UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FACEBOOK, INC. IPO SECURITIES AND DERIVATIVE LITIGATION	MDL No. 12-2389 (RWS) This document relates to the Consolidated Securities Action: No. 12-cv-4081 No. 12-cv-4099 No. 12-cv-4131 No. 12-cv-4150 No. 12-cv-4157 No. 12-cv-4184 No. 12-cv-4194 No. 12-cv-4215 No. 12-cv-4252 No. 12-cv-4291 No. 12-cv-4312 No. 12-cv-4332 No. 12-cv-4360 No. 12-cv-4362 No. 12-cv-4551 No. 12-cv-4648 No. 12-cv-4763 No. 12-cv-4777 No. 12-cv-5511 No. 12-cv-7542 No. 12-cv-7543 No. 12-cv-7544 No. 12-cv-7545 No. 12-cv-7546 No. 12-cv-7547 No. 12-cv-7548 No. 12-cv-7550 No. 12-cv-7551 No. 12-cv-7552 No. 12-cv-7586 No. 12-cv-7587

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs Arkansas Teacher Retirement System ("Arkansas Teacher") and Fresno County Employees' Retirement Association ("Fresno," and collectively with Arkansas Teacher, "Lead Plaintiffs"), on behalf of themselves and the other members of the certified Class, respectfully submit this memorandum of law in support of their motion for final approval of the proposed settlement resolving all claims asserted in the Action in return for the payment of $35 million in cash for the benefit of the Class (the "Settlement"), and for approval of the proposed plan of allocation of the proceeds of the Settlement (the "Plan of Allocation").[1]

PRELIMINARY STATEMENT

Subject to Court approval, Lead Plaintiffs have agreed to settle all claims in the Action in exchange for a cash payment of $35 million, which has been deposited into an escrow account. Lead Plaintiffs respectfully submit that the proposed Settlement is a favorable result for the Class and satisfies the standards for final approval under Rule 23 of the Federal Rules of Civil Procedure in light of the amount of the Settlement, the substantial challenges that Lead Plaintiffs would have faced in proving liability and damages, and the costs and delays of continued litigation.

The Settlement is the product of extensive arm's-length negotiations between the Parties, which included multiple in-person mediation sessions and significant follow-up discussions under the auspices of highly respected and experienced mediators, including retired Judge Daniel Weinstein of JAMS. The $35 million Settlement is based on the Parties' acceptance of Judge

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated February 26, 2018 (the "Stipulation") (ECF No. 571-1) (the "Stipulation") or in the Joint Declaration of John Rizio-Hamilton and James W. Johnson in Support of (I) Lead Plaintiffs' Motion for Final Approval of Settlement and Approval of Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses (the "Joint Declaration" or "Joint Decl."), filed herewith. Citations to "¶" in this memorandum refer to paragraphs in the Joint Declaration.

(Cont'd)

Weinstein's proposal that the Action be settled for that amount.

The agreement to settle was reached only eight weeks before trial was scheduled to begin and, thus, Lead Plaintiffs and Lead Counsel had an extremely well-developed understanding of the strengths and weaknesses of the Action at the time of the Settlement. As more fully described in the Joint Declaration,[2] by the time the Settlement was agreed to, Lead Counsel had, among other things: (i) conducted an extensive initial investigation into the alleged misrepresentations in the registration statement and prospectuses for Facebook's IPO (the "Offering Documents"), including a thorough review of SEC filings, analyst reports, press releases, Company presentations, media reports, and other public information; (ii) drafted a detailed consolidated complaint based on this investigation; (iii) successfully opposed Defendants' motions to dismiss; (iv) completed extensive and highly contested fact discovery efforts, which included obtaining and reviewing more than 1.5 million pages of documents produced by Defendants and third parties; taking, defending, or participating in 40 depositions of fact witnesses; and a number of significant discovery disputes; (v) successfully moved for class certification, including conducting related discovery and preparing an expert report on the underwriting of Facebook's IPO; (vi) worked extensively with experts concerning the social network industry, securities-industry practices, investors' absorption of information, underwriting and due diligence, and loss causation and damages; (vii) completed extensive expert discovery, including deposing Defendants' six experts, defending the depositions of Lead Plaintiffs' five experts, and fully briefing and arguing *Daubert*

[2] The Joint 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 (¶¶ 17-115); the nature of the claims asserted (¶¶ 11-16, 23-25); the negotiations leading to the Settlement (¶¶ 111-114); the risks and uncertainties of continued litigation (¶¶ 116-137); the terms of the Plan of Allocation (¶¶ 144-152); and a description of the services Lead Counsel provided for the benefit of the Class (¶¶ 6, 17-115).

motions; (vii) fully briefed and argued Lead Plaintiffs' opposition to Defendants' four motions for summary judgment; (ix) extensively prepared for trial, including conducting several mock jury exercises with a jury consultant; (x) fully briefed and argued Lead Plaintiffs' motion to bifurcate the trial; and (xii) exchanged detailed mediation statements with Defendants and engaged in vigorous arm's-length settlement negotiations.

