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 LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF INDIVIDUAL DEFENDANT AND UNDERWRITER DEFENDANT SETTLEMENTS AND PLAN OF ALLOCATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff, Douglas Kurz ("Lead Plaintiff"), on behalf of himself and the Settlement Classes, respectfully submits this memorandum of law in support of final approval of the proposed settlements resolving all claims against the Individual Defendants and the Underwriter Defendants (collectively, the "Settling Defendants") (but not the claims against Apple) for a total payment of $36.7 million in cash (the "Settlements"), and for approval of the proposed plan of allocation of the proceeds of the Settlements (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Lead Plaintiff has agreed subject to Court approval to settle all claims asserted against the Individual Defendants in exchange for $27 million in cash (the "Individual Defendant Settlement") and against the Underwriter Defendants in exchange for $9.7 million in cash (the "Underwriter Defendant Settlement"), for a total settlement value of $36.7 million in cash.[2] Lead Plaintiff respectfully submits that the proposed Settlements are fair, reasonable, and adequate and should be approved.

---

[1] Lead Counsel are simultaneously submitting the Declaration of John C. Browne in Support of: (I) Lead Plaintiff's Motion for Final Approval of Individual Defendant and Underwriter Defendant Settlements and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Browne Declaration" or "Browne Decl.") (cited as "¶"). Capitalized terms have the meanings ascribed to them in the Browne Declaration, the Stipulation and Agreement of Settlement with Individual Defendants dated January 26, 2018 (ECF No. 178-1), or the Stipulation and Agreement of Settlement with Settling Underwriter Defendants dated August 18, 2017, and the supplement thereto dated January 26, 2018 (ECF No. 178-2).

[2] The proposed Settlements do not settle any of the claims asserted against the remaining defendant in the Action, Apple, Inc. ("Apple" or the "Non-Settling Defendant"), which Lead Plaintiff will continue to prosecute. As a result of its filing for bankruptcy protection, GT Advanced Technologies, Inc. ("GTAT") was not named as a defendant in this Action.

The very favorable recovery achieved in this partial settlement already represents the fourth-largest securities class action recovery in New Hampshire history (and the claims against Apple are continuing). This is a considerable achievement given the bankruptcy of GTAT and the very limited resources available to fund a settlement from the Individual Defendants.

Lead Plaintiff and Lead Counsel have a well-developed understanding of the strengths and weaknesses of the Action. Lead Counsel has committed the resources necessary to comprehend fully the classes' claims and the Settling Defendants' defenses. These efforts are detailed with particularity in the Browne Declaration,[3] and include (i) conducting an extensive investigation that included interviews with multiple potential witnesses (including 132 former GTAT employees) (¶¶5, 33-36); (ii) researching, drafting, and filing the initial complaint and 131-page Consolidated Class Action Complaint (the "Complaint") (¶¶5, 37-38); (iii) briefing in opposition to Defendants' five motions to dismiss totaling more than 2,700 pages (¶¶5, 41-48); (iv) consulting with an expert on the issue of damages (¶¶5, 36); and (viii) reviewing and analyzing more than 13,500 documents obtained from Defendants that totaled more than 70,000 pages (¶¶5, 52-53).

Lead Counsel also engaged in extensive arms'-length settlement negotiations both directly and through a formal mediation involving the Individual Defendants and a professional mediator, the Honorable Layn R. Phillips, which involved the exchange of mediation statements that addressed both liability and damages. ¶59.

Lead Plaintiff respectfully submits that the Settlements are particularly noteworthy considering the substantial litigation risks involved in advancing the claims against the Settling

[3] The Browne 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 history of the Action (¶¶30-65); the nature of the claims asserted (¶¶17-29); the negotiations leading to the Settlements (¶¶50, 58-63); and the risks and uncertainties of continued litigation (¶¶66-82).

Defendants. ¶¶66-82. While Lead Plaintiff and Lead Counsel believe that those claims are meritorious, they recognize the substantial challenges to establishing the Settling Defendants' liability, demonstrating loss causation and proving damages, and achieving a greater recovery.

