UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE COBALT INTERNATIONAL ENERGY, INC. SECURITIES LITIGATION	Lead Case No. 4:14-cv-3428 (NFA)

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTS AND PLAN OF ALLOCATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Lead Plaintiffs GAMCO Global Gold, Natural Resources & Income Trust, GAMCO Natural Resources, Gold & Income Trust (the "GAMCO Funds"), and additional plaintiffs St. Lucie County Fire District Firefighters' Pension Trust Fund, Fire and Police Retiree Health Care Fund, San Antonio, Sjunde AP-Fonden, and Universal Investment Gesellschaft m.b.H. (collectively, "Plaintiffs") on behalf of themselves and the Settlement Class, respectfully submit this motion in support of final approval of the settlements in this Action (the "Settlements") with the (i) Cobalt Settling Defendants, (ii) Sponsor Defendants, Sponsor Designee Defendants and GS&Co., and (iii) Underwriter Settling Defendants (collectively, "Defendants," and with the Plaintiffs, the "Parties"), and for approval of the proposed plan of allocation of the net proceeds of the Settlement (the "Plan of Allocation").[1]

Plaintiffs respectfully submit that each of the Settlements is "fair, reasonable, and adequate" under Fed. R. Civ. P. 23(e), and the Court should now grant final approval to the Settlements.

[1] Unless otherwise defined, all capitalized terms herein have the same meanings as set forth in the (i) Stipulation and Agreement of Settlement with the Sponsor Defendants, the Sponsor Designee Defendants and Goldman Sachs & Co. LLC, dated October 9, 2018 (the "Sponsor/GS&Co. Stipulation") (ECF No. 334-1); (ii) Stipulation and Agreement of Settlement Among the Plaintiffs, Cobalt Individual Defendants, and Nader Tavakoli, Solely Acting as Plan Administrator on Behalf of the Cobalt Debtors, dated October 11, 2018 (the "Cobalt Stipulation") (ECF No. 337-1); and/or (iii) Stipulation and Agreement of Settlement Between Plaintiffs and Underwriter Defendants Other Than Goldman Sachs & Co. LLC, dated November 28, 2018 (the "Underwriter Stipulation") (ECF No. 352-1) (collectively, the "Stipulations").

Nature And Stage Of The Proceeding

The Court granted preliminary approval of the Settlements on November 2, 2018 and November 29, 2018. ECF Nos. 346-347, 354. Lead Plaintiffs now respectfully submit this memorandum of law in support of their motion for final approval of each of the respective Settlements and the Plan of Allocation.

Issues To Be Ruled Upon

This motion raises the following issues to be ruled upon by the Court:

1. Whether the proposed Settlements satisfy the requirements for final approval under Federal Rule of Civil Procedure 23(e).

2. Whether the Plan of Allocation is fair, reasonable and adequate.

3. Whether the notice to the Settlement Class was satisfactory under Federal Rules of Civil Procedure 23(c)(2) and 23(e), the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and principles of due process.

INTRODUCTION

Subject to this Court's final approval, Plaintiffs have agreed to settle all claims asserted against Defendants in this Action in exchange for at least $173.8 million payable to the Settlement Class from Defendants as follows: (i) $146.85 million from the Sponsor/GS&Co. Settling Defendants; (ii) $22.75 million from the Underwriter Settling Defendants, and (iii) $4.2 million from the Cobalt Settling Defendants plus any future recoveries up to an additional $161.5 million from ongoing litigation between the Cobalt Settling Defendants and their insurance carriers. Plaintiffs and Class Counsel respectfully submit that the proposed Settlements represent a substantial and favorable recovery for the

Settlement Class and readily meet the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure.

The proposed Settlements are the result of four years of intensive litigation between the Parties. As detailed in the Joint Declaration,[2] the litigation efforts in this case included, among other things, (i) Plaintiffs' extensive investigation of the claims against Defendants; (ii) the filing of two detailed consolidated class action complaints; (iii) two rounds of motions to dismiss the complaints; (iv) a motion for class certification and related appeals; (v) extensive fact and expert discovery, including consultation with various experts; and (vi) arm's-length negotiations between the Parties under the supervision of former United States District Judge Layn R. Phillips, a highly-experienced mediator. This substantial work gave Plaintiffs and Plaintiffs' Counsel a thorough understanding of the strengths and weaknesses of the claims and defenses asserted in the Action. Plaintiffs support the Settlements (¶ 102) and, together with Lead Counsel, respectfully submit that the Settlements represent an outstanding recovery that is in the best interests of the Settlement Class.

In reaching the Settlements, Plaintiffs and Lead Counsel considered the numerous litigation risks associated with continuing the litigation. As detailed below, these included

[2] Plaintiffs respectfully refer the Court to the Joint Declaration of Andrew J. Entwistle and David R. Stickney in Support of Lead Plaintiffs' Motion for Final Approval of Class Action Settlements and Plan of Allocation and Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Joint Declaration") filed herewith. The Joint Declaration contains a detailed description of, among other things, the nature of the claims asserted, the procedural history of the Action, the negotiations leading to the Settlements, and the terms of the Plan of Allocation. Citations herein to "¶ __" refer to paragraphs in the Joint Declaration, and all exhibits referenced herein are attached to the Joint Declaration.

a risk that Defendants would ultimately prevail at summary judgment, trial or appeal. The litigation of such proceedings would likely take years to complete and could have jeopardized a favorable result for Plaintiffs and the Settlement Class. Moreover, Plaintiffs faced a risk that the Fifth Circuit Court of Appeals would decertify some or all of the Class, which would significantly undermine any Class-wide recovery. Plaintiffs also faced the risks that Cobalt's bankruptcy posed to obtaining a meaningful recovery for the Class. The Settlements will enable the Settlement Class to immediately recover a substantial benefit without incurring the significant risks of ongoing litigation.