The Settlement is also a favorable result in light of the risks of continued litigation. While Lead Plaintiffs and Lead Counsel believe that the claims asserted against Defendants in the Action are meritorious, they recognize that this Action presented a number of substantial risks. Absent the Settlement, there was a significant risk that the Court might have granted Defendants' motions for summary judgment in part or in whole, or that a jury might have accepted Defendants' arguments at trial.

For example, Defendants vigorously contended that the statements in the Offering Documents about the impact of increased mobile use on Facebook's advertising revenues were accurate and complete, and, thus, no liability could be established. The principal alleged false statement was a hedged, conditional risk warning that Facebook's business "may" or "would be negatively affected" "if" Facebook was unable to successfully implement monetization strategies for mobile users. Plaintiffs argued that this statement was false and misleading because increased mobile usage had *already* affected Facebook's revenue before the IPO, as reflected in Facebook's revised revenue projections for the second quarter of 2012 and 2012 as a whole. However, it was far from certain that Plaintiffs could establish that this statement was false and misleading in light of: (1) the conditional nature of the statement and the number of other related risk disclosures about increasing mobile usage included in the Offering Documents; (2) certain evidence supporting Defendants' argument that, following a short downward blip, revenues had actually

rebounded by the time of the IPO; and (3) the fact that Facebook ultimately met its original, higher revenue projections and was very successful in generating revenue from mobile users, ultimately causing its stock price to vastly surpass the $38 per share offering price. Thus, the Court at a summary judgment or the jury at trial might also have accepted Defendants' argument that the alleged misstatement was, in fact, a correct statement of Defendants' *opinion* at the time of the IPO – and, indeed, an opinion that actually turned out to be unduly pessimistic.

Moreover, even if Plaintiffs established that the Offering Documents were misleading, Defendants here had a powerful actual-knowledge defense – *i.e.*, that some of all or the Class could not have been misled because they had actual knowledge of the truth. Based on a significant amount of evidence, Defendants contended that (1) all institutional investors were told about the Underwriter Defendants' analysts' downward revision to their revenue models, which revealed the impact of increasing mobile use on Facebook's business; (2) certain institutional investors were told about Facebook's own reduced revenue guidance; and (3) pre-IPO news reports disclosed Facebook's revenue cuts to retail investors.

Although Plaintiffs did not bear the burden of proving loss causation in this Securities Act case, there was a risk here that the Court or a jury might have accepted Defendants' negative-causation defense and found that the declines in the price of Facebook common stock were not caused by the alleged misstatements. Specifically, Defendants argued that the alleged misstatements could not be the cause of the price drops because the post-IPO news articles about Facebook's revised revenue guidance cited by Lead Plaintiffs as the basis for the stock price declines did not contain any new information that had not been publicly disclosed before the IPO. Supported by multiple expert witnesses, Defendants argued that price declines on May 21 to 22, 2012 were, in fact, caused by ongoing repercussions from the NASDAQ trading-system failures

that occurred on May 18, 2012, the first day of trading of Facebook stock.

Defendants would also have argued that a large portion of the Class suffered no damages at all because the price of Facebook stock rebounded strongly a year after the IPO and was at record highs – multiples above the IPO price – in early 2018, when the trial would have occurred.

In light of all these risks, as discussed further below and in the Joint Declaration, Lead Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate, and warrants final approval by the Court. Approval of the Settlement is endorsed by both institutional investor Lead Plaintiffs Arkansas Teacher and Fresno as well as by all the other Class Representatives, who were members of the Retail Investor Subclass. *See* Joint Decl. Exs. 2A to 2F.

Additionally, Lead Plaintiffs request that the Court approve the Plan of Allocation, which is set forth in the Settlement Notice sent to Class Members. The Plan of Allocation, which was developed by Lead Counsel in consultation with Lead Plaintiffs' damages expert, provides a reasonable method for allocating the Net Settlement Fund among Class Members who submit valid claims, with equitable adjustments to account for the increased litigation risks faced by members of the Institutional Investor Subclass and to protect the interests of smaller investors. For these reasons, the Plan of Allocation is fair and reasonable, and should likewise be approved.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS 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 Settlement should be approved if the Court finds it "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 154 (S.D.N.Y. 2013); *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459, 464 (S.D.N.Y. 2013).

Public policy favors the settlement of disputed claims among private litigants, particularly in class actions. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("*Visa*") ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted). In ruling on final approval of a class settlement, the court should examine both the negotiating process leading to the settlement, and the settlement's substantive terms. *See Visa*, 396 F.3d at 116; *In re Citigroup Inc. Sec. Litig.*, No. 09 MD 2070 (SHS), 2014 WL 2112136, at *2-3 (S.D.N.Y. May 20, 2014); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 188 (S.D.N.Y. 2012).

A. The Settlement Was Reached After Extensive Arm's-Length Negotiations and Is Procedurally Fair

A settlement is entitled to a "presumption of fairness, adequacy, and reasonableness" when "reached in arms's length negotiations between experienced, capable counsel after meaningful discovery." *Visa*, 396 F.3d at 116; *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016).