First and foremost, Lead Plaintiff faced the very significant risk that, even if Plaintiffs succeeded at trial (and after appeals from any verdict), the Individual Defendants would not be able to fund a judgment larger than the Individual Defendant Settlement, given the limited and depleting amount of liability insurance coverage available to the Individual Defendants. ¶¶12, 73-74. This was essentially the only source of recovery from the Individual Defendants in light of GTAT's bankruptcy filing and the relatively limited assets of the Individual Defendants.

There were also substantial risks to liability. The Settling Defendants would have vigorously defended themselves and forced Lead Plaintiff to produce evidence on each element of the claims asserted against them. In particular, the Settling Defendants would have argued that Lead Plaintiff could not establish the elements of falsity and materiality. The Settling Defendants would have argued that the alleged false and misleading statements were not false when made since the Individual Defendants believed that GTAT would successfully create sapphire for Apple under the terms of the agreement. ¶¶75-77.

Defendants would have also contended that GTAT's sapphire venture with Apple was extremely risky. In essence, GTAT was trying to do something that had never been done before or since – create and manufacture artificial sapphire crystals of sufficient quality to be used as the screens for smartphones. The Settling Defendants would have pointed to the many risk warnings in GTAT's SEC filings and claimed at summary judgment and trial that many allegedly false statements were immunized from liability because they were protected by the PSLRA's "safe harbor" provision or were otherwise immaterial as a matter of law. ¶¶8, 77. In addition, the

Underwriter Defendants, who were being sued solely with respect to the December 2013 offerings of debt and equity securities, had no liability exposure with respect to the Plaintiffs' claims with respect to statements made by the Individual Defendants during most of the class period. The Underwriter Defendants have argued that the Offerings were effected before GT had even begun to perform the Apple contract and, in any event, that they performed appropriate due diligence and thus had a complete defense to any claim under the securities laws. ¶¶79-80.

Furthermore, even if Lead Plaintiff succeeded in proving that the Individual Defendants made materially false and misleading statements and omissions, the Individual Defendants would have advanced substantial arguments that they did not act with the requisite scienter to commit securities fraud. This issue would have centered on complex issues of proof regarding the Individual Defendants' state of mind, with no guarantee that Lead Plaintiff would prevail. ¶¶10, 76. For example, Defendants would have pointed to the fact that Apple's substantial investment in the project makes it implausible to suggest that Defendants thought it was doomed to failure. Along a similar vein, Defendants would have noted that Apple made substantial contractual prepayments during the Class Period, which, again, cuts against the notion that the project was failing.

Finally, even if Lead Plaintiff was successful in establishing liability at trial, there were significant risks to damages. The Underwriter Defendants had cogent arguments that, if accepted at summary judgment, *Daubert* motions, trial or appeal, would have drastically reduced or entirely eliminated damages with respect to claims asserted against them. *See* ¶¶11, 78-80.

The proposed Settlements avoid these risks and delays while providing a substantial, certain, and immediate benefit to the Settlement Classes in the form of a combined payment of $36.7 million in cash. Furthermore, Lead Plaintiff and the Securities Act Plaintiffs have closely

monitored and participated in this litigation from the outset, participated in the settlement negotiations, and they recommend that the Settlements be approved. *See* Declaration of Douglas Kurz ("Kurz Decl."), attached to the Browne Decl. as Exhibit 2, at ¶¶3-5; Declaration of Bradley R. Goldman ("Palisade Fund Decl."), attached to the Browne Decl. as Exhibit 3, at ¶¶4-5; Declaration of Robert C. Varnell ("Highmark Decl."), attached to the Browne Decl. as Exhibit 4, at ¶¶4-5. Likewise, Lead Counsel, which has extensive experience in prosecuting securities class actions, strongly believes that the proposed Settlements are fair, reasonable and adequate and in the best interests of the Settlement Classes. ¶¶13, 16, 105.

Lead Plaintiff also moves for approval of the proposed Plan of Allocation of the Net Settlement Funds as fair and reasonable. The Plan of Allocation was developed in conjunction with a well-regarded economist and is designed to fairly and equitable distribute the proceeds of the Settlements to members of the Settlement Classes. *See* ¶¶14, 96.

