsel, Class Representatives and Class Counsel have and will adequately represent the Class. *See* Dkt. 245 at 42-44, 46.

B. The Apple Settlement Was Reached After Arm's-Length Negotiations and Following Substantial Discovery

In weighing approval of a class action settlement, the Court must consider whether the settlement "was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Courts have traditionally considered other related circumstances in determining the "procedural" fairness of a settlement, including (i) counsel's understanding of the strengths and weakness of the case based on factors such as "the stage of the proceedings and the amount of discovery completed,"[5] and (ii) the absence

[5] *See Grinnell*, 495 F.2d at 463 (third factor); *see also In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015) ("*Facebook*") ("the question is whether *(Cont'd)*

of any indicia of collusion.[6] These circumstances strongly support the approval of the Settlement here.

At the time the parties reached the Settlement, the knowledge of Class Representatives and their counsel, and the proceedings themselves, had reached a stage where the parties could make a well-founded evaluation of the claims and propriety of settlement of the claims against Apple. As discussed above and in the Ormsbee Declaration and the First Settlement Declaration previously filed with the Court in support of the Earlier Settlements (Dkt. 188), Class Counsel conducted an extensive investigation into the alleged fraud by, among other things, reviewing the voluminous public record (including relevant SEC filings, earnings announcements and press releases, transcripts of analyst conference calls, investor presentations, and news articles), and conducting interviews with multiple potential witnesses (including 132 former GTAT employees). After Class Representatives reached an agreement to settle all claims against the Individual Defendants and Underwriter Defendants, Class Representatives then engaged in an enormous discovery process to prosecute their claims against Apple, including the review and analysis of over 400,000 documents totaling over 2.3 million pages of documents, and conducting, defending, or actively participating in 28 fact, class, and expert depositions, including the depositions of GTAT's former CEO, two CFOs and COO, and seven expert depositions related to class and expert discovery. ¶¶4, 9-11, 40, 48-62. Lead Counsel also performed extensive legal research in

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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"), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

[6] *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) ("the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, [and] the extensive discovery preceding settlement . . . are important indicia of the propriety of settlement negotiations").

preparing the 131-page Complaint, the briefing in opposition to Defendants' multiple motions to dismiss the Complaint, and Lead Plaintiff's motion for class certification. ¶¶25-26, 37-38, 41, 43-45, 47. The class certification motion also involved the preparation of two substantial expert reports from Lead Plaintiff's market efficiency and damages expert; defending the depositions of Lead Plaintiff, three representatives of the Securities Act Plaintiff, and Lead Plaintiff's expert; and deposing Apple's expert. ¶¶40, 42. Thus, the advanced stage of the proceedings and the substantial amount of discovery conducted in the Action supports approval of the Settlement. *See StockerYale*, 2007 WL 4589772, at *3 (finding that courts consider whether "class counsel adequately appreciated the merits of the case" prior to negotiating the settlement).

Moreover, the circumstances surrounding the settlement negotiations are devoid of any indicia of collusion between the parties. Lead Plaintiff and Apple first explored the possibility of settlement in the fall of 2017. On October 2, 2017, Lead Counsel and counsel for Apple and the Individual Defendants participated in a full-day mediation session before retired United States District Court Judge Layn R. Phillips, prior to which the parties exchanged detailed mediation statements and exhibits addressing liability and damages. While the parties gained a better understanding of each other's position, Lead Plaintiff and Apple were unable to reach a settlement during the mediation and continued to vigorously litigate the control person claims asserted against Apple for an additional two years. ¶30. Then, following the close of fact and expert discovery and the filing of Apple's motion for summary judgment in September 2019, Class Representatives and Apple once again explored the possibility of settlement. As the result of arm's-length negotiations between the parties in September, October, and November 2019, Class Representatives and Apple agreed to a settlement in principle in November 2019. ¶68. Accordingly, the proposed Settlement, which was reached only after arm's-length negotiations

between the parties following significant litigation and wide-ranging discovery, is procedurally fair and is entitled to a presumption of reasonableness. *See Relafen*, 231 F.R.D. at 71-72; *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) ("settlement negotiations . . . conducted at arms' length over several months . . . support 'a strong initial presumption' of the Settlement's substantive fairness"); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (a class action settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arms' length negotiations between experienced, capable counsel after meaningful discovery") (citation omitted).