The Settlement here merits a presumption of fairness because it was achieved after extensive arm's-length negotiations between well-informed and experienced counsel after the completion of an extensive process of fact and expert discovery, as well as mock juries and other trial preparation. The Parties and their counsel were fully informed about the strengths and weaknesses of the case prior to reaching the agreement to settle. For example, Lead Counsel had conducted a thorough investigation prior to filing the Complaint; prepared a detailed Complaint and briefing in opposition to Defendants' motions to dismiss; obtained and reviewed a very significant amount of fact discovery, including 1.5 million pages of documents produced by Defendants and third parties, and testimony obtained from the depositions of 40 fact witnesses; exchanged expert reports and took or defended 12 expert depositions; fully briefed Defendants'

four motions for summary judgment; and fully briefed numerous *Daubert* motions. ¶¶ 6, 17-110. Lead Counsel also consulted extensively with experts throughout the Action, had engaged in several detailed mock jury exercises to analyze the potential reaction of jurors to the evidence gathered through discovery, and were further informed through the exchange of detailed mediation statements and the observations of Judge Weinstein at the mediation. ¶¶ 6,104, 112-113. As a result, Lead Plaintiffs and Lead Counsel had a very well-informed basis for assessing the strength of the Class's claims and Defendants' defenses when they accepted Judge Weinstein's mediator's recommendation to settle the Action.

The conclusion of Lead Plaintiffs and Lead Counsel that the $35 million Settlement is fair and reasonable and in the best interests of the Class further supports its approval. Lead Plaintiffs are both sophisticated institutional investors that took active roles in supervising this litigation, as envisioned by the PSLRA, and have strongly endorsed the Settlement. *See* Joint Decl. Exs. 2A and 2B. A settlement reached "with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). The other Class Representatives have also endorsed the Settlement. *See* Joint Decl. Exs. 2C to 2F.

In addition, the judgment of Lead Counsel, two firms that are highly experienced in securities class action litigation, that the Settlement is in the best interests of the Class is entitled to "great weight." *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *2 (S.D.N.Y. Mar. 24, 2014); *accord In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (courts have consistently given "'great weight' . . . to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation") (citation omitted).

B. Application of the *Grinnell* Factors Supports Approval of the Settlement as Substantively Fair, Reasonable and Adequate

The Settlement is also substantively fair, reasonable, and adequate. The standards governing approval of class action settlements are well established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Second Circuit held that the following factors should be considered in evaluating a class action settlement:

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

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), *see also Visa*, 396 F.3d at 117; *In re Advanced Battery Techs. Inc. Sec. Litig.*, 298 F.R.D. 171, 175 (S.D.N.Y. 2014); *In re Bear Stearns Cos., Inc. Sec. Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 265-66 (S.D.N.Y. 2012).

"In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)); *see also Advanced Battery Techs.*, 298 F.R.D. at 175 (same). Additionally, in deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of determining whether to approve a settlement simply substitute one complex, time consuming and expensive litigation for another." *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611 (LAK), 2007 WL 703926, at *2 (S.D.N.Y. Mar. 7, 2007).

Here, the Settlement fully satisfies the criteria for approval articulated in *Grinnell*.

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

"[I]n evaluating the settlement of a securities class action, federal courts, including this Court, 'have long recognized that such litigation is notably difficult and notoriously uncertain.'" *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, No. 02-CV-3400 (CM)(PED), 2010 WL 4537550, at *15 (S.D.N.Y. Nov. 8, 2010) (citation omitted). Indeed, courts recognize that "[s]ecurities class actions are generally complex and expensive to prosecute." *In re Gilat Satellite Networks*, *Ltd*., No. CV-02-1510, 2007 WL 1191048, at *10 (E.D.N.Y. Apr. 19, 2007).

This case was no exception. Although the case settled after more than five years of vigorous litigation and only weeks before the scheduled trial, achieving a litigated verdict at trial (and sustaining any such verdict for Plaintiffs on the appeals that would inevitably ensure) would have been a very complex undertaking that would have required substantial additional time and expense. The trial of the Action here would have required extensive expert testimony on numerous contested issues, including diffusion of information, negative causation and damages, IPO securities industry practices, mobile advertising revenue, and due diligence in IPOs. Moreover, even if Plaintiffs had prevailed at trial it is virtually certain that appeals would be taken, which could have substantially delayed any recovery for the Class. Defendants would also have sought to challenge each Class Members' recovery through a contested individual claims process. The foregoing would pose substantial expense for the Class and delay the Class's ability to recover – assuming, of course, that Lead Plaintiffs and the Class were even successful in establish liability at trial.

In contrast to costly, lengthy and uncertain litigation, the Settlement provides an immediate, significant and certain recovery of $35 million for members of the Class. Accordingly, this factor supports approval of the Settlement.