For these reasons and the reasons set forth below, Lead Plaintiff respectfully submits that both the Settlements and Plan of Allocation are fair, reasonable and adequate and warrant final approval by the Court.

ARGUMENT

I. THE PROPOSED SETTLEMENTS WARRANT FINAL APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action settlement must be presented to the Court for approval. The Settlements should be approved if the Court finds them "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *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); *Braun v. GT Solar Int'l, Inc.*, No. 1:08-CV-00312-JL, slip op. (D.N.H. Sep. 27, 2011), ECF No. 139 (Ex. 10). Courts "enjoy great discretion to 'balance [a settlement's] benefits and costs' and apply this general standard." *Voss*, 592 F.3d at 251.

Courts generally consider both "the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005). For courts in the First Circuit, the evaluation of the settlement "requires a wide-ranging review of the overall reasonableness of the settlement that relies on neither a fixed checklist of factors nor any specific litmus test." *In re Tyco Int'l Ltd. Multidistrict Litig.,* 535 F. Supp. 2d 249, 259 (D.N.H. 2007); *see also New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 602 F. Supp. 2d 277, 280 (D. Mass. 2009) ("The First Circuit has not established a fixed test for evaluating the fairness of a settlement."). However, 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 attendants risks of litigation.

First Databank, 602 F. Supp. 2d at 280-81 (quoting *Grinnell*, 495 F.2d at 463); *Relafen*, 231 F.R.D. at 72 (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 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

[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; *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003).

the merits of the case" or "second-guess the settlement." *Compact Disc*, 216 F.R.D. at 211. 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 must 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"); *Tyco*, 535 F. Supp. 2d at 259 ("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.'").

A. The Settlements Were Reached Following Extensive Arm's-Length Negotiations and Are Endorsed by Plaintiffs and Lead Counsel

Where the parties have negotiated a settlement at arms'-length and have conducted sufficient discovery, the district court should presume that the settlement is reasonable. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009); *City P'Ship*, 100 F.3d at 1043; *Relafen*, 231 F.R.D. at 71-72; *Lupron*, 228 F.R.D. at 93.

Here, the Settlements merit a presumption of reasonableness because they were achieved only after years of vigorous litigation and after prolonged arms'-length settlement negotiations

between well-informed and experienced counsel. ¶¶50, 58-60. Plaintiffs and their counsel were knowledgeable about the strengths and weaknesses of the case prior to finalizing the stipulations with the Settling Defendants. For example, Lead Counsel had: conducted a thorough investigation of the claims in the Action, including interviewing former GTAT employees and consulting with experts; researched and drafted the detailed Complaint; briefed opposition to Defendants' five motions to dismiss; consulted with an expert on damages-related issues; and engaged in arm's-length negotiations with the Settling Defendants' counsel. ¶¶5, 33-36, 50, 58-60. In addition, Lead Counsel had conducted meaningful due diligence discovery related to the Underwriter Defendant Settlement, including the review of 13,500 documents totaling approximately 70,000 pages of documents produced by the Underwriter Defendants. ¶¶5, 52-53. Accordingly, the proposed Settlement 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").

Further, the proposed Individual Defendant Settlement was achieved only after a mediation session conducted under the auspices of an experienced and highly respected mediator, the Honorable Layn R. Phillips, on October 2, 2017. Although no agreement to settle was reached during the mediation session, the parties gained a better understanding of each other's position. Following continued negotiations after the mediation session, Lead Plaintiff reached an agreement in principle to settle the Action against the Individual Defendants for $27 million in cash on October 13, 2017. ¶¶59-60. Judge Phillips believes that this recovery "is reasonable and fair for the Individual Defendant Settlement Class and all parties involved."[5] The active involvement of

[5] Declaration of Layn R. Phillips, attached to the Browne Decl. as Exhibit 1, at ¶13.

an experienced, independent mediator provides strong evidence of the absence of collusion, and supports approval of the Settlements. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (mediator's involvement "helps to ensure that the proceedings were free of collusion and undue pressure").