The informed determination by Class Representatives and Class Counsel that the Apple Settlement is fair, reasonable, and in the best interests of the Class further supports approval of the Settlement. Class Representatives took an active role in supervising this litigation and were kept apprised of the progress of the settlement negotiations with Apple, and have strongly endorsed the Settlement. *See* Kurz Decl. ¶¶3-5, 9; Goldman Decl. ¶¶4-6, 10. Class Representatives' endorsement supports approval of the Settlement. *See, e.g., City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014) ("the recommendation of Lead Plaintiff, a sophisticated institutional investor, also supports the fairness of the Settlement").

In addition, Class Counsel is highly experienced in securities class action litigation and was well-informed about the facts of the case, and has likewise concluded that the Settlement is in the best interests of the Class. *See* ¶111. The judgment of experienced and well-informed class counsel should be accorded great weight by the Court. *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair,

reasonable and adequate should be given significant weight.") (citation omitted); *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.").

C. The Relief that the Settlement Provides for the Class is Adequate, Taking into Account the Costs and Risks of Further Litigation and All Other Relevant Factors

In determining whether a class action settlement is "fair, reasonable, and adequate," the Court must consider whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal" as well as other relevant factors. Fed. R. Civ. P. 23(e)(2)(C). In most cases, this will be the most important factor for the Court to consider in its analysis of the proposed settlement. *See Grinnell*, 495 F.2d at 455 ("The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.") (citation omitted).[7]

Here, the complexity of the claims against Apple and the substantial expense and delay that would result if Class Representatives sought to achieve a litigated verdict against Apple weigh strongly in favor of approval of the Settlement. *See StockerYale*, 2007 WL 4589772, at *3 (this factor "captures the probable costs, in both time and money, of continued litigation"); *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02–CV–3400 (CM)(PED), 2010 WL 4537550, at *15

[7] Indeed, this factor under Rule 23(e)(2)(C) essentially encompasses at least six of the nine factors of the traditional *Grinnell* analysis. *See Grinnell*, 495 F.2d at 463 ("(1) the complexity, expense and likely duration of the litigation; . . . (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; . . . (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation") (citations omitted).

(S.D.N.Y. Nov. 8, 2010) "[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'") (citation omitted).

As discussed in detail in the Ormsbee Declaration and below, continued litigation of the Action against Apple presented numerous risks that Class Representatives would be unable to establish liability (both primary and control) and damages. In addition, continuing the litigation through trial and appeals would impose substantial additional costs on the Class and would result in extended delays before any recovery from Apple could be achieved, assuming Class Representatives were successful in defeating Apple's pending motion for summary judgment and motion to exclude the expert testimony of Plaintiffs' damages expert. The Apple Settlement, which provides an additional recovery of $3.5 million for Class Period investors in GTAT Securities, on top of the $36.7 million previously recovered in this Action, avoids those further costs and delays, and the risks associated with the continued litigation of the Action.

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

While the claims asserted against Apple were upheld as the motion to dismiss stage, Class Representatives faced a significant risk that the Court would determine that they failed to establish liability or damages as a matter of law at summary judgment, or, if the Court were to permit the claims to proceed to trial, that a jury (or appeals court) would find against them.

(a) Risks to Proving Material Falsity and Scienter with Respect to Control Person Liability

As noted above, in order to prove the control person claims asserted against Apple, Class Representatives would have to establish the underlying liability claims alleged in the Action. While Class Representatives and Class Counsel believe that the underlying liability claims have merit, Apple raised several strong arguments with respect to those claims which created a

significant risk that, after years of additional, hard-fought litigation, Class Representatives and the Class would recover nothing from Apple in this case. Indeed, while many of Apple's arguments were made unsuccessfully by Defendants on their motions to dismiss—when the Court was required to accept all allegations in the Complaint as true—there was a significant possibility that Apple would have succeeded on these arguments at summary judgment and subsequent states of the litigation when Class Representatives' allegations would need to be supported by admissible evidence. ¶82.