The Plan of Allocation for distribution of the Settlement proceeds is designed to make fair distributions to Settlement Class Members who were injured by the misconduct alleged in the Operative Complaint. The proposed Plan of Allocation was developed in consultation with Dr. Michael Hartzmark, a highly-regarded damages expert who has been credited by the Court at the class certification stage of the Action. ¶¶ 129-130, Ex. 3 (Hartzmark Declaration).

The Court granted preliminary approval of the Sponsor/GS&Co. and Cobalt Settlements on November 2, 2018 (ECF Nos. 346 and 347) and granted preliminary approval of the Underwriter Settlement on November 29, 2018 (ECF No. 354). The Court also approved the process by which the Settlement Class would receive notice of the Settlements and submit claims, objections, or requests for exclusion. 85,122 copies of the Notice have been mailed to potential Settlement Class Members and their nominees. The Notice, Claim Form and other key Settlement documents have also been made available on a dedicated website maintained by the Claims Administrator. In addition, the Summary

Notice has been published in *The Wall Street Journal* and transmitted over the *PR Newswire*. While the deadline for objecting to and requesting exclusion from the Settlement Class has not yet passed, no Settlement Class Member has objected to the Settlements or Plan of Allocation (¶ 127); nor has any Settlement Class Member sought exclusion from the Settlement Class to date. *See* Joint Declaration, Ex. 2 (Villanova Declaration ¶ 14). This positive reaction by the Settlement Class Members further supports final approval of the Settlements and Plan of Allocation.

As detailed further below, Plaintiffs submit that the Settlements and Plan of Allocation are fair, reasonable, and adequate and respectfully request that they be approved.

ARGUMENT

I. THE SETTLEMENTS MEET THE STANDARDS FOR FINAL APPROVAL UNDER RULE 23(e)

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise or settlement of class action claims. *See* Fed. R. Civ. P. 23(e). A class action settlement should be approved if the court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (the gravamen of the inquiry is whether the proposed settlement is "fair, adequate, and reasonable and is not the product of collusion between the parties"). The Fifth Circuit has also recognized a strong public policy in favor of pretrial settlements of class action lawsuits. *See In re Deepwater Horizon*, 739 F.3d 790, 807 (5th Cir. 2014) (noting a public interest favoring

class action settlements); *see also In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 2003 WL 22962792, at *4 (S.D. Tex. Nov. 5, 2003) (same).

Rule 23(e)(2) 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."

Federal Rule of Civil Procedure 23(e)(2) (as amended on December 1, 2018).

Consistent with these factors, courts in this Circuit also consider the following six-part test to determine whether a class action settlement is fair, reasonable, and adequate: "(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *see*

also Newby, 394 F.3d at 301 (applying *Reed* factors to proposed settlement of securities class action).[3]

As set forth in Plaintiffs' motions for preliminary approval, the Settlements easily satisfy each factor in the final approval test and meet the favored public policy goal of resolving securities class action claims.

A. Class Representatives and Lead Counsel Adequately Represented the Class

Rule 23(e)(2)(A) favors final approval of the Settlements because the Class Representatives and Lead Counsel "have adequately represented the class." Here, the Class Representatives litigated the Action vigorously on behalf of the Settlement Class for four years. They each produced documents in response to Defendants' discovery requests, made representatives available for class certification depositions, responded to written discovery, and consulted with Lead Counsel on litigation strategy and case developments. ¶¶ 47, 71-72, 160-165. In addition, the Class Representatives have claims that are typical of other Class Members and have no conflict of interests with other members of the Class. Accordingly, the Court previously found that Plaintiffs were adequate representatives for the Class when certifying the Class for litigation purposes. *See* ECF No. 244, at 7-8, 20.

Lead Counsel, along with the other Plaintiffs' Counsel, likewise have "adequately represented the class" throughout the litigation. Among other things, Lead Counsel

[3] The December 1, 2018 amendments to Rule 23(e)(2) are not intended to "displace any factor" used by the Circuit Courts to assess final settlement approval, but rather to focus on core concerns to guide the approval decision. *See* Fed. R. Civ. P. 23, 2018 Advisory Committee Notes. The factors in amended Rule 23(e)(2) are entirely consistent with the factors used by the Fifth Circuit to assess final settlement approval and are each addressed in the sections below.