The informed determination by Lead Plaintiff and the Securities Act Plaintiffs and Lead Counsel that the Settlements are fair, reasonable, and in the best interests of the Settlement Classes further support approval of the Settlements. Lead Plaintiff and the Securities Act Plaintiffs took an active role in supervising this litigation and were kept apprised of the progress of settlement negotiations with the Settling Defendants, and have strongly endorsed the Settlements. *See* Kurz Decl. ¶¶3-5; Palisade Fund Decl. ¶¶4-5; Highmark Decl. ¶¶4-5. Plaintiffs' endorsement further supports approval of the Settlements. *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, Lead 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 Settlements are in the best interests of the Settlement Classes. *See* ¶¶13, 16, 105. 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."); *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.").

B. Consideration of All Relevant Factors Supports the Approval of the Settlements as Substantively Fair, Reasonable and Adequate

Consideration of all the relevant factors set forth in *Grinnell* and adopted by the courts in this Circuit strongly supports approval of the Settlements as fair, reasonable and adequate.

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

The complexity of this case and the substantial expense and delay that would result if Lead Plaintiff sought to achieve a litigated verdict weigh strongly in favor of approval of the Settlements. *See StockerYale*, 2007 WL 4589772, at *3 (this factor "captures the probable costs, in both time and money, of continued litigation"); *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at *11 (E.D. La. Mar. 2, 2009) (where continued litigation, including through discovery, class certification, trial and appeals, "would consume substantial judicial and attorney time and resources . . . avoiding such costs weighs in favor of settlement").

Continued litigation of this Action against the Individual Defendants and the Underwriter Defendants would have required additional years of additional time and expense, including: completing fact discovery and complex and expensive expert discovery on issues such as loss causation and damages; briefing on class certification and a potential Rule 23(f) appeal; expected motions for summary judgment; and a trial. Even then, it is virtually certain that appeals would be taken from any verdict, further delaying the receipt of any recovery by the class. ¶81; *see Relafen*, 231 F.R.D. at 72 ("in light of the high stakes involved, an appeal is certain to follow regardless of the outcome at trial") (internal quotation marks omitted).

All of the foregoing would pose substantial expense for the Settlement Classes and delay the classes' ability to recover – assuming, of course, that Plaintiffs were ultimately successful on

their claims. Furthermore, in this case, there is a substantial risk that the years of delay would deplete the only meaningful source of recovery from the Individual Defendants – the insurance proceeds. In contrast, the proposed Settlements provide an immediate, significant and certain recovery of a combined $36.7 million for members of the Settlement Classes, without subjecting them to the risk, delay and expense of continued litigation. Accordingly, this factor strongly supports approval of the Settlements.

2. The Reaction of the Settlement Classes Supports Approval of the Settlements

"The 'favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval.'" *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 WL 127728, at * 8 (D. Mass. Jan. 8, 2015) (citation omitted). Here, the reaction of the Settlement Classes to date also supports approval of the Settlements. Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Garden City Group, LLC ("GCG"), began mailing copies of the Notice and Claim Form to potential members of the Settlement Classes and nominees on March 14, 2018. *See* Declaration of Jose C. Fraga Regarding (A) Mailing of Notice and Claim Form; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received to Date ("Fraga Decl."), attached as Exhibit 6 to the Browne Decl., at ¶¶2-4. As of May 23, 2018, GCG had mailed a total of 179,435 copies of the Notice Packet (consisting of the Notice and Claim Form) to potential members of the Settlement Classes and their nominees. *See id*. ¶7. In addition, a Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire* on March 26, 2018. *See id*. ¶8. The Notice set out the essential terms of the Settlements and informed potential Settlement Class Members of, among other things, their right to opt out of the Settlement Classes or object to any aspect of the Settlements, as well as the procedure for submitting Claim Forms.

While the deadline for members of the Settlement Classes to exclude themselves or object to the Settlements has not yet passed, to date, no objections to the Settlements or the Plan of Allocation and only 3 requests for exclusion have been received from individual investors. Fraga Decl. ¶11. *See, e.g.*, *Roberts v. TJX Cos., Inc.*, No. 13-cv-13142-ADB, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) (finding the fact that no class members objected to the settlement and only three of the 4,018 class members requested exclusion supported approval of the settlement). The deadline for submitting objections and requesting exclusion from the Settlement Class is June 7, 2018. As provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers on June 21, 2018 addressing all requests for exclusion, and any objections, received. ¶90.