For example, Apple argued in its summary judgment motion that GTAT and the Individual Defendants fully disclosed the risks of the Apple Agreement and appropriately updated their disclosures as developments concerning the Apple venture unfolded. ¶78. Apple also argued that the Individual Defendants' allegedly false and misleading statements were not, in fact, false when made. According to Apple, many, if not all, of the allegedly false and misleading statements were immaterial as a matter of law or were immunized from liability because they were protected by the PSLRA's "safe harbor" provisions. ¶79. Apple also argued in its summary judgment motion, and would also argue to a jury, that the Apple venture was a uniquely risky project—the Company was literally trying to do something that had never been done before (or since), namely, manufacture sapphire of sufficient quality to be used as the screens for smartphones—and the Individual Defendants and the Company provided copious risk warnings such that investors were well aware that the project could fail. *Id.*

Even if the Class Representatives were able to prove that the Individual Defendants' statements were materially false, Class Representatives would have faced challenges in establishing that the Individual Defendants made the alleged false statements with scienter, *i.e.*, they intended to mislead investors or were severely reckless in making the statements. Apple

would continue to argue that both Mr. Gutierrez and Mr. Squiller, GTAT's former CEO and COO, respectively, genuinely believed that the Company could fulfill the terms of the Apple Agreement, and that GTAT was on a path to fulfilling the terms of the Apple Agreement during the Class Period. ¶80.

Moreover, Apple would continue to argue that the Class Representatives could not adequately prove scienter through motive and intent by way of the Individual Defendants' sales of GTAT stock. According to Apple, the Individual Defendants' stock sales were not unusual in amount in comparison to their holdings of GTAT stock options, and their pattern of selling during the Class Period was consistent with their sales before the Class Period. ¶81.

(b) Risks Related to Loss Causation and Damages

Even if Class Representatives were successful in overcoming each of the above risks and were able to establish primary liability, they would have confronted additional challenges in establishing loss causation and damages. *See Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005) (plaintiffs bear the burden of proving "that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'"). According to Apple, Class Representatives would not be able to establish loss causation with respect to one or both of the alleged corrective disclosures that revealed the truth regarding the alleged fraud. ¶84. Apple also contends that damages are curtailed because the Class Period cannot start until 2014, on the basis that a rational fact finder would not conclude that GTAT or Apple intended the Apple Agreement to fail the day it was announced. *Id.*

With respect to the alleged September 9, 2014 corrective disclosure, Apple argued that its announcement on that date revealing the new iPhone (which did not include sapphire cover glass) did not correct any prior statement by GTAT. ¶85. In support of its argument, Apple has pointed to the fact that neither GTAT nor Apple ever stated outright that the 2014 iPhones would contain

sapphire, and cites analyst reports and testimony in support of their position that many in the market never expected sapphire to be included in the iPhone products announced in 2014. *Id.* If the trier of fact ultimately agreed with Apple and found that Apple's non-GTAT-specific product announcement did not reveal a concealed fact, damages would be significantly reduced.

Apple also argued that the October 6, 2014 GTAT bankruptcy announcement was not a corrective disclosure. Given that the GTAT stock plummeted to nearly $0 on this news, the bulk of the Class's potential damages are attributed to this disclosure. ¶85. If the trier of fact accepted Apple's argument that GTAT's bankruptcy was a business decision by GTAT that was made despite the fact that GTAT could perform under the Apple Agreement, Class Representatives faced dismissal on the grounds of loss causation. In addition, Apple argued that the bankruptcy filing was a manifestation of known risks and not concealed risks, given the market's awareness that GTAT was struggling to perform by no later than September 9, 2014. *Id.*

(c) Risks Related to Proving Control Liability

As noted above, even if Class Representatives were able to establish the underlying liability of the Individual Defendants and prove loss causation and damages, Class Representatives must still prove that Apple had sufficient control over GTAT to establish liability for GTAT's misrepresentations. Further, even if it were established that Apple did exert "control" over GTAT's statements and conduct, Apple could escape liability by establishing that it acted in "good faith."