(i) conducted a comprehensive factual investigation of the claims at issue in the Action; (ii) prepared two detailed amended complaints based on their factual investigation and on documents produced by Defendants during fact discovery; (iii) prevailed on Defendants' multiple motions to dismiss the amended complaints and overcame Defendants' motions for interlocutory appeal; (iv) conducted extensive factual discovery, including the review and analysis of over 1.3 million pages of documents produced by Defendants and third-parties and obtaining testimony from nearly 20 witnesses, including the individual defendants; (v) prepared comprehensive submissions in support of class certification, as well as the taking and defending of numerous class certification depositions; (vi) prepared detailed briefing in opposition to Defendants' appeal of the Court's Class Certification Order; (vii) consulted with experts on the Foreign Corrupt Practices Act ("FCPA"), the oil and gas industry, and issues pertaining to Class-wide damages and loss causation; and (viii) engaged in protracted arm's-length settlement negotiations. ¶¶ 18-32, 34-52, 62-65, 67-74, 82-86, 92-95, 146.

B. The Settlements Were Negotiated At Arm's-Length And There Was No Fraud Or Collusion

Rule 23(e)(2)(B) and the first *Reed* factor also support final approval because the Settlements were negotiated after substantial discovery and there is no evidence of fraud or collusion in connection with the Settlements. Each of the Settlements was reached only after extensive arm's-length negotiations by experienced counsel with the assistance of Judge Phillips (Ret.), an experienced and well-respected mediator. *See* Joint Declaration, Ex. 1 (Phillips Declaration). The Parties engaged in a formal in-person mediation session

with Judge Phillips in October 2017, which included the exchange of detailed mediation statements. Following the mediation, the Parties continued to negotiate with the assistance of Judge Phillips throughout 2018, culminating in the acceptance of mediator proposals to settle the claims against the respective Defendant groups. ¶¶ 95-100.

The Parties were represented by counsel with extensive experience litigating and settling securities class actions. ¶¶ 143-144. Having litigated the Action for four years, including through the completion of extensive fact discovery, counsel was well versed on the strengths and weaknesses of Plaintiffs' claims and the potential defenses thereto.

The extensive arm's-length negotiations that resulted in each of the Settlements demonstrates that they are procedurally fair and are not the product of fraud or collusion. *See, e.g., In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1063-65 (S.D. Tex. 2012) (approving settlement where parties engaged in arm's-length negotiations for over three months with the benefit of discovery to gauge the strengths and weaknesses of the case); *Billitteri v. Sec. Am., Inc.*, 2011 WL 3586217, at *10 (N.D. Tex. Aug. 4, 2011) (finding no fraud or collusion in settlement reached through counsel's diligent arm's-length negotiations before a neutral mediator); *Quintanilla v. A&R Demolition Inc.*, 2008 WL 9410399, at *4 (S.D. Tex. May 7, 2008) (same).

C. The Settlements Are Fair And Adequate Given The Costs And Delay Of Trial And Appeal

Rule 23(e)(2)(C)(i) and the second *Reed* factor further support final approval of the Settlements. Continued litigation of the Action would involve complex and costly trial and post-trial proceedings that would delay the ultimate resolution of the claims without any

guarantee of recovery for the Class. "When the prospect of ongoing litigation threatens to impose high costs of time and money on the parties, the reasonableness of approving a mutually-agreeable settlement is strengthened." *Klein v. O'Neal*, 705 F. Supp. 2d 632, 651 (N.D. Tex. 2010); *see also Heartland*, 851 F. Supp. 2d at 1064 (approving settlement and noting that litigating case to trial would be "time consuming, and '[i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years."); *In re Dell Inc., Sec. Litig.*, 2010 WL 2371834, at *7 (W.D. Tex. June 11, 2010) (noting that "[s]ecurities litigation on the whole is 'notoriously difficult and unpredictable' . . . . [t]hus the complexity, expense, and likely duration of the suit weighs in favor of approval of the settlement."), *aff'd sub nom. Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012).

Further litigation of the Action would have required the Parties to engage in substantial additional fact and expert discovery, dispositive motion practice, pre-trial preparation, and post-trial appeals. Specifically, Plaintiffs intended to take several additional fact depositions of relevant non-parties. The Parties would have also engaged in extensive expert discovery concerning Cobalt's oil and gas exploration activities, the underwriting of Cobalt's Class Period securities offerings, and the calculation of Class-wide damages, among other issues. This would have included the preparation of detailed expert reports and numerous expert witness depositions.

The Parties also planned to file detailed summary judgment motions seeking dispositive pre-trial rulings on the asserted claims. At trial, the Parties would likely face motions *in limine* to exclude certain expert testimony and documentary evidence, the

outcome of which also could have a significant impact on the jury's consideration of liability and damages. Numerous post-trial issues would have likely been the subject of appeals by the Parties, which could further delay and potentially eliminate any recovery for the Class.

In contrast, the Settlements provide an immediate and substantial recovery of at least $173.8 million for the Class, without exposing Class Members to the risk, expense and delay of continued litigation. Accordingly, this factor plainly supports final approval of the Settlements.

D. The Stage Of The Proceedings Warrants Final Approval of the Settlements

The third *Reed* factor also weighs in favor of final approval of the Settlements. The Settlements were reached after the Parties engaged in comprehensive litigation efforts over the course of four years. This included extensive pre-trial motion practice such as (i) briefing on three separate motions to dismiss Plaintiffs' complaints by each Defendant group; (ii) briefing on Plaintiffs' motion for class certification; (iii) briefing on Defendants' class certification appeals; and (iv) the litigation of four significant discovery motions before this Court concerning issues of privilege and the scope of Defendants' document productions. ¶¶ 26-29, 53-60, 63-65, 67-68, 82-86.