3. The Stage of the Proceedings and the Amount of Information Available to Counsel Support Approval of the Settlements

This factor "captures "'the degree of case development that class counsel [had] accomplished prior to settlement.'" *StockerYale*, 2007 WL 4589772, at *3 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001)). Courts consider whether "class counsel adequately appreciated the merits of the case" prior to negotiating the settlement. *See id*. Formal discovery is not required prior to settlement. *See, e.g.*, *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" and this factor supported approval of the settlement).

Here, Lead Counsel expended significant time and resources analyzing and litigating the factual issues in this Action against the Settling Defendants, including by conducting a substantive investigation prior to filing the Complaint that included a review of relevant SEC filings, research reports by securities and financial analysts, news articles, and investor call transcripts, interviewing potential witnesses, and consulting with experts. ¶¶5, 33-36. After filing the Complaint, Lead

Counsel learned more about the Settling Defendants' defenses and the risks to the Settlement Classes' ability to recover through briefing Defendants' motions to dismiss and then even more through settlement negotiations. ¶¶41-45, 58-59. Finally, in agreeing in principle to settle the claims against the Underwriter Defendants, Lead Counsel expressly conditioned the Underwriter Defendant Settlement on its ability to conduct meaningful discovery into the fairness, reasonableness, and adequacy of the Individual Defendant Settlement. ¶51. By the time Lead Plaintiff finalized the Underwriter Defendant Stipulation, Lead Counsel had already conducted significant due diligence discovery. ¶¶52-55.

Thus, Lead Plaintiff and Lead Counsel clearly had a sufficient understanding of the strengths and weaknesses of the case when negotiating and evaluating the adequacy of the proposed Settlements. Accordingly, the substantial amount of information developed provided Lead Plaintiff and Lead Counsel with a well-informed basis for their belief that the Settlements are highly favorable to the Settlement Classes, and this factor supports approval of the Settlements.

4. The Risks of Establishing Liability and Damages Support Approval of the Settlements

In assessing the fairness, reasonableness, and adequacy of a settlement, Courts should consider "the risks of establishing liability [and] the risks of establishing damages." *Grinnell*, 495 F.2d at 463 (citations omitted). While Lead Plaintiff and Lead Counsel believe that the claims asserted against the Settling Defendants have merit, they recognize that there were risks in proving both liability and damages at trial, as explained below.

Even though Plaintiffs prevailed at the motion to dismiss stage, they recognize that the they would continue to face vigorous challenges from Defendants in proving that Defendants made actionable false statements and acted with scienter. ¶¶75-77, 79-80. For example, Defendants argued that the alleged false and misleading statements were not actually false when made because

the Individual Defendants believed that GTAT would successfully create sapphire for Apple under the terms of the agreement. ¶¶8, 77, 80. Additionally, Defendants argued that many, if not all, of the allegedly false and misleading statements were immunized from liability because they were either protected by the PSLRA's "safe harbor" provisions or otherwise immaterial as a matter of law. ¶¶8, 77.

Furthermore, even if Lead Plaintiff succeeded in establishing that Defendants made materially false and misleading statements and omissions, Defendants would have advanced arguments that they did not act with scienter, – *i.e.*, that they acted with a fraudulent state of mind and not merely negligence – which is often the most difficult element to prove in an Exchange Act claim. For example, the Individual Defendants argued and would have continued to argue that GTAT and its officers fully disclosed the risks of GTAT's agreement with Apple and appropriately updated their disclosures as new developments occurred. ¶¶10, 76.