2. The Reaction of the Class to the Settlement

The reaction of the class to a proposed settlement is a significant factor to be weighed in considering its fairness and adequacy. *See, e.g.*, *Bear Stearns*, 909 F. Supp. 2d at 266-67; *FLAG Telecom*, 2010 WL 4537550, at *16; *Veeco*, 2007 WL 4115809, at *7.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), began mailing copies of Notice Packet (consisting of the Settlement Notice and Claim Form) to potential Class Members and nominees on March 26, 2018. *See* Declaration of Adam Walter Regarding (A) Mailing of the Settlement Notice and Claim Form; and (B) Publication of the Summary Notice, Exhibit 1 to the Joint Declaration ("Walter Decl."), at ¶¶ 7-8. As of August 1, 2018, A.B. Data had mailed a total of 1,313,895 copies of the Notice Packet to potential Class Members and nominees. *See id.* ¶ 10. In addition, the Summary Settlement Notice was published in *Investor's Business Daily* and transmitted over the *PR Newswire* and *CNW Newswire* on April 9, 2018. *See id.* ¶ 11. The Settlement Notice set out the essential terms of the Settlement and informed potential Class Members of, among other things, their right to object to any aspect of the Settlement, as well as the procedure for submitting Claim Forms. While the deadline set by the Court for Class Members to object to the Settlement has not yet passed, to date, only one purported objection to the Settlement and no objections to the Plan of Allocation have been received.[3] The deadline for submitting objections is August 15, 2018. As

[3] The one objection received to date was submitted by Larry Gilbert, a Facebook investor from Canada who objects to the Settlement on the ground that he supposedly is not included in the Class because he could not purchase Facebook stock in Canada until May 23, 2012, after the Class Period ended. ECF No. 585. If, in fact, Mr. Gilbert purchased his shares on May 23, 2012, it is true that he would not be a Class Member – and thus would not have standing to object to the Settlement. However, Lead Counsel are working with A.B. Data and Mr. Gilbert to determine whether he may have actually purchased during the Class Period. It is possible that the May 23, 2012 date on his broker statement reflects the settlement date, rather than trade date, for his purchase. If he purchased during the Class Period, and thus is an eligible Class Member, we presume his objection *(Cont'd)*

provided in the Preliminary Approval Order, Lead Plaintiffs will file reply papers no later than August 29, 2018 addressing all objections that have been received.

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

Here, where the Action was settled on the eve of trial, after completion of all discovery, certification of the Class, and full briefing of summary judgment motions, *Daubert* motions, and certain other pre-trial motions, there can be no question that the stage of the proceedings and amount of information available to counsel strongly support approval of the Settlement. *See Veeco*, 2007 WL 4115809, at *7 (this factor clearly supported settlement where the case "was litigated to the very eve of trial, after completion of merits and expert discovery").

As noted above, Lead Plaintiffs and Lead Counsel had the obtained the benefit of extensive document discovery, which included the review of more than 1.5 million pages of documents from Defendants and third parties, and had taken the depositions of dozens of fact witnesses, including top executives and Board members of Facebook, such as Mark Zuckerberg and Sheryl Sandberg, as well as of the lead Underwriter Defendants, at the time of the Settlement. ¶¶ 62-69. Lead Counsel had also consulted extensively with experts while investigating and prosecuting the Action, including experts in the areas of the social network industry, securities-industry practices, investors' absorption of information, underwriting and due diligence, and loss causation and damages, to assist them in evaluating the claims asserted. ¶¶ 6, 174. Further, Lead Counsel had also explored how potential jurors might react to the evidence obtained through discovery and Defendants' defenses to liability by conducting detailed mock jury exercises. ¶¶ 104. Lead Counsel were also fully informed about Defendants' defenses through briefing of the summary

would be mooted and we will assist him in filing a claim. In any event, Mr. Gilbert's objection and any others that may be received will be discussed in greater detail in Lead Plaintiffs' reply brief.

judgment and *Daubert* motions, and the extended settlement negotiations. ¶¶ 76-102, 111-12.

Thus, at the time the agreement in principle to settle was reached, Lead Plaintiffs and Lead Counsel clearly had a "sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02 Civ. 5575 (SWK), 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006).

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

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). Lead Plaintiffs and the Class faced very real risks in surmounting Defendants' motions for summary judgment and in proving both liability and damages at trial.

(a) **Risks to Proving Liability**

While Lead Plaintiffs and Lead Counsel believed and continue to believe that the claims asserted against Defendants in the Action are meritorious, they recognize that Defendants had meaningful defenses to liability in this case. Absent the Settlement, there was a significant risk that the Court might have granted Defendants' motions for summary judgment in part or in whole or that Lead Plaintiffs would not be able to obtain a verdict at trial.

In particular, Lead Plaintiffs would have faced real challenges in establishing liability by proving that the statements in the Offering Documents about the mobile trend's impact on Facebook's advertising revenue were in fact false and misleading. ¶¶ 118-120. Throughout the litigation, Defendants had vigorously argued, and would have continued to argue that the statements in the Offering Documents concerning the impact of trends in mobile usage on Facebook's revenues were, in fact, accurate and complete. *Id*.

First, Defendants could point to the fact that Offering Documents contained many disclosures related to increasing mobile usage and its potential impact on Facebook's business and therefore this risk was never hidden from investors. ¶ 119.[4] Second, the Court or the jury might have accepted Defendants' argument that the Offering Documents' statement that increasing mobile usage "may" or "would" affect Facebook's revenue (if Facebook failed to develop strategies to monetize such users) was not false or misleading because there was no certainty at the time of the IPO that increasing mobile usage had already harmed Facebook's revenues. ¶ 120. Defendants contended that there was merely short, quantitatively insignificant downward blip in revenues in the first week of May 2012, and that Facebook's revenue actually rebounded by the time of the IPO. *Id*. Defendants could also point to the fact that Facebook's actual revenues for the second quarter and full year of 2012 met its original revenue guidance and exceeded the reduced guidance given to analysts during the IPO roadshow. *Id*.