Plaintiffs, through their counsel, also conducted thorough fact and expert discovery into the claims and defenses at issue in the Action. As noted above, this included, among other things: (i) the review and analysis of more than 1.3 million pages of documents produced by Plaintiffs, Defendants and third-parties; (ii) nearly 20 fact depositions of key

witnesses, including certain of the Cobalt Individual Defendants, Sponsor Designee Defendants and Underwriter Defendants; (iii) the depositions of the Parties' experts on class certification; and (iv) the depositions of ten Plaintiff representatives. ¶¶ 34-44, 48-52, 70, 72. The Parties also exchanged detailed expert reports on issues pertaining to class certification. ¶¶ 68-69. In addition, Plaintiffs consulted with experts retained by Lead Counsel concerning the oil and gas industry, the FCPA, and the issues of Class-wide damages. ¶¶ 92-93.

These efforts and the Court's findings on the various pre-trial motions gave the Parties a clear understanding of the strengths and weaknesses of their respective positions. As a result, the Parties were able to fully evaluate the claims and agree on Settlements that are fair, reasonable and adequate to the Settlement Class. Accordingly, this factor also favors final approval of the Settlements. *See*, *e.g.*, *Heartland*, 851 F. Supp. 2d at 1064 ("Under [this] factor, the key issue is whether 'the parties and the district court possess ample information with which to evaluate the merits of the competing positions'"); *In re OCA, Inc. Sec. & Derivative Litig.*, 2009 WL 512081, at *12 (E.D. La. Mar. 2, 2009) (same).

E. The Settlements Are Fair And Reasonable Given The Risks Of Trial And Appeal

Rule 23(e)(2)(C)(i) and the fourth *Reed* factor further support final approval of the Settlements because Plaintiffs recognize that, although there is substantial evidence to support their claims, there are also substantial risks in establishing liability and damages at trial. Weighing these risks against the certain and substantial recovery for the Settlement

Class demonstrates that the Settlements are fair, reasonable, and adequate. *See, e.g.*, *OCA*, 2009 WL 512081, at *13 (settlement approval favored where plaintiffs faced substantial risks in establishing elements of securities law violations); *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *18 (N.D. Tex. Nov. 8, 2005) ("plaintiffs' uncertain prospects of success through continued litigation" supported approval of securities class action settlement).

The Cobalt Settling Defendants contested every element of the claims asserted against them under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"). On the Section 10(b) claim, these Defendants disputed the falsity of the alleged misstatements concerning Cobalt's Angolan partners and oil wells. ¶ 26. The Cobalt Settling Defendants also asserted that they did not act with the requisite scienter in making these statements, and that investor losses were not caused by the disclosure of facts correcting their alleged misstatements. *Id*. Although evidence was elicited during discovery that supported the core elements of the claims, Plaintiffs nonetheless faced the risk that the Court or jury would find otherwise at summary judgment or trial.

Moreover, Cobalt's bankruptcy posed substantial risks to a meaningful recovery for the Class *even if* Plaintiffs proved the Cobalt Settling Defendants' liability. Cobalt's bankruptcy rendered it unable to pay any significant monetary damages obtained against it at trial, and any monetary judgment against it was likely to be subordinated and/or discharged in bankruptcy through Cobalt's Chapter 11 cases. ¶ 117. Likewise, without indemnification from Cobalt, none of the Cobalt Individual Defendants have personal assets adequate to pay a judgment that is even a fraction of Class-wide damages. ¶ 118. Their stock holdings in a bankrupt Cobalt are worthless. In any case, the Cobalt Settlement

preserves the right of these Defendants and the Class to seek recovery from insurance policies covering the misdeeds by the Cobalt Settling Defendants. ¶¶ 90, 97.

The Sponsor Defendants also disputed their exercise of day-to-day control over Cobalt's operations in response to the claim under Section 15 of the Securities Act of 1933 ("Securities Act"). ¶ 27. In addition, these Defendants vigorously contested their liability for alleged insider trading under Section 20A of the Exchange Act. Specifically, the Sponsor Defendants denied any knowing use of material nonpublic information in connection with their Class Period sales of Cobalt stock. ¶ 63. They further asserted that Plaintiffs cannot establish any violation of Section 10(b) of the Exchange Act, which they argued is a necessary predicate to proving insider trading under Section 20A. *Id.* Class recovery on such claims would be significantly curtailed or eliminated should the Sponsor Defendants persuade the Court or jury of any of these arguments at summary judgment or trial.

The Underwriter Settling Defendants also strongly contested any wrongdoing in connection with their underwriting of Cobalt's Class Period securities offerings. Among other arguments, the Underwriter Defendants challenged the falsity of the alleged misstatements in the Offering Materials concerning Cobalt's Angolan partners and oil wells, as well as Plaintiffs' ability to rebut their negative causation defense on the claims asserted against them under Sections 11 and 12 of the Securities Act. ¶ 27, 107. These Defendants also asserted an affirmative "due diligence" defense, for which they contended that they conducted adequate due diligence on Cobalt prior to each offering, and that they reasonably believed the accuracy of the Company's statements concerning its Angolan

partners and oil wells. ¶ 107. There would be no Class recovery under the Securities Act claims if the Underwriter Settling Defendants prevailed on this affirmative defense at summary judgment or trial.