In addition, since Defendants' motions to dismiss were pending at the time the agreement in principle to settle claims against the Underwriter Defendants was reached, Lead Plaintiff faced the risk that the Court could have narrowed or eliminated Plaintiffs' Securities Act Claims against the Underwriter Defendants. ¶¶9, 79. For example, the Underwriter Defendants argued that because the Offering Materials were issued less than one month after the beginning of the Class Period and before GTAT began the production of sapphire for Apple, it did not mislead investors about the terms of the Apple agreement and the risks to GTAT. The Underwriter Defendants have also asserted that they performed customary and appropriate due diligence in connection with the Offerings, which is a complete defense to a claim under the Securities Act. The Underwriter Defendants also argued that the Securities Act Plaintiffs lacked standing to bring claims against the Underwriter Defendants based on GTAT's Equity Offering because the Securities Act

Plaintiffs only purchased securities in GTAT's Debt Offering. ¶79. An adverse opinion on the Underwriter Defendants' motion to dismiss would have eliminated Plaintiffs' Securities Act claims, and thus eliminated any chance for recovery from the Underwriter Defendants. ¶80.

Even assuming Plaintiffs successfully established liability, they also faced risk in proving damages. For example, the Individual Defendants argued and would have continued to argue that Lead Plaintiff would not be able to establish loss causation with respect to one or both of the alleged corrective disclosures. ¶¶11, 75, 78. In addition, although the agreement in principle to settle claims against the Underwriter Defendants was reached while the Defendants' motions to dismiss were pending, the Underwriter Defendants maintained that they would ultimately be able to establish a full defense of negative causation, which if accepted by the Court on the Underwriter Defendants' renewed motion to dismiss, would have eliminated Plaintiffs' Securities Act Claims and any recoverable damages from the Underwriter Defendants. ¶¶79-80. The Settlements avoid these risks. *See, e.g.*, *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury."); *Tyco*, 535 F. Supp. 2d at 260-61 ("[E]ven if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages."). Thus, "[t]he complex issues surrounding damages . . . support final approval of the Settlement." *Aeropostale*, 2014 WL 1883494, at *9.

In sum, Lead Plaintiff and the Settling Defendants were deeply divided on key fact issues, and there was no guarantee Lead Plaintiff would prevail at either summary judgment or at trial. If the Settling Defendants had succeeded on any of their defenses, Lead Plaintiff and the class would have recovered nothing at all or, at best, would likely have recovered far less than the amount of the Settlements. When viewed in the context of these significant litigation risks and the

uncertainties involved with any litigation, the Settlements are very favorable results. Accordingly, this factor supports approval of the Settlements. *See, e.g.*, *StockerYale*, 2007 WL 4589772, at *3 (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"); *OCA*, 2009 WL 512081, at *13 (the substantial risks that plaintiffs faced in establishing loss causation and proving *scienter* favored approval of the settlement); *Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005) ("plaintiffs' uncertain prospects of success through continued litigation" – including challenges in proving that "the statements made by Defendants were false when made" and in establishing *scienter* – favored approval of the settlement).

5. The Risks of Maintaining Class Action Status Through Trial

This factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial" because "the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the [class action]." *StockerYale*, 2007 WL 4589772, at * 3 (internal quotations and citation omitted). Here, the Settling Defendants undoubtedly would have raised various challenges to certification of the classes, which would have required Lead Plaintiff and Lead Counsel to conduct targeted class certification discovery, including taking and defending depositions, and to retain experts to address the Settling Defendants' opposition. Even assuming Lead Plaintiff successfully got the classes certified, there could be the risk of decertification at a later stage in the proceedings. Here, the risk and uncertainty surrounding certification of the classes support approval of the Settlements. *See id*. at *3 (concluding that "the difficulties in maintaining this putative class weighs in favor of settlement."); *TJX*, 2016 WL 8677312, at *7 ("The numerous opportunities for certification to fail could lead to delay and create substantial risk of Plaintiffs failing completely.").