Further, the Court or the jury might have accepted Defendants' argument that the key statement in question (that increasing mobile usage "may" or "would" negatively affect Facebook's revenue if the Company did not successfully implement monetization strategies for mobile users) was, in fact, an accurate statement of opinion. ¶ 120. Moreover, by the time the trial was scheduled to be held in early 2018, increasing mobile usage had turned out to be a great strength for the Company, which ultimately developed successful mobile advertising services after the IPO and generated enormous revenues from mobile usage. ¶¶ 120, 127.

Even if the Court had held that there was a genuine issue of fact as to whether the Offering

[4] For example, this Court in dismissing the related derivative action found that the Facebook Defendants "repeatedly made express and extensive warnings in the Company's Registration Statement, drafts of the Registration Statement and in its final Offering Documents about the trend of increased use of mobile applications." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 469 (S.D.N.Y. 2013), *aff'd*, 797 F.3d 148 (2d Cir. 2015).

Documents contained material misrepresentations or omissions, the Court (or the jury at trial) might have accepted Defendants' argument that the evidence proved an actual-knowledge defense. Defendants cited dozens of investor declarations and numerous examples of sworn testimony in contending that (1) all institutional investors were told about the Underwriter Defendants' analysts' revenue-model revisions, which revealed the impact of mobile usage on revenues; (2) some institutional investors were specifically told about Facebook's own reduced revenue guidance; and (3) pre-IPO news reports had disclosed Facebook's revenue projection cuts to all investors, including retail investors. ¶ 121. The Court recognized in certifying the Class that "Defendants have marshaled an impressive amount of evidence showing that varying aspects and amounts of the content of [Facebook's guidance reduction] and the Syndicate Analysts' projections spread to other institutional investors." *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 312 F.R.D. 332, 342 (S.D.N.Y. 2015). With respect to retail investors, Defendants argued that these investors had actual knowledge based on numerous pre-IPO news reports reporting that Facebook had told analysts that it would not meet its most optimistic projections. ¶ 121.

There was also a significant risk that the Court might have granted Defendants' *Daubert* motions in whole or in part, and that the Court might have denied Lead Plaintiffs' *Daubert* motions in part or in whole. A decision against Lead Plaintiffs on any of these motions would have significantly increased the risk of a decision against Lead Plaintiffs on Defendants' summary-judgment motions, since both sides relied heavily on their experts in the summary-judgment briefing. ¶ 124. There was also a risk that the Court would deny Lead Plaintiffs' motion to bifurcate the trial. Trying both common questions affecting the entire Class and individual questions affecting particular Class Representatives and other Class members in a single trial would have significantly increased the risk of a jury verdict for Defendants, because it would have allowed

Defendants to present extensive evidence that many institutional investors or their investment advisers knew about the Underwriter Defendants' analysts' reduced revenue models before the IPO and still considered Facebook stock a good investment at the IPO price. ¶ 125.

Even if the Court had ruled entirely or largely in favor of Lead Plaintiffs on the summary-judgment motions, *Daubert* motions, and Lead Plaintiffs' motion to bifurcate, Lead Plaintiffs could have recovered a judgment only by prevailing at trial. In addition to the numerous legal risks summarized above, a trial of this Action would have posed additional, practical risks. For example, most jurors would have been personally familiar with Facebook's services, and many of them likely would have been familiar with the public reputations of Mr. Zuckerberg, a famous self-made billionaire, and Ms. Sandberg, a prominent advocate for women in business. ¶ 127. In addition, most jurors would have been aware that Facebook had ultimately successfully developed mobile-advertising services after its IPO, and that Facebook generated enormous mobile-advertising revenues in subsequent years, leading to its stock price achieving record highs in early 2018, when the trial would have occurred, that were multiples higher than the IPO price. *Id*.

At trial, Defendants would mostly likely have sought to portray investors who purchased in the IPO and suffered losses when they sold shortly thereafter, rather than investing in Facebook for the long term, as "gamblers" who took an informed risk in investing and for whom the federal securities laws should not be used as a form of "insurance." Defendants would have argued that the Offering Documents explained to investors that Facebook "prioritizes [its] user engagement over short-term financial results" and urged investors to view Facebook common stock as a long-term investment. ¶ 131. At trial there was a risk that Defendants could successfully characterize investors who sold the shares for a loss in the months after the IPO as essentially gamblers who

had bought Facebook stock hoping for a short-term post-IPO "pop" and who should have understood the risks of such investments and held the stock for the long term.

Lead Plaintiffs would also have faced a substantial challenge in trying to convince jurors at trial that it was materially misleading for Facebook to disclose in the Offering Documents that increasing mobile usage "*may* negatively affect our revenue and financial results," rather than saying that increasing mobile usage "*has had*" such an impact – a subtle distinction that might have been challenging for Lead Plaintiffs to convince jurors was material, especially in light of that fact that post-IPO events had vindicated Facebook's hope, at the time of the IPO, that the Company would successfully develop revenue-generating mobile services. ¶ 128.