In support of its "control" liability defense, Apple has pointed out that there is a dearth of cases supporting control liability in both this Circuit and the federal courts in general, and there have been few, if any, cases sustaining control person claims against a company unrelated to the issuer who is the primary subject of the Complaint. ¶88. Furthermore, Apple argued in its motion for summary judgment, and surely would argue at trial, that Apple did not have general power to

control GTAT. ¶89. Apple argued that Plaintiffs were foreclosed from asserting control liability claims against Apple because they could not demonstrate that "the alleged controlling person must not only have the general power to control the company, but must also actually exercise control over the company." *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 85 (1st Cir. 2002).

Apple further argued that the elements Class Representatives would point to as evidence of Apple's control over GTAT, including the Apple Agreement and negotiation terms, GTAT's sapphire operations, GTAT's public statements, and Apple's position as GTAT's lender, were aspects of a normal business relationship. ¶90. While Plaintiffs believe there is sufficient evidence to demonstrate that Apple's relationship with GTAT was not typical and exhibited key elements of control, Apple's arguments and expert testimony could have been persuasive to this Court or a jury. *Id.*

Finally, Apple's argument that it believed in good faith that the GTAT project could succeed, accompanied by evidence that it continued to invest significant resources in GTAT despite setbacks to the sapphire project and its genuine surprise at GTAT's decision to declare bankruptcy, could also be persuasive to this Court or a jury. ¶91.

In sum, proving Apple's control liability was a significant risk. Between the lack of cases supporting control liability where the controlling company does not exercise general control over the controlled company and Apple's persuasive arguments, Class Representatives recognized that there was a cognizable risk that the Class would not recover anything against Apple or that any recovery would not exceed the proposed Settlement.

Moreover, even if Class Representatives successfully established control person liability against Apple, Apple would argue to a jury that it should only apportion a small percentage—or none—of the proportionate liability for Defendants' violations of the federal securities laws.

Given the lack of false and misleading statements attributable to Apple, Apple's proportionate liability argument could persuade a jury to award less than the Apple Settlement Amount.

2. The Costs and Delays of Continued Litigation Support Approval of the Settlement

The substantial costs and delays that would be required before any recovery could be obtained through litigation also strongly support approval of the Apple Settlement. Courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007).

While the Apple Settlement was not reached until after the close of fact and expert discovery and the filing of Apple's summary judgment motion, achieving a litigated judgment against Apple in this Action would still have required substantial additional time and expense. Absent the Settlement, achieving a recovery for the Class would have required: (i) fully briefing and ultimately defeating Apple's motion for summary judgment and motion to exclude the opinion of Lead Plaintiff's damages expert; (ii) substantial pre-trial motion practice including *Daubert* motions and motions *in limine*; (iii) a trial involving substantial fact and expert testimony; and (iv) post-trial motions. Finally, whatever the outcome at trial, it is virtually certain that appeals would be taken from any verdict for Class Representatives. The foregoing would pose substantial expense for the Class and delay the Class's ability to recover on the remaining claims in the Action—assuming, of course, that Class Representatives were ultimately successful on those claims.

In contrast to this costly, lengthy, and uncertain litigation, the Settlement provides an immediate and certain additional recovery of $3.5 million for Class Members.