Plaintiffs also faced the risk that the Class would be decertified in whole or in part by Defendants' appeals before the Fifth Circuit. The Cobalt Settling Defendants and Sponsor Defendants argued in their pending appeal that this Court erred in finding Plaintiffs are entitled to a class-wide presumption of reliance for the Section 10(b) claim. ¶¶ 83, 120. Should they prevail on this issue before the Fifth Circuit, certification of the Class could be jeopardized, imperiling claims against the Defendants.

On appeal, the Underwriter Settling Defendants additionally asserted that no Section 11 class can be certified for the Cobalt common stock offerings because share purchases cannot be traced to these offerings on a Class-wide basis. ¶¶ 84, 121. They also disputed class certification for the Cobalt note offerings given purported individualized issues on the location of note purchases (*i.e.*, foreign vs. domestic). *Id.* The Underwriter appeal also sought to vacate class certification on grounds that the statute of repose bars the Securities Act claims. *Id.* Although Plaintiffs are confident that the Class was properly certified, Defendants' pending appeals pose additional risks to Class recovery. Such recovery would only be further jeopardized by Defendants' inevitable post-trial appeals of the remaining claims that Plaintiffs prevailed on at trial.

Plaintiffs would have strong legal and factual responses to each of Defendants' arguments at the summary judgment, trial and appellate stages of the Action. However, when viewed in the context of the numerous litigation risks and uncertainties raised by

Defendants' contentions, the substantial Settlements represent an immediate and certain recovery for the Settlement Class. In sum, consideration of the "risks . . . of trial and appeal" further supports final approval of the Settlements. *See* Rule 23(e)(2)(C)(i).

F. The Settlements Are Well Within The Range Of Reasonableness

The fifth *Reed* factor considers "whether the terms of the settlement 'fall within *a range of reasonable recovery*, given the likelihood of the plaintiffs' success on the merits.'" *Billitteri*, 2011 WL 3586217, at *12 (emphasis in original). As part of this inquiry, courts recognize the uncertainty of securities litigation and the potential difficulty of proving liability and damages at trial. *See Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (recognizing the complexity of securities fraud class action claims brought under the PSLRA).

Here, the Settlements are well within the range of reasonableness given the multiple risks associated with further litigation of the Action. Under the proposed Settlements, the Settlement Class will receive $173.8 million in cash in exchange for releasing the claims against Defendants. In addition, the Settlement Class may recover additional amounts through the Cobalt Settlement, depending on resolution of the ongoing coverage litigation against the Cobalt Settling Defendants' insurance carriers. Under any measure, this is a substantial recovery, and is especially so when weighed against the risks of continued litigation with Defendants as noted above. Indeed, the Class might have recovered substantially less or even nothing at all had this Court, the Fifth Circuit, or a jury credited even some of Defendants' arguments concerning liability and damages.

The Settlements also exceed the settlement amounts recovered in similar securities

class action cases over the past decade. According to a 2018 report from NERA Economic Consulting, the average settlement in similar securities class actions ranged from $25 million to $59 million between 2009 and June 2018.[4] According to a 2017 report by Cornerstone Research, securities class action settlements between $34 million and $149 million ranked in the 90th percentile of such settlements from 2008 through 2017.[5] The $173.8 million recovered for the Settlement Class (with total recoveries potentially exceeding $300 million upon resolution of the pending insurance coverage litigation), is above historical amounts and exceeds the 90th percentile of securities class action settlements over the last ten years.

When measured against historical settlements, as well as against the particular risks of this litigation, the Settlements represent an extraordinary recovery that is well within the range of reasonableness. The Settlements should be approved for this additional reason.

G. Lead Counsel, Class Representatives And Settlement Class Members Support Final Approval

Lead Counsel, Class Representatives, and Settlement Class Members all support final approval of the Settlements, thereby satisfying the sixth *Reed* factor. *See, e.g.*, *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007) (noting courts

[4] *See* Stefan Boettrich & Svetlana Starykh, NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: H1 2018 Update*, at 9 (2018), http://www.nera.com/content/dam/nera/publications/2018/Recent_SCA_Trends_2018_1H.pdf.

[5] *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2017 Review and Analysis*, Cornerstone Research, at 19, App'x 1 (2018), http://securities.stanford.edu/research-reports/1996-2017/Settlements-Through-12-2017-Review.pdf.

generally "give weight to class counsel's opinion regarding the fairness of the settlement."); *Schwartz*, 2005 WL 3148350, at *21 ("where the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of [the] case'").

Lead Counsel have conducted a thorough fact-finding investigation into the claims against the Defendants and have a firm understanding of the strengths and risks attendant to these claims. Based on this understanding, as well as Lead Counsel's substantial experience litigating complex securities class actions such as this one, Lead Counsel has concluded that the Settlements are fair, reasonable and adequate to the Settlement Class. Moreover, the Court-appointed Class Representatives strongly endorse the Settlements. Each is a sophisticated institutional investor that has supervised and monitored the work of Plaintiffs' Counsel throughout the Action, and each was kept apprised of the mediation and settlement negotiations with Defendants. ¶¶ 102, 140, 160-165.