Finally, even if Plaintiffs were successful at trial, many of these same arguments could have been continued on appeal, and, in the absence of any settlement, presumably would have been. Thus, there were very significant risks attendant to the continued prosecution of the Action through summary judgment, trial, and appeals, and there was no guarantee that Defendants' liability could be established.

(b) **Risks Related to Negative Causation and Damages**

Even assuming that Plaintiffs successfully established the elements of liability at trial (and this was upheld on appeal), they still faced risks in overcoming Defendants' negative-causation defense and proving damages.

While Defendants bore the burden of proving that the alleged misstatements in the Offering Documents did *not* cause the price declines following the IPO, this was a plausible defense under the circumstances of this case. Defendants were able to argue that the post-IPO news articles about Facebook's pre-IPO revised guidance cited by Lead Plaintiffs did not contain any new information that had not been publicly disclosed before the IPO, and thus, could not have caused the declines in the Class Period. ¶ 123.

Defendants contended throughout the Action that investors' losses during the Class Period were caused entirely or in large part by NASDAQ's system failures on May 18, 2012, the first day of trading after the IPO, which caused trading delays, order disruptions, and investor uncertainty, and had supported that position with reports submitted by two well-qualified experts. ¶ 130. Defendants argued vigorously that, while NASDAQ may have fixed its system failures by the afternoon of the first day of trading, the effects of the trading disruptions continued on the next two trading days, when the Class's losses occurred. *Id*. If the Court had denied Lead Plaintiffs' *Daubert* motion with respect to the proposed testimony of Defendants' experts, Drs. O'Hara and Gompers, and allowed them to testify on this matter, there would have been a significant risk that a jury might have accepted their testimony that little or none of investors' losses were caused by any misrepresentations in the Offering Documents. *Id*.

In addition, Defendants would have argued that a large portion of the Class suffered little or no damages because the price of Facebook common stock ultimately rebounded strongly and was trading at many multiples of the IPO price as the trial approached. ¶ 131.

Moreover, in order to resolve many of these disputed issues regarding negative causation and damages, as well as issues related to market efficiency and the diffusion of information to participants in the securities market, among others, the Parties would have had to rely heavily on expert testimony. While Lead Counsel had worked extensively with Lead Plaintiffs' experts with a view towards presenting compelling arguments to the jury and prevailing on these matters at trial, Defendants had established a battery of well-qualified experts who were likely to opine at trial that the Class suffered little or no damages. As Courts have long recognized, the substantially uncertainty as to which side's experts' view might be credited by the jury presents a substantial litigation risk. *See IMAX*, 283 F.R.D. at 193 ("[I]t is well established that damages calculations in

securities class actions often descend into a battle of experts."); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579-80 (S.D.N.Y. 2008) (in this "battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. Nov. 24, 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.").

Given all of these significant litigation risks with respect to liability, negative causation arguments, and damages, Lead Plaintiffs and Lead Counsel respectfully submit that it is in the best interests of the Class to accept the immediate and substantial benefit conferred by the Settlement.

5. The Risks of Maintaining Class Certification Support Approval of the Settlement

In its December 11, 2015 Order, the Court granted the Class Representatives' motion and certified the Class in this Action consisting of two subclasses (the Retail Investor Subclass and the Institutional Investor Subclass) over the vigorous opposition of Defendants. The Second Circuit subsequently denied Defendants' petition for interlocutory review of that decision under Federal Rule of Civil Procedure 23(f).

While Lead Plaintiffs believe this Action is appropriate for class treatment, there was a risk that Defendants' argument concerning knowledge possessed by members of the Institutional Investor Subclass or individual issues relating to knowledge for both subclasses, might ultimately convince the Court to decertify either the Institutional Investor Subclass or both subclasses, or that the Second Circuit might to do so on appeal after a verdict for Plaintiffs. ¶¶ 122. Indeed, Defendants had indicated to Lead Plaintiffs that they intended to move to decertify the Institutional Investor Subclass and the Retail Investor Subclass either before trial or at trial. *Id*. There was a legitimate risk that the Court might decertify either or both of the Subclasses in light of the

evidence that all institutional investors were told about the Underwriter Defendants' analysts' reduced revenue models that were prompted by Facebook's reduced guidance, that a significant number of institutional investors were told about Facebook's own reduced revenue projections, and that information about the analysts' reduced models had been published in the news media before the IPO. ¶ 121. The risks of maintaining certification of the Class through trial and on appeal support approval of the Settlement. *See Ebbert v. Nassau Cty.*, No. CV 05-5445 AKT, 2011 WL 6826121, at *12 (E.D.N.Y. Dec. 22, 2011) (risk of de-certification of the certified class supported approval of the Settlement); *Ingles v. Toro*, 438 F. Supp. 2d 203, 214 (S.D.N.Y. 2006) (same).