6. The Ability to Withstand a Greater Judgment

In evaluating this factor, Courts consider "whether the defendants could withstand a judgment for an amount significantly greater than the [s]ettlement." *StockerYale*, 2007 WL 4589772, at * 4 (internal quotations and citation omitted). Despite the outstanding recoveries obtained here, Lead Plaintiff believes that Underwriter Defendants could withstand a judgment greater than the $9.7 million Underwriter Defendant Settlement. However, "a defendant is not required to empty its coffers before a settlement can be found adequate." *In re Sturm, Ruger & Co. Sec. Litig.*, No. 3:09cv1293 (VLB), 2012 WL 3589610, at *7 (D. Conn. Aug. 20, 2012) (citation omitted). Indeed, this factor, standing alone, is not sufficient to preclude a finding of substantive fairness where, as here, the other factors weigh heavily in favor of approving a settlement. *See D'Amato*, 236 F.3d at 86. Thus, this factor is neutral with respect to approval of the Underwriter Defendant Settlement. *See, e.g.*, *Relafen*, 231 F.R.D. at 73; *Lupron*, 228 F.R.D. at 97.

With respect to the Individual Defendant Settlement, Lead Plaintiff appropriately considered the fact that GTAT was bankrupt and that the Individual Defendants' limited financial resources and depleting available insurance would render the collectability of any judgment above the Individual Defendant Settlement amount highly problematic. ¶¶12, 73-74. As a result of these considerations, Lead Plaintiff and Lead Counsel believe there was a very substantial risk that, even if Lead Plaintiff prevailed on all claims against the Individual Defendants through a lengthy litigation and secured a verdict at trial, the members of the Individual Defendant Settlement Class might not be able to recover on that judgment. ¶74. The fact that Lead Plaintiff secured a $27 million settlement from the Individual Defendants in the face of these limitations on collecting any larger amount after trial (when the available insurance coverage could likely have been substantially or entirely depleted) demonstrates that this is a very favorable recovery for the

Individual Defendant Settlement Class. Accordingly, this factor weighs in favor of final approval of the Individual Defendant Settlement.

7. The Range of Possible Recoveries and the Attendant Risks of Litigation Support Approval of the Settlements

When weighed against the risks of continued litigation, including the risks that there would be no recovery at all, the proposed Settlements representing a combined $36.7 million in cash recovery is an excellent result. As discussed above, if a jury or the Court had credited even some of the Settling Defendants' arguments, the Settlement Classes might have recovered nothing. ¶¶4, 75, 80. Moreover, given the stark ability-to-pay issues present in this case, further litigation against the Individual Defendants could have resulted in a far smaller recovery. In light of these risks, the Settlements provide very favorable results for the Settlement Classes.

* * *

In sum, all of the relevant factors – including the arm's-length nature of the settlement negotiations; the complexity, expense and delay of further litigation; the significant risks of establishing liability and damages; and Lead Plaintiff's and Lead Counsel's informed understanding of the strengths and weaknesses of the claims – support a finding that the Settlements are fair, reasonable and adequate.

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

A plan for allocating settlement proceeds, like the settlement itself, should be approved if it is fair, reasonable and adequate. *See Tyco*, 535 F. Supp. 2d at 262 ("Like the settlement itself, the plan of allocation must be fair, reasonable, and adequate."); *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (same). A plan of allocation is fair and reasonable as long as it has a "reasonable, rational basis." *Aeropostale*, 2014 WL 1883494, at *10 ("A plan of allocation 'need only have a reasonable, rational basis, particularly if recommended by

"experienced and competent" class counsel.'"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012) (same).

A plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable, but the plan "need not necessarily treat all class members equally." *Schwartz*, 2005 WL 3148350, at *23. 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 also 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"); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 669 (E.D. Va. 2001) (approving plan that "sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims"). In addition, in determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See Advanced Battery Techs.*, 298 F.R.D. at 180 ("When evaluating the fairness of a Plan of Allocation, courts give weight to the opinion of qualified counsel."); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 163 (S.D.N.Y. 2011) ("[i]n determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel").

Here, the proposed Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiff's damages expert, provides a fair and reasonable method to allocate the Net Settlement Funds among eligible Settlement Class Members who submit valid Claim Forms. In this Action, claims were asserted against the Individual Defendants under both the Securities Act and the Exchange Act, while claims were asserted against the Underwriter Defendants under the Securities Act only. Accordingly, under the Plan of Allocation, the net proceeds of the Underwriter Settlement will be allocated on a *pro rata* basis among eligible

Underwriter Defendant Settlement Class Members based solely on the "Securities Act Calculations" set forth for shares of GTAT common stock and GTAT Senior Notes purchased during the Class Period pursuant or traceable to the respective Offerings of those securities. ¶94. The proceeds of the Individual Defendant Settlement, on the other hand, will be allocated on a *pro rata* basis among eligible Individual Defendant Settlement Class Members based on both the "Exchange Act Calculations" and "Securities Act Calculations" set forth under the Plan of Allocation for all GTAT Securities purchased or otherwise acquired during the Class Period. *Id*.