Additionally, the positive response of Settlement Class Members to date further supports final approval of the Settlements. The Court-appointed Claims Administrator, Epiq Class Action & Claims Solutions, Inc. ("Epiq"), has mailed 85,122 copies of the Notice to potential Settlement Class Members and nominees. *See* Joint Declaration, Ex. 2 (Villanova Decl. ¶ 8). The Notice describes the essential terms of the Settlements, and informs Settlement Class Members of their right to opt-out of the Settlement Class or object to any aspect of the Settlements. As set forth in the Notice, the deadline for Settlement Class Members to submit objections to the Settlements or request exclusion

from the Settlement Class is January 23, 2019. While this deadline has not yet passed, to date, no objections to the Settlements or Plan of Allocation have been received. ¶ 127. Nor has Epiq received any requests for exclusion from the Settlement Class to date. *Id.* at Ex. 2 (Villanova Decl. ¶ 14).[6]

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

Rule 23(e)(2), as amended, also considers (i) the effectiveness of the proposed method of distributing relief to the class; (ii) the terms of any proposed award of attorney's fees; (iii) any agreement made in connection with the proposed settlement; and (iv) the equitable treatment of class members. *See* Rule 23(e)(2)(C)(ii), (iii), and (iv); Rule 23(e)(2)(D). Each of these additional considerations also support approval of the Settlements.

1. The Proposed Method of Distributing Settlement Proceeds is Effective

The proceeds of the Settlement will be distributed to Settlement Class Members who submit eligible Claim Forms with required documentation to the Court-approved claims administrator, Epiq. Epiq will review and process the claims received, provide claimants with an opportunity to cure any deficiency or request review of the denial of their claim by the Court, and will ultimately mail or wire claimants their *pro rata* share of the Net Settlement Fund as calculated under the Plan of Allocation. This type

[6] Under the schedule set by the Court, Plaintiffs will file reply papers in further support of final approval on February 6, 2019, by which time any objections or requests for exclusion will have been received and addressed by Lead Counsel.

of claims processing is standard in securities class actions and has long been used and found to be effective. *See, e.g.*, *OCA*, 2009 WL 512081, at *6 (granting final approval to settlement and plan of allocation that compensated claimants on a *pro rata* basis according to claimants' recognized loss); *Dell*, 2010 WL 2371864, at *10 (same).

2. The Requested Attorneys' Fees And Expenses Are Fair And Reasonable

Lead Counsel have filed a Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses concurrently herewith (the "Attorneys' Fee Motion"). As detailed therein, Lead Counsel have applied for an attorneys' fee award of 25% of the Settlement Fund, which is consistent with attorneys' fee percentages approved in complex securities class actions such as this. *See, e.g.*, *In re Anadarko Petroleum Corp. Class Action Litig.*, 2014 WL 12599393, at *1 (S.D. Tex. Sept. 11, 2014) (approving attorneys' fees of 25% of settlement fund); *Schwartz*, 2005 WL 3148350, at *27 ("courts throughout this Circuit regularly award fees of 25% and more often 30% or more of the total recovery under the percentage-of-the-recovery method."). The Attorneys' Fee Motion also includes a request for reimbursement of $1,972,357.01 in typical costs and expenses incurred by Plaintiffs' Counsel in prosecuting the claims against the Defendants, and $56,977 in reimbursement of costs and expenses incurred by Plaintiffs related to their representation of the Settlement Class in this Action.

Pursuant to the terms of the Stipulations, and as is standard in securities class actions, attorneys' fees and expenses will be paid upon any such award being granted by

the Court, and shall be reimbursed to the Settlement Fund if the award is reduced or reversed in any subsequent legal proceedings. *See* ECF Nos. 334-1, 337-1, 352-1.

3. The Supplemental Agreements Do Not Affect the Fairness of the Settlements

Rule 23(e)(2)(C)(iv) asks the Court to consider any additional agreements made by the Parties in connection with the settlement. Here, the only such agreements are the Parties' confidential Supplemental Agreements entered into in connection with each Settlement that set forth the conditions under which each Defendant group would be able to terminate the respective Settlement if the number of Settlement Class Members who request exclusion from the Settlement Class reaches a certain threshold. That type of agreement is a standard provision in securities class actions and has no negative impact on the fairness of the Settlements. *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 2018 WL 1942227, at *5 (N.D. Tex. Apr. 25, 2018) (granting final approval of securities class action settlement that included a supplemental confidential agreement permitting settlement termination in the event of exclusion requests by a certain portion of the class).

4. The Settlements Treat Settlement Class Members Equitably

Finally, the proposed Settlements treat members of the Settlement Class equitably relative to one another. There is no preferential treatment for any members of the Settlement Class. Lead Plaintiffs and the other named Plaintiffs will receive recoveries based on the same formula under the Plan of Allocation (other than awards for reimbursement for the time their employees spent working on the Action as permitted by

the PSLRA). As discussed below in Section II, the Net Settlement Fund will be distributed among the Settlement Class Members in accordance with the Plan of Allocation, which provides a fair and equitable method of allocation.