6. The Ability of Defendants to Withstand a Greater Judgment

There is no question that Defendants as a whole, including the highly successful Facebook company, have the ability to pay a judgment in excess of the $35 million Settlement Amount. However, "defendants' ability to withstand a higher judgment . . . standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). A "defendant is not required to 'empty its coffers' before a settlement can be found adequate." *IMAX*, 283 F.R.D. at 191 (citation omitted). Indeed, Courts have repeatedly recognized that this *Grinnell* factor, standing alone, does not weigh against approval of a settlement where, as here, the other factors weigh in favor of approving the Settlement. *See Id.*; *FLAG Telecom*, 2010 WL 4537550, at *19 ("the mere ability to withstand a greater judgment does not suggest the settlement is unfair") (citation omitted).

7. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and all the Attendant Risks of Litigation Support Approval of the Settlement

The last two substantive factors courts consider are the range of reasonableness of the settlement fund in light of (i) the best possible recovery and (ii) litigation risks. In analyzing these factors, the issue for the Court is not whether the settlement represents the best possible recovery,

but how the settlement relates to the strengths and weaknesses of the case. The court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462 (citations omitted). Courts agree that the determination of a "reasonable" settlement "is not susceptible of a mathematical equation yielding a particularized sum." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 130 (S.D.N.Y. 1997) (citation and internal quotations omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Instead, "in any case there is a range of reasonableness with respect to a settlement." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

Lead Plaintiffs submits that the Settlement is within the range of reasonableness in light of all the attendant risks of litigation. When weighed against the risks of continued litigation, the proposed Settlement for $35 million in cash is a favorable result. After carefully evaluating all of the issues and considering Defendants' arguments concerning damages and negative causation, Lead Plaintiffs concluded that $35 million represents a substantial percentage of damages that could be reasonably expected to be proved at trial. While maximum potential damages were significantly higher than the Settlement Amount, Lead Plaintiffs faced severe obstacles in proving those damages at trial given Defendants' arguments that the truth was widely known among institutional investors prior to the IPO. Moreover, had Defendants' negative-causation arguments been accepted in full or even in part at summary judgment or trial, damages could have been significantly lower, or eliminated entirely. Finally, even if Lead Plaintiffs were successful at trial, Defendants could have challenged the damages of every Class member in post-trial proceedings, substantially reducing any aggregate recovery by Plaintiffs.

* * *

In sum, the *Grinnell* factors – including the expense and delay of further litigation, Lead Plaintiffs' well-developed understanding of the strengths and weaknesses of the case, and the significant risks of the litigation – support a finding that the Settlement is 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 IMAX*, 283 F.R.D. at 192; *Bear Stearns*, 909 F. Supp. 2d at 270. A plan of allocation is fair and reasonable as long as it has a "rational basis." *FLAG Telecom*, 2010 WL 4537550, at *21; *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Generally, a plan of allocation that reimburses class members based on the relative strength and value of their claims is reasonable. *See IMAX*, 283 F.R.D. at 192. A plan of allocation, however, need not be tailored to fit each and every class member with "mathematical precision." *PaineWebber*, 171 F.R.D. at 133. In determining whether a plan of allocation is fair and reasonable, courts give great weight to the opinion of experienced counsel. *See 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") (citation omitted); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (same).

Here, the proposed plan of allocation (the "Plan of Allocation"), which was developed by Lead Counsel in consultation with Lead Plaintiffs' damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms. The Plan of Allocation is set forth at pages 10 to 11 of the Settlement Notice that was mailed to potential Class Members. *See* Settlement Notice (Walter Decl., Ex. B) at pp. 10-11.

The Recognized Loss Amounts calculated under the Plan of Allocation for claimants' purchases of Facebook Common Stock during the Class Period are based principally on the statutory formula for damages under Section 11(e) of the Securities Act, 15 U.S.C. § 77k(e). *See* Settlement Notice ¶ 64. In addition, the Plan of Allocation provides that there is no recovery for shares sold before the close of trading on May 18, 2012, because the first public disclosure of information that Plaintiffs alleged revealed that the statements in the Offering Documents were false and misleading, causing the price to drop, did not occur until after the close of trading on May 18, 2012. *See id*. ¶¶ 64, 67A.

Specifically, under the Plan of Allocation, a Recognized Loss Amount is calculated for each share of Facebook Class A common stock that is purchased during the Class Period and sold for a loss through February 23, 2018 as follows: (a) for shares sold for a loss prior to the close of trading on May 18, 2012, the Recognized Loss Amount is zero, *see* Settlement Notice ¶ 67A; (b) for shares sold at a loss after the close of trading on May 18, 2012 through the close of trading on May 22, 2012, the Recognized Loss Amount is the purchase price (not to exceed the IPO price of $38.00), minus the sale price, *see id*. ¶ 67B; and (c) for shares held through the close of trading on May 22, 2012, but sold prior to the close of trading on February 23, 2018 at a loss, a Recognized Loss Amount is the purchase price (not to exceed $38.00), minus the greater of: (i) the sale price or (ii) $31.00, the closing price of Facebook Common Stock on May 22, 2012. *See id*. ¶ 67C.