Lead Counsel submits that the Plan of Allocation fairly and rationally allocates the Net Settlement Funds among eligible Settlement Class Members based on the losses they suffered on transactions in GTAT Securities attributable to the conduct alleged in the Complaint. ¶96. Moreover, the Plan of Allocation is set forth as Appendix A to the Notice, and to date no objections to the Plan have been received from any Settlement Class Members. ¶97. Accordingly, for all of the reasons set forth herein and in the Browne Declaration, the Plan of Allocation is fair and reasonable, and should be approved.

III. NOTICE TO THE SETTLEMENT CLASSES SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Settlement 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 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 Notice and the method of its dissemination to potential members of the Settlement Classes satisfied these standards. The Court-approved 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 Settlement Classes; (iii) the amount of each Settlement; (iv) a description of the Plan of Allocation; (v) an explanation of the reasons why the parties are proposing the Settlements; (vi) a statement indicating the attorneys' fees and costs that will be sought; (vii) a description of Settlement Class Members' right to opt-out of the Settlement Class(es) or object to the Settlements, the Plan of Allocation, or the requested attorneys' fees or expenses; and (viii) notice of the binding effect of a judgment on Settlement Class Members.

As noted above, in accordance with the Preliminary Approval Order, beginning on March 14, 2018 through and including May 23, 2018, the Claims Administrator has mailed over 179,400 copies of the Notice Packet by first-class mail to potential Settlement Class Members and their nominees. *See* Fraga Decl. ¶¶2-7. In addition, GCG caused the Summary Notice to be published in the *Wall Street Journal* and transmitted over the *PR Newswire* on March 26, 2018. *Id*. ¶8. Copies of the Notice, Claim Form, Stipulations, Preliminary Approval Order, and Complaint were made available on the settlement website maintained by GCG, www.GTATSecuritiesLitigation.com, beginning on March 14, 2018. *Id*. ¶10. This combination of individual first-class mail to all Settlement 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*, 2005 WL 3148350, at *10-*11; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-*13 (S.D.N.Y. 2009); *Cabletron*, 239 F.R.D. at 35-36.

IV. CLASS CERTIFICATION

The Court's Preliminary Approval Order preliminarily certified the Settlement Classes for settlement purposes only under Rules 23(a) and (b)(3). Nothing has changed to alter the propriety of certification of the classes for settlement purposes and, for the all the reasons set forth in Lead Plaintiff's preliminary approval brief, Lead Plaintiff respectfully request that the Court grant final certification of the Settlement Classes pursuant to Rules 23(a) and (b)(3).

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Settlements as fair, reasonable and adequate and approve the Plan of Allocation as fair and reasonable.

Dated: May 24, 2018

Respectfully submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ John C. Browne
John C. Browne (Admitted *Pro Hac Vice*)
Lauren Ormsbee (Admitted *Pro Hac Vice*)
Ross Shikowitz (Admitted *Pro Hac Vice*)
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Lead Counsel for Lead Plaintiff, Douglas Kurz

ORR & RENO, P.A.

/s/ Jennifer A. Eber
Jennifer A. Eber N.H. Bar No. 8775
Jeffrey C. Spear N.H. Bar No. 14938
45 S. Main Street, PO Box 3550
Concord, NH 03302-3550
Tel: (603) 224-2381
Fax: (603) 224-2318
jeber@orr-reno.com
jspear@orr-reno.com

Local Counsel for Lead Plaintiff, Douglas Kurz

CERTIFICATE OF SERVICE

I hereby certify that the above Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Individual Defendant and Underwriter Defendant Settlements and Plan of Allocation 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 24, 2018.

/s/ Jennifer Eber
Jennifer Eber