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

The Plan of Allocation should also be granted final approval because it provides a fair and reasonable method to allocate the Net Settlement Fund and does not improperly give preferential treatment to Plaintiffs or any other Settlement Class Member. *See*, *e.g.*, *Dell*, 2010 WL 2371864, at *10 (to be fair, reasonable, and adequate, "[t]he allocation formula 'need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.'"); *OCA*, 2009 WL 512081, at *11 (granting final approval where the plan of allocation "does not give unfair or preferential treatment to the lead plaintiff or any segment of the class."). All Settlement Class Members with valid claims for the Net Settlement Fund, including Plaintiffs, will receive an allocation pursuant to the uniformly applied Plan of Allocation.

The Plan of Allocation was formulated by Class Counsel in consultation with their retained damages expert, Dr. Michael Hartzmark, and is consistent with his expert reports submitted in support of class certification in this Action. *See* Joint Declaration, at Ex. 3 (Hartzmark Declaration). Generally, the Plan of Allocation divides the funds obtained in the Underwriter, Sponsor/GS&Co. and Cobalt Settlements into three separate pools based on the nature of claims asserted as follows: (i) a Group 1 Fund, for purchasers of Cobalt Securities with claims under Section 10(b) of the Exchange Act; (ii) a Group 2 Fund for

purchasers of Cobalt Securities with claims under Section 20A of the Exchange Act; and (iii) a Group 3 Fund, for purchasers of Cobalt Securities with claims under Sections 11, 12(a)(2) and 15 of the Securities Act. [7]

Each Fund will be distributed *pro rata* to eligible Settlement Class Members based on the group and their Recognized Loss amount. Recognized Losses will be calculated based on (i) the type and number of Cobalt Securities purchased/acquired, (ii) when the securities were purchased/acquired, (iii) whether the securities were held or sold, and (iv) if sold, the date and price at which they were sold. Under the Plan of Allocation, there is no Recognized Loss amount for Cobalt securities acquired during the Class Period and sold before the respective corrective disclosure dates since any losses suffered on such sales would not be the result of Defendants' alleged misstatements and omissions. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005).

Thus, the Plan of Allocation fairly accounts for each respective Settlement Class Members' purchases and sales of Cobalt securities, as well as the specific claim they have under the federal securities laws. *See OCA*, 2009 WL 512081, at *11 (approving a plan of allocation that "compensates class members in relation to the timing of their actual purchases and sales as well as the amount of their actual losses."). Although the methodologies used in the Plan of Allocation may result in different per-share recoveries for each Authorized Claimant, they will be uniformly applied to all Settlement Class Members. No Settlement Class Member will receive preferential treatment when the

[7] Court-approved attorneys' fees, Litigation Expenses, Notice and Administration Costs and Taxes for the Settlements will be allocated among the three funds proportionally.

Settlements are distributed. Moreover, under the direction of Lead Counsel, the Claims Administrator will apply the Plan of Allocation to determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund. The Net Settlement Fund will be distributed to Authorized Claimants on this *pro rata* basis until the Fund is depleted or it is no longer economically feasible to do so.

The Plan of Allocation is fully described in the Notice that was distributed to Settlement Class Members pursuant to the Preliminary Approval Order. To date, the Plan of Allocation has received no objections from any Settlement Class Members. ¶ 127. Accordingly, for the reasons set forth herein and in the Joint Declaration, Plaintiffs submit that the Plan of Allocation is fair and reasonable and respectfully request that it be approved by the Court.

III. THE NOTICE TO THE SETTLEMENT CLASS SATISFIED RULE 23

The Notice provided to Settlement Class Members satisfied the requirements of both Fed. R. Civ. P. 23(c)(2) and 23(e). Rule 23(e) requires that notice of the proposed settlement be given "in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2) further requires certified classes to receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." In securities actions, the content of the notice must contain the information outlined in Rule 23(c)(2)(B) and the PSLRA. *See* 15 U.S.C. § 78u-4(a)(7).

Both the content of the Court-approved Notice and the method of its distribution to Settlement Class Members satisfy the notice requirements. Consistent with Fed. R. Civ.

P. 23(c)(2)(B), the Notice described: (i) the nature of the Action; (ii) the definition of the Settlement Class; (iii) the class claims, issues, and defenses; (iv) the process by which Settlement Class Members may enter an appearance through their own counsel; (v) how Settlement Class Members can exclude themselves from the Settlement Class; (vi) the binding effect of the Settlement approval proceedings; (vii) the proposed Plan of Allocation; and (viii) the reasons the Parties are proposing the Settlements. The Notice also supplied the date, time, and place of the Settlement Hearing, and the procedures for commenting on the Settlements and appearing at the hearing.

The Notice also satisfied the PSLRA requirement by including: (i) the amount of the Settlements proposed to be distributed to the parties to the Action, determined in the aggregate and on an average per-share basis; (ii) a statement from the Parties concerning the issues on which the Parties disagree; (iii) a statement indicating the maximum amount of attorneys' fees and expenses (both on an aggregate and per share basis) sought by Lead Counsel, and a brief explanation supporting the requested fees and expenses; (iv) the name, telephone number, and address of Lead Counsel who will be reasonably available to answer questions concerning any matter contained in the Notice; (v) a brief statement explaining the reasons why the Parties are proposing the Settlements; and (vi) such other information as may be required by the Court. *See* 15 U.S.C. § 78u-4(a)(7)(A)-(F).