The Plan of Allocation also provides for the calculation of Recognized Gain Amounts for Class Members who sold the Facebook Common Stock they purchased during the Class Period for a gain, which are used to offset those claimants' Recognized Loss Amounts. Specifically, shares purchased during the Class Period and sold at any time before the close of trading on February 23, 2018 for a gain, have a Recognized Gain Amount calculated which is the sale price minus the

purchase price. *See* Settlement Notice ¶ 67D. For shares purchased in the Class Period and still held as of February 23, 2018, a Recognized Gain Amount will be calculated, which shall be $183.29 (the closing price of Facebook Common Stock on February 23, 2018) minus the purchase price. *Id*. ¶ 67E. A Claimant's Recognized Gain Amount (if any) for his, her or its Class Period purchases of Facebook Common Stock will offset his, her or its Recognized Loss Amounts dollar for dollar and a Net Recognized Loss Amount will be calculated. *Id*. ¶ 69.

In addition, the Plan of Allocation contains other provisions intended to ensure equitable treatment for members of the Institutional Investor Subclass and the Retail Investor Subclass and to protect smaller investors. The claims of institutional investors are substantially discounted under the Plan of Allocation to reflect the substantial additional risks that they would have faced in establishing that they were not aware that Facebook had reduced its revenue estimates prior to the IPO (and the risks that the Institutional Investor Subclass might be decertified). Specifically, for members of the Institutional Investor Subclass, their "Recognized Claim," which is used as the basis for the final *pro rata* distribution among all Eligible Claimants, will be calculated as 25% of their calculated Net Recognized Loss Amount. *See* Settlement Notice ¶ 71. For members of the Retail Investor Subclass, their Recognized Claim will be 100% of their Net Recognized Loss Amount. See *id*. ¶ 70. The Net Settlement Fund will then be distributed on a *pro rata* basis to all Eligible Claimants (from both subclasses) based on their Recognized Claim amounts.

In addition, to ensure adequate payment for smaller investors, any claimant whose payment falls below $100 as the result of the application of the *pro rata* percentage will still receive $100, unless their full Recognized Claim (before *pro ration*) was already below $100, in which case they will receive that full Recognized Claim amount. *See* Settlement Notice ¶ 72C.

For these reasons, Lead Counsel believe that the Plan of Allocation provides a fair and

reasonable method to equitably allocate the Net Settlement Fund. ¶ 151. Moreover, as noted above, as of August 1, 2018, more than 1.3 million copies of the Settlement Notice, which contains the Plan of Allocation, and advises Class Members of their right to object to the proposed Plan of Allocation, have been sent to potential Class Members and their nominees, *see* Walter Decl. ¶ 10, and, to date, no objections to the proposed Plan of Allocation have been received. ¶ 152.

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

Lead Plaintiffs have provided the Class with notice of the proposed Settlement that satisfied all the requirements of Rule 23(e) and due process, which require that notice of a settlement be "reasonable" – *i.e.*, it must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Visa*, 396 F.3d at 114; *see also Shapiro*, 2014 WL 1224666, at *16. Both the substance of the Settlement Notice and the method of its dissemination to potential members of the Class satisfied these standards.

The Settlement Notice provides all of the necessary information for Class Members to make an informed decision regarding the Settlement. The Settlement Notice informs Class Members of, among other things: (1) the amount of the Settlement; (2) the reasons why the Parties are proposing the Settlement; (3) the estimated average recovery per affected share of Facebook Common Stock; (4) the maximum amount of attorneys' fees and expenses that will be sought; (5) the identity and contact information for the representatives of Lead Counsel who are reasonably available to answer questions from Class Members concerning matters contained in the Settlement Notice; (6) the right of Class Members to object to the Settlement; (7) the binding effect of a judgment on Class Members; and (8) the dates and deadlines for certain Settlement-related events. *See* 15 U.S.C. § 78u-4(a)(7). The Settlement Notice also contains the Plan of Allocation and

provides Class Members with information on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund.

As noted above, in accordance with the Preliminary Approval Order, on March 26, 2018, A.B. Data began mailing copies of the Settlement Notice and Claim Form via first-class mail to all persons and entities who were previously mailed copies of the Class Mailed Notice in 2016 as well as any other potential Class Members identified through reasonable effort. *See* Walter Decl. ¶¶ 7-10. In addition, A.B. Data caused the Summary Settlement Notice to be published in *Investor's Business Daily* and transmitted over *PRNewswire* and *CNW Newswire* on April 9, 2018. *Id.* ¶ 11. A.B. Data also updated the website for this case, www.FacebookSecuritiesLitigation.com, to provide members of the Class and other interested persons with information about the Settlement and the applicable deadlines, as well as access to copies of the Settlement Notice, the Claim Form, Stipulation, and the Preliminary Approval Order, Walter Decl. ¶ 12, and Lead Counsel published copies of the Settlement Notice and Claim Form on their respective websites, Joint Decl. ¶ 142.

This combination of individual first-class mail to all Class Members who could be identified with reasonable effort, supplemented by notice in an appropriate 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; *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144 (CM), 2009 WL 5178546, at *12-13 (S.D.N.Y. Dec. 23, 2009).

CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court approve the proposed Settlement as fair, reasonable and adequate and approve the Plan of Allocation as fair, reasonable and adequate.

Dated: August 1, 2018

Respectfully submitted,

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