3. All Other Factors Set Forth in Rule 23(e)(2)(C) Support Approval of the Settlement

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" "the terms of any proposed award of attorney's fees, including timing of payment;" and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors also supports approval of the Settlement or is neutral and does not suggest any basis for inadequacy of the Apple Settlement.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Apple Settlement to eligible Claimants are well-established, effective methods that have been widely used in securities class-action litigation. Here, the proceeds of the Apple Settlement will be distributed to Class Members who either (i) previously submitted a valid Claim to the Court-approved Claims Administrator, Epiq Systems ("Epiq"), that was approved for payment from the Individual Defendant Settlement, or (ii) now submit a valid Claim to Epiq that is approved for payment from the Net Apple Settlement Fund. Epiq, an independent company with extensive experience handling the administration of securities class actions, will review and process all additional Claims received under the supervision of Lead Counsel, provide Claimants with an opportunity to cure any deficiencies in their Claims, and then mail or wire Claimants their *pro rata* share of the Net Apple Settlement Fund upon approval of the Court.[8] This type of claims processing is standard in securities class actions and has long been used and found to be effective.

[8] The Settlement is not a claims-made settlement. If the Settlement is approved, Apple will have no right to the return of any portion of Settlement based on the number or value of Claims submitted. *See* Apple Settlement Stipulation ¶15.

Such claim filing and processing is necessary because neither Class Representatives nor the Company possess individual investors' trading data that would allow the parties to create a "claims-free" process to distribute Settlement funds.

Second, the relief provided for the Class in the Settlement is also adequate when the terms of the proposed award of attorney's fees are taken into account. As discussed in the accompanying Fee Memorandum, the proposed attorneys' fees of 20% of the Apple Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Plaintiffs' Counsel and the risks in the litigation. Most importantly with respect to the Court's consideration of the fairness of the Settlement, is the fact that approval of attorneys' fees are entirely separate from approval of the Settlement, and neither Class Representatives nor Class Counsel may terminate the Settlement based on this Court's or any appellate court's ruling with respect to attorneys' fees. *See* Apple Settlement Stipulation ¶19.

Lastly, the amended Rule 23 asks the court to consider the fairness of the proposed settlement in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the only such agreement (other than the Apple Settlement Stipulation itself) is the parties' confidential Supplemental Agreement, which sets forth the conditions under which Apple would be able to terminate the Settlement if the number of Class Members who request exclusion from the Class reaches a certain threshold. This type of agreement is a standard provision in securities class actions and has no negative impact on the fairness of the Settlement. *See Hefler v. Wells Fargo & Co.*, No. CV-02-1510, 2018 WL 6619983, at *7 (N.D. Cal. Dec. 18, 2018).

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

Rule 23(e)(2)(D) requires that the proposed Settlement "treats class members equitably relative to each other." Under the terms of the Settlement, eligible members of the Apple Class

that previously submitted or now submit Claims approved for payment by the Court will receive their *pro rata* share of the Apple recovery based on their Class Period transactions in GTAT Securities. Pursuant to the Court's Order Preliminarily Approving Settlement with Defendant Apple Inc. and Providing for Notice, dated March 3, 2020 (the "Order Preliminarily Approving Apple Settlement") (Dkt. 254), the Plan of Allocation approved by the Court in connection with the Earlier Settlements (*see* Dkt. 191) will be utilized for determining the allocation of the proceeds of the Apple Settlement to eligible Apple Class Members. Specifically, the Claims of Apple Class Members will be calculated under the Court-approved Plan of Allocation in the same manner that the Claims of members of the Individual Defendant Settlement Class are calculated under the Plan of Allocation. *See* Dkt. 191, ¶9(a). Class Representatives will receive precisely the same level of *pro rata* recovery (based on their Recognized Claims as calculated under the Plan of Allocation) as all other Class Members. Accordingly, the requirements of Rule 23(e)(2)(D) are satisfied here.

In sum, all of factors to be considered under Rule 23(e)(2) support a finding that the Settlement is fair, reasonable, and adequate.

E. The Reaction of the Class to the Settlement

One factor set forth in *Grinnell* but not included in Rule 23(e)(2) that should be considered is the reaction of the class to the proposed Settlement, which is an important factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at * 8 (D. Mass. Jan. 8, 2015) (citation omitted) (finding that the "favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval.").