The method of notice also fulfilled the requirements of due process because Lead Counsel and the Court-appointed Claims Administrator informed those Settlement Class Members who could be identified through reasonable efforts of all the information set forth above. Courts in this Circuit routinely find that comparable notice programs meet

the requirements of due process, the PSLRA, and Rule 23. *See, e.g., In re Enron Corp. Sec. & ERISA Litigs.*, 2003 WL 22494413, at *3 (S.D. Tex. July 24, 2003); *OCA*, 2009 WL 512081, at *7-9.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator began mailing copies of the Notice and Claim Form (the "Notice Packet") by first-class mail to Settlement Class Members and their nominees on December 4, 2018. *See* Joint Declaration, Ex. 2 (Villanova Decl. ¶¶ 3-5). In addition, the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. Villanova Decl. ¶ 9. As of January 7, 2019, the Claims Administrator had mailed a total of 85,122 copies of the Notice and Claim Form to potential Settlement Class Members and nominees. *Id*. ¶ 8. The Claims Administrator has also made the Notice, Claim Form and other key documents for the Settlements available to the general public on a website dedicated to the Settlements (www.CobaltSecuritiesLitigation.com). *Id*. ¶ 13.

This thorough approach of providing individual mailings to Settlement Class Members, notice in widely circulated publications, and a dedicated website containing all relevant Settlement documents was undoubtedly the "best notice . . . practicable" for Settlement Class Members. *See* Fed. R. Civ. P. 23(c)(2)(B) (specifying that appropriate notice may be by "United States mail, electronic means, or other appropriate means."); *see also In re 2014 RadioShack ERISA Litig.*, 2016 WL 6561597, at *4 (N.D. Tex. Jan. 25, 2016) (notice met Rule 23 and due process requirements when it was mailed to class members, published in a news publication and *PR Newswire*, and posted on a dedicated website).

The timing of the Notice is also adequate. Settlement Class Members have 50 days from the initial mailing of the Notice to decide if they want to request exclusion or object to the Settlements or Plan of Allocation. Courts in this Circuit have held that such amount of time, or less, constitutes sufficient notice. *In re OCA, Inc. Sec. & Derivative Litig.*, 2008 WL 4681369, at *16 (E.D. La. Oct. 17, 2008) (finding that 39 days between mailing and objection/exclusion deadline was adequate).

In sum, the Notice complied with the Court's Preliminary Approval Order, as well as the requirements of Fed. R. Civ. P. 23, the PSLRA and due process.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (i) grant final approval of the Settlements; (ii) approve the Plan of Allocation for the Settlements; and (iii) grant such other relief as the Court deems just and proper.

Dated: January 9, 2019

Respectfully submitted,

ENTWISTLE & CAPPUCCI LLP

By: */s/Andrew J. Entwistle*
Andrew J. Entwistle
(Texas Bar No. 24038131)
Vincent R. Cappucci (admitted *pro hac vice*)
Jonathan H. Beemer (admitted *pro hac vice*)
299 Park Avenue, 20th Floor
New York, NY 10171
Telephone: (212) 894-7200
Facsimile: (212) 894-7272
E-mail: aentwistle@entwistle-law.com
E-mail: vcappucci@entwistle-law.com
E-mail: jbeemer@entwistle-law.com

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/David R. Stickney
David R. Stickney (admitted *pro hac vice*)
Jonathan D. Uslaner (admitted *pro hac vice*)
Brandon Marsh (admitted *pro hac vice*)
12481 High Bluff Drive, Suite 300
San Diego, CA 92130-3582
Telephone: (858) 793-0070
Facsimile: (858) 793-0323
E-mail: davids@blbglaw.com
E-mail: jonathanu@blbglaw.com
E-mail: brandon.marsh@blbglaw.com

Counsel for Lead Plaintiffs and Co-Lead Counsel for the Class

AJAMIE LLP
Thomas R. Ajamie
(Texas Bar No. 00952400)
Pennzoil Place - South Tower
711 Louisiana, Suite 2150
Houston, TX 77002
Telephone: (713) 860-1600
Facsimile: (713) 860-1699
E-mail: tajamie@ajamie.com

Liaison Counsel for the Class

KESSLER TOPAZ MELTZER & CHECK, LLP
Johnston de Forest Whitman, Jr.
(admitted *pro hac vice*)
Naumon A. Amjed
(admitted *pro hac vice*)
280 King of Prussia Road
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
E-Mail: jwhitman@ktmc.com
E-Mail: namjed@ktmc.com

Counsel for Plaintiff Sjunde AP-Fonden

MOTLEY RICE LLC
Christopher Moriarty (admitted *pro hac vice*)
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464
Telephone: (843) 216-9245
Facsimile: (843) 216-9450
E-Mail: cmoriarty@motleyrice.com

Counsel for Plaintiff Universal Investment Gesellschaft m.b.H.

CERTIFICATE OF SERVICE

I certify that on January 9, 2019, the foregoing memorandum of law was filed with Clerk of the Court through the Court's ECF system, which will cause the document to be served upon all counsel of record.

/s/ Andrew J. Entwistle
Andrew J. Entwistle