In accordance with the Order Preliminarily Approving Apple Settlement, Epiq began mailing copies of the Apple Settlement Notice to potential Class Members and nominees on March 31, 2020. *See* Declaration of Jaime Firenze (the "Firenze Decl."), submitted on behalf of Epiq

(Ex. 3), at ¶¶2-5. Through May 8, 2020, Epiq mailed 211,148 copies of the Apple Settlement Notice. *See id*. ¶7. In addition, Epiq caused the Apple Summary Settlement Notice to be published in the *Investor's Business Daily* and to be transmitted over the *PR Newswire* on April 13, 2020. *See id*. ¶8. The Apple Settlement Notice set out the essential terms of the Apple Settlement and informed potential Class Members of, among other things, their right to opt out of the Apple Class or object to any aspect of the Apple Settlement, as well as the procedure for submitting Claim Forms.

While the deadline set by the Court for Class Members to exclude themselves or object to the Apple Settlement has not yet passed, to date, only one objection to the Apple Settlement and 5 requests for exclusion have been received from individual investors. ¶102. The deadline for submitting objections and requesting exclusion from the Class is May 25, 2020. As provided in the Order Preliminarily Approving Apple Settlement, Class Counsel will file reply papers no later than June 8, 2020 addressing all objections and requests for exclusion received.

* * *

II. NOTICE TO THE APPLE CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Apple Settlement Notice provided to the Apple Class satisfied the requirements of Rule 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, 173-75 (1974). The Apple Settlement Notice also satisfied Rule 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), 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." *Duhaime*, 177 F.R.D. at 61 (quoting *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974)).

Both the substance of the Apple Settlement Notice and the method of its dissemination to potential members of the Apple Class satisfied these standards. The Court-approved Apple Settlement Notice includes all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) and the PSLRA, 15 U.S.C. §§ 77z-1(a)(7), 78u-4(a)(7), including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the definition of the Class; (iii) the amount of the Settlement; (iv) an explanation of the reasons why the parties are proposing the Settlement; (v) a statement indicating the attorneys' fees and costs that will be sought; (vi) a description of Class Members' right to opt-out of the Class or object to the Settlement and/or the requested attorneys' fees or expenses; and (vii) notice of the binding effect of a judgment on Class Members.

As noted above, in accordance with the Order Preliminarily Approving Apple Settlement, beginning on March 31, 2020 through and including May 8, 2020, the Claims Administrator has mailed over 211,000 copies of the Apple Settlement Notice by first-class mail to potential Class Members and their nominees. *See* Firenze Decl. ¶¶2-7. In addition, Epiq caused the Apple Summary Settlement Notice to be published in the *Investor's Business Daily* and to be transmitted over the *PR Newswire* on April 13, 2020. *Id*. ¶8. Epiq also updated the case website originally established in connection with the Earlier Settlements—www.GTATSecuritiesLitigation.com—to provide potential Class Members with information concerning the Apple Settlement. The case website was also updated to provide access to downloadable copies of the Apple Settlement Notice, Apple Stipulation, and Order Preliminary Approving Apple Settlement, and copies of the Court-approved Plan of Allocation and Claim Form previously mailed to Class Members in connection with the Earlier Settlements remain posted to the case website and available for

downloading.[9] This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate, widely-circulated publication, transmitted over the newswire, and set forth on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g.*, *Advanced Battery Techs.*, 298 F.R.D. at 182-83; *Schwartz v. TXU Corp.*, No. 3:02CV-2243-K, 2005 WL 3148350, at *10-11 (N.D. Tex. Nov. 8, 2005); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-*13 (S.D.N.Y. 2009); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 35-36 (D.N.H. 2006).

CONCLUSION

For the foregoing reasons, Class Representatives respectfully request that the Court approve the proposed Apple Settlement as fair, reasonable and adequate.

Dated: May 11, 2020

Respectfully submitted,

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[9] In accordance with the Order Preliminary Approving Apple Settlement, the Claim Form posted to the case website was updated to include the revised postmark deadline of June 29, 2020 for the submission of Claims submitted in connection with the Apple Settlement.

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CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Class Representatives' Motion for Final Approval of Settlement with Defendant Apple Inc. was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on May 11, 2020.

/s/ Jennifer Eber
Jennifer